Shah & another (Suing as Personal Representatives of the Estate of Lalchand Fulchand Shah) v Chief Land Registrar , Nairobi Lands Registry & 2 others (Environment & Land Petition E030 of 2023) [2023] KEELC 22097 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22097 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E030 OF 2023

JO MBOYA, J

DECEMBER 7, 2023

IN THE MATTER OF: ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES 1, 2 , 3 , 10 , 19 , 20 , 21, 22, 23, 24, 26, 27, 28, 29, 31, 40, 43, 45, 47, 60, 61, 62, 63 , 64, 162, AND 259 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012 AND IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

BETWEEN

DIPAK LALCHAND SHAH ..... 1ST PETITIONER

SUNIL LALCHAND SHAH ..... 2ND PETITIONER

SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF LALCHAND FULCHAND SHAH

AND

THE CHIEF LAND REGISTRAR , NAIROBI LANDS REGISTRY .... 1ST RESPONDENT

INVESTMENT AND MORTAGAGES (I&M) BANK ..... 2ND RESPONDENT

ESTATE OF JOSEPH MWANGI KANYONGO ..... 3RD RESPONDENT

RULING

Introduction and Background:

1. The instant Ruling touches on and concerns the Notice of Motion Application dated the 19th September 2023; as well as the Notice of Preliminary Objection of even date, which have been filed by and on behalf of the 2nd Respondent/Applicant herein.

2. Suffice it to point out that the issues raised at the foot of the Application and the Notice of Preliminary objection relates substantially to same issues and in this regard, it is therefore imperative to reproduce the reliefs sought at the foot of the Application only.

3. Consequently and in this regard, the reliefs sought at the foot of the Application dated the 19th September 2023; are reproduced as hereunder;[verbatim]:

    i. That there be a stay of any further proceedings in this matter pending the hearing and determination of this Application and the 2nd Respondent's Notice of Preliminary Objection dated the 19th September 2023.

    ii. This Honorable Court be pleased to strike out the instant Petition dated the 19th June 2023 with costs on the grounds that it is Res-Judicata.

    iii. The Petitioners do pay the costs of this Application and the Petition

4. Instructively, the instant Application is premised and anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the affidavit of one, namely, Andrew Muchina, sworn on even date; and in respect of which the Deponent has annexed assorted documents.

5. Upon being served with the Application under reference, the Petitioners responded thereto vide Replying affidavit sworn by the 2nd Petitioner and which affidavit is sworn on the 27th November 2023.

6. On the other hand, it is worthy to note that matter herein came up for mention on the 11th October 2023; whereupon it transpired that the 2nd Respondent herein had filed the instant Application, together with the Notice of Preliminary objection dated the 19th September 2023, wherein the 2nd Respondent substantially sought to strike out the Petition by and on behalf of the Petitioners.

7. Arising from the foregoing, it became necessary to issue directions towards the hearing and determination of both the Application and the Notice of Preliminary objection. Consequently and in this regard, the advocates for the Parties covenanted to canvass and dispose of both the Application and the Preliminary Objection, simultaneously.

8. Furthermore, it was also agreed that the Application and the Preliminary objection would be canvassed/ ventilated by way of written submissions to be filed and exchanged within set timelines.

9. Pursuant to and in accordance with the directions given by the Honourable court, the 2nd Respondent/ Applicant proceeded to and filed written submissions dated the 17th November 2023; whilst the Petitioners filed written submissions dated the 27th September 2023.

10. For coherence, both written submissions are on record.

Parties' Submissions:

a. 2nd Respondent's/Applicant's SubmissionS:

11. The Applicant herein filed written submissions dated the 17th November 2023; and in respect of which same adopted the grounds contained at the foot of the Application, as well as the contents of the Supporting affidavit thereto. Furthermore, the Applicant thereafter isolated, highlighted and canvassed one [1] issue for consideration by the Honourable Court.

12. For good measure, the issue raised and canvased by the Applicant herein touches on and concerns whether the issue raised at the foot of the Petition is Res-judicata and hence, barred by the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

13. It was the submissions of Learned counsel for the Applicant that the Petitioners/Respondents herein have hitherto filed and lodged a plethora of suits touching on and concerning the same question and/or issue pertaining to the fraudulent registration of the charge over and in respect of (sic) the suit property, which in the subject of the instant Petition.

14. Additionally, Learned counsel for the Applicant has similarly contended that the previous suits which have hitherto been filed by the Petitioners herein, have also touched on and concerned the alleged fraudulent sale and transfer of (sic) the suit property to and in favor of one Joseph Mwangi Kany'ogo, (now deceased).

15. Other than the foregoing, Learned counsel for the Applicant has thereafter proceeded to and itemized the various previous suits, which have hitherto been filed by the Petitioners. For coherence, Learned counsel for the Applicant as itemized, inter-alia, Nairobi HCC No. 2533 of 1997, Court of Appeal Civil Application no. 165 of 2000 (UR), Nairobi HCC Petition No. 104 of 2012 and Court of Appeal Civil Appeal No. 181 of 2013, which are stated to have been determined by Courts of competent Jurisdiction.

16. On the other hand, Learned counsel for the Applicant has also submitted that the issues that are now being raised herein are the same issues that have been hitherto been canvassed and ventilated in the previous suits and hence the Petitioners herein cannot be allowed to re-invent and re-agitate the instant suit, either in the manner proposed or at all.

17. In a nutshell, Learned counsel has therefore urged the Honourable court to find and hold that the instant suit is Res-judicata and thus ought to be struck out in limine.

18. In support of the submissions that the said Suit/Petition is barred by the Doctrine of Res-judicata, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of Accredo A G & 3 Others vs Stephano Uccelli & Another (2019)eKLR, George W M Omondi & Another vs National Bank of Kenya Ltd & Another (2001)eKLR and Godfrey Kinuu Maingi & 4 Others vs Nthimbiri Farmers Cooperative Society (2014)eKLR, respectively.

19. Premised on the foregoing submissions, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that the instant suit is Res-judicata and thus same constitutes an abuse of the Due process of the court.

b. Petitioners' Submissions:

20. The Petitioners' herein filed written submissions dated the 27th November 2023; and wherein same have adopted and reiterated the contents of the Replying affidavit sworn on the 27th November 2023; and thereafter highlighted three [3] salient issues for consideration by the Honourable court.

21. First and foremost, Learned counsel for the Petitioners has submitted that the question of Res-judicata is one that requires the Applicant to bring forth and place before the Honorable court documents/ evidence, to enable the court to interrogate the various pleadings and documents, if any, filed in the previous suit and to contrast same with the pleadings and documents, in the current suit with a view to discerning whether same substantially concern the same subject dispute.

22. Nevertheless, Learned counsel has contended that in respect of what has been placed before the Honorable court, it is not possible for the court to under take the requisite examination of (sic) the pleadings and documents in the previous suit and thereafter to contrast same with the current suit.

23. Consequently and in this regard, Learned counsel for the Petitioners' has therefore contended that the preliminary objection based on the plea of Res-judicata is therefore misconceived and legally untenable.

24. In support of the foregoing submissions, Learned counsel for the Petitioners' has cited and relied on, inter-alia, the case of Wenslay Baraza versus Immaculate Awino Abongo & Another (2020)eKLR; and Engineer E M Kithimba T/a Kithimba Associates Consulting Engineers versus The Attorney General & Another (2014)KLR, respectively.

25. Secondly, Learned counsel for the Petitioners' has submitted that Nairobi HCC No 2533 of 1997, upon which the Applicant premises the contention that the instant suit is Res-judicata, was dismissed for want of prosecution and hence the same was not heard and determined on merits.

26. Furthermore, Learned counsel for the Petitioners' has also submitted that where a suit is dismissed on a technicality, including for want of prosecution, then it cannot be contended that such a suit was heard and determined/ disposed of on merits.

27. Premised on the foregoing position, Learned counsel for the Petitioners has thus submitted that the plea of Res-judicata as raised by the Applicants herein is therefore premature, misconceived and based on a misapprehension of what constitutes Res-judicata.

28. Thirdly, Learned counsel for the Petitioners has submitted that the issues raised in the current Petition touch on and/or concern the fraudulent manner in which the 1st and 2nd Respondents proceeded to and undertook the registration of the charge over and in respect of the suit property, while there was still another charge standing un-discharged.

29. Further and in any event, Learned counsel for the Petitioners has submitted that the question pertaining to the fraudulent registration of the charge over the suit property and the subsequent exercise of the statutory power of sale by the 2nd Respondent, are issues that are yet to be heard and determined on merits.

30. Consequently and in the premises, Learned counsel for the Petitioners has therefore impressed upon the Honourable court to find and hold that both the Notice of Preliminary objection; and the Application dated the 19th September 2023, respectively, are devoid of merits and thus ought to be dismissed.

c. 3rd Respondent's Submissions:

31. Though the 3rd Respondent was present in court on the 11th October 2023; when directions pertaining to and concerning the disposition of the Application and the Notice of preliminary objection, were given, same however failed to file any written submissions.

32. In the premises, the court shall therefore proceed to dispose of the Notice of preliminary objection and the Application dated the 19th September 2023, respectively, based on the two sets of written submissions, [whose details has been alluded to hereinbefore].

Issues for Determination:

33. Having reviewed the contents of the Application and the Notice of Preliminary objection; and having taken into account the Response thereto; and upon consideration of the written submissions filed by the advocates for the respective Parties; the following issues do emerge and are thus worthy of determination;

    i. Whether the Petitioners' herein are seized and possessed of the requisite Locus standi to mount and/or maintain the instant Petition or otherwise.

    ii. Whether the instant Petition discloses a reasonable cause of action as pertains to the suit property or at all.

    iii. Whether the instant suit is barred by the Doctrine of Res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

    iv. Whether the instant suit/Petition amounts to an abuse of the Due process of the court.

Analysis and Determination

Issue Number 1

Whether the Petitioners herein are seized and possessed of the requisite Locus standi to mount and/or maintain the instant Petition or otherwise.

34. Before venturing to address and resolve the issue hereinbefore mentioned, it is imperative to point out that L.R No 209/66/41 [hereinafter referred to as the suit property], was hitherto registered in the name of Lalchand Fulchand Shah and Rambhaben Lalchand Shah as Joint tenants thereto.

35. Furthermore, it is also important to underscore that the title which was vested in both [the names of], Lalchand Fulchand Shah and Rambhaben Lalchand Shah, respectively, was for a term of 99 years w.e.f the 1st April 1904.

36. Arising from the foregoing, it is therefore common ground that the rights and/or interests to and in favor of Lalchand Fulchand Shah and Rambhaben Lalchand Shah, respectively, was therefore to subsist for the named duration, to wit, up to and including the 1st April 2003, albeit subject to renewal, where appropriate.

37. Furthermore, from the totality of the evidence placed before the Honourable court, there is no evidence as to whether or not the lease in favor of Lalchand Fulchand Shah and Rambhaben Lalchand Shah, was ever renewed, either in accordance with the law or at all.

38. To the contrary, it is evident and apparent that the Lease, [if any], that was issued in favor of Lalchand Fulchand Shah and Rambhaben Lalchand Shah, lapsed and/or expired and hence the prayer by the

Petitioners herein, inter-alia, that the Honourable court be pleased to issue an order directing the 1st Respondent to commence the process of renewal of the Lease over and in respect of the suit property.

39. For brevity, it is imperative to reproduce the contents of Prayer (g) of the Petition

40. Same is reproduced as hereunder;

> " An order of this Court be and is hereby issued directing the 1st Respondent to commence the process of renewal of the lease on land reference Number LR. NO. 209/66/41 and issue a certificate of title in the names of Lalchand Fulchand Shah and Rambhaben Lalchand Shah".

41. From the nature of the reliefs, [whose details have been reproduced herein before], it is evident that the Petitioners herein admits and acknowledge that the lease in favor of Lalchand Fulchand Shah and Rambhaben Lalchand Shah, lapsed and/or expired and hence the necessity to (sic) compel the 1st Respondent to commence the process of renewal of the Lease in respect of the suit property.

42. Consequently and in the premises, the question that does arise and which merits due consideration by the court, is whether the Petitioners herein, [whether as the legal administrators of Lalchand Fulchand Shah or otherwise], have any lawful rights and/or interests over the suit property, capable of anchoring the subject Petition.

43. In my humble albeit considered view, the moment the term of the lease, which was hitherto granted in favor Lalchand Fulchand Shah and Rambhaben Lalchand Shah, lapsed, the Grantees ceased to have any lawful rights to the suit property and hence same could not mount the Petition.

44. By parity of reasoning, if the Grantees could not by themselves mount a suit, then it means that even their Legal Administrator(s) and/or assigns, the current Petitioners not excepted, are not seized of the requisite Locus standi or at all.

45. Secondly, it is also important to underscore that the suit property was hitherto registered in the names of Lalchand Fulchand Shah and Rambhaben Lalchand Shah, as Joint tenants. Consequently and ithis regard, it thus means that if any one of the Joint tenants died or pre-deceased the other, then the rights of the deceased, if any, would inhere and vest in the Survivor of the Joint Tenants.

46. For good measure, where one or more of Joint tenants passes on, the rights/ Interests which hitherto vested in such deceased person(s), are by law transmitted to the survivor under the Doctrine of Jus accruscendi, which essentially denotes the Right of Survivorship..

47. To buttress the foregoing submissions, it suffices to take cognizance of the ratio decidendi in the case of Mukazitoni Josephine versus Attorney General Republic Of Kenya [2015] Eklr, where the Court of Appeal, stated and observed thus;

> 34. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.
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> 35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totem tenet et nihit tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee

-v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows:

> "The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence."

48. Taking into account the foregoing legal position, the question that now does arise is whether upon the death of Lalchand Fulchand Shah, [now Deceased], who is indicated to have died on the 8th July 2020, his interests over and in respect of the suit property, if at all, survived his death.

49. Put differently, the issue that does arise is whether the Petitioners herein, could purport to procure and obtain Grant of letters of administration over and in respect of the Estate of Lalchand Fulchand Shah, now deceased; and thereafter purport to file the instant Petition.

50. To my mind, the interests of Lalchand Fulchand Shah, if any, over and in respect of the suit property, lapsed upon his death and hence the Petitioners herein stand divested of the Legal capacity to commence the suit, [sic], for and on behalf of the Estate of the named Deceased.

51. Arising from the two perspectives, which I have highlighted in the preceding paragraphs, it is my humble albeit considered view, that as at the 19th June 2023, when the Petition beforehand was filed, the Petitioners herein were devoid of the requisite locus standi and hence same could not mount and/or sustain the instant Petition.

52. Remarkably, Locus standi is a threshold question and hence same ought to be proved and established at the onset. Further and in any event, lack of locus standi, deprives the Claimant (read the Petitioners herein) of the right to approach the Honourable court or at all.

53. To underscore the foregoing position, it suffices to adopt, restate and reiterate the established position alluded to in the case of Alfred Njau & Others v City Council of Nairobi [1982-88] IKAR 229, where the court stated and held as hereunder;

> " Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."
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> The court proceeded to state:
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> > "To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

54. To surmise, my answer to issue number one [1] which touches on and concerns the question of Locus standi, is to the effect that the Petitioners herein are devoid of the requisite Locus standi; and hence the entire Petition beforehand is incompetent, misconceived and stillborn.

Issue Number 2

Whether the instant Petition discloses a reasonable cause of action as pertains to the suit property or at all.

55. Other than the question of Locus standi, there is no gainsaying that any Claimant (the Petitioners not excepted), are only obliged and obligated to approach the Honorable court with a view to ventilating a cause of action [Complaint], known to law and not otherwise.

56. Consequently and in this regard, it was therefore incumbent upon the Petitioners to demonstrate and/ or establishe on a prima facie basis, what rights and/or interests, if any, that same have [sic] over the suit property.

57. Quite clearly, the Petitioners herein are before the court allegedly as the Legal administrators of the Estate of Lalchand Fulchand Shah, now deceased; and are contending that the rights/ Interests of the said deceased (sic) survived the deceased over and in respect of the suit property.

58. However, there is no gainsaying that having been a Joint tenant, the death of Lalchand Fulchand Shah, now deceased, would terminate his (deceased's) interests over the suit property and hence no interest would devolve to and in favor of his Legal administrators or otherwise, under the Doctrine of the right of survivorship.

59. Secondly, even assuming that the rights and interests of Lalchand Fulchand Shah, now Deceased, survived his death, (which is not the case), it is also imperative to underscore that the Lease which hitherto inhered in Lalchand Fulchand Shah and Another, lapsed on or about the 1st April 2003.

60. Pertinently, upon the lapse and/or extinction of the terms of the Lease on or about the 1st April 2003, neither the deceased nor his Legal administrators had any lawful rights/ interests, to and in respect of the suit property.

61. Notably, irrespective of whichever perspective one looks at the issue, there is no gainsaying that the Petitioners herein have no demonstrable cause of action or at all over and in respect of the suit property to anchor/ premise the Petition before the Honourable court.

62. Arising from the foregoing, there is no gainsaying that in the absence of any lawful or legal interest to the suit property, no legitimate cause of action exists and hence it would be a futile exercise to postpone the day of reckoning, awaiting (sic) production of evidence by the Petitioners.

63. In a nutshell, the situation obtaining and discernable from the instant Petition merits the invocation and application of the summary procedure/ process of striking out.

64. Suffice it to point out that striking out of a suit/Petition is a drastic/ draconian procedure and thus same ought to be resorted to sparingly and with necessary circumspection. Nevertheless, this does not mean that the Honourable court ought not to invoke the summary procedure, in appropriate cases, like the instant one.

65. Suffice it to underscore that the court process should only be invoked and utilized for purposes of vindicating known and established legal rights and not for the sake of it. Further and in any event, where there is no existing legal rights, known to Law or Equity, the court must act appropriately to protect its process from being misused.

66. In respect of circumstances where the summary process ought and should be invoked, it suffices to adopt and take cognizance of the dictum in the case of Industrial and Commercial Development Corporation versus Daber Enterprises Limited [2000] eKLR, where the court stated as hereunder;

> Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to crossexamination - see the case of Wenlock v. Moloney and Others , [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.
>
> And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable

67. Furthermore, the circumstances where the summary process and/or procedure can apply and/or be resorted to were also highlighted, nay, illuminated by the Court of Appeal in the case of Kivanga Estates Limited versus National Bank of Kenya Limited [2017] eKLR , where the court stated and held thus:

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations."

68. Similarly and in view of the foregoing exposition, it is my humble view and finding that the instant Petition does not disclose any reasonable cause of action or at all; and thus merits striking out despite the usual caution, that courts should be slow in striking out a suit, no matter how weak same (suit) is.

Issue Number 3

Whether the instant suit is barred by the Doctrine of Res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

69. It is common ground and there is no denying that the Petitioners herein have hitherto filed a plethora of suits touching on and concerning inter-alia (sic) the fraudulent registration of the charge over and in respect of the suit property; as well as the impugned sale of the suit property to one, namely, Joseph Mwangi Kanyongo, now deceased.

70. To start with, the Petitioners herein and/or their predecessors, filed Nairobi HCC No. 2533 of 1997 against the 2nd Respondent herein and wherein same, inter-alia, sought to stop the exercise of the 2nd Respondent's statutory powers of sale, better still, referred to as the Right of foreclosure.

71. Furthermore, the Petitioners or their predecessor's in title also filed an application for temporary injunction to stop the sale of the suit property and which an application was heard and disposed of vide Ruling rendered on the 18th February 2000.

72. For coherence, the Honorable Court (differently constituted) found and held that the impugned application was devoid of merits and same was dismissed. Consequently and in this regard, the court gave greenlight to the 2nd Respondent to proceed with the statutory power of sale.

73. Secondly, the Petitioners' herein or their predecessors thereafter moved to the Court of Appeal and filed Civil Application No 165 of 2000 (UR) 73 of 2000, wherein same sought for orders of temporary injunction before the Honorable Court of Appeal.

74. Notably, the Honorable Court of Appeal entertained and thereafter adjudicated upon the named Application culminating into the delivery of a Ruling whereupon the Application in question was dismissed.

75. Other than the foregoing, the Petitioners' herein also reverted to the High Court vide Petition No. ELC E011 of 2022, wherein same were still raising the twin issues of fraudulent charge and sale of the suit property.

76. Suffice it to point out that the Petition [details in terms of the preceding paragraph], was disposed of vide Ruling rendered on the 28th March 2022.

77. Additionally, it is also imperative to recall that the Petitioners' herein or their predecessors in title had also mounted an Appeal before the Court of Appeal vide Court of Appeal Civil Appeal No. 181 of 2013; and in respect of which the same set of issues were canvassed and ventilated before the Court.

78. Remarkably, the Honorable Court of Appeal addressed the issues pertaining to the validity or otherwise of the charge that had hitherto been registered by the 2nd Respondent [Bank] over the suit property and rendered itself thereon.

79. Instructively and for ease of reference, the decision of the Court of Appeal to this effect, is duly cited in Kenya Law Reports as Lalchand Fulchand Shah versus Investments Mortgages Bank Ltd & 5 Others (2018)eKLR.

80. From the foregoing set of facts, there is no gainsaying that the issue that colors the current Petition, has hitherto been canvassed and ventilated before the High Court, the Environment and Land Court and also the Honorable Court of Appeal, on various occasions and that the named courts, have hitherto rendered considered decisions over the issues before hand.

81. Consequently, what does arise is whether or not the issues beforehand can be re-litigated/ regurgitated afresh before this Honourable court, either in the manner propagated or at all.

82. Be that as it may, it is my considered view that the Petitioners herein cannot be allowed to revert back on this Honourable court and seek to ventilate the same issues which have hitherto been canvassed before courts of competent Jurisdictions and determined in previous proceedings/suit.

83. Simply put, the disputes and or issues raised at the foot of the current Petition are squarely caught up by the Doctrine of Res-judicata, as espoused vide the Provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya. Consequently, the Petitioners' are non-suited.

84. Without belaboring the point, it is instructive to re-state and reiterate the succinct holding of the Court of Appeal in the case of Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited [2017] eKLR, where the court stated and observed as hereunder;

> "In its quest to escape liability or mitigate loss, Benjoh has pursued almost all possible legal avenues and has employed tremendous legal ingenuity and sophistry. Benjoh however seems to have ignored or failed to grasp the full tenor, extend and spirit of the doctrine of res judicata. The doctrine is grounded on public interest and thus transcends the parties' interests in a suit. Public interest requires or demands that litigation must at some point come to an end. In the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand v Radha Kishan, AIR 1977 SC 789 where it was stated;
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> > "The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.
> >
> > The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

85. To my mind, the words adopted and deployed by the Honorable Court of Appeal, [as captured in the excerpts reproduced in the preceding paragraphs], apply with equal force to the situation obtaining over and in respect of the instant matter.

86. Simply put, the Petitioners' herein have endeavored to apply all tricks in the law books, [including deceit and dishonesty] , with a desire to re-litigate an issue that has hitherto been determined by various Courts of competent Jurisdiction.

87. Sadly, this Honourable court is not keen to countenance the unwavering appetite by the Petitioners to continue this unrelenting proceedings, which are quite clearly, devoid and bereft of bona fides.

Issue Number 4

Whether the instant suit/Petition amounts to an abuse of the Due process of the court.

88. Whilst discussing issue number three [3] hereinbefore, this Honourable court has enumerated and elaborated upon a plethora of suits, which have hitherto been filed by and on behalf of the Petitioners herein and/or their predecessors.

89. Additionally, the court has also highlighted the various decisions that have hitherto been made and/or rendered by courts of competent Jurisdiction, inter-alia, the Honorable Court of Appeal, touching on the same question of (sic) fraud and fraudulent charge of the suit property, if at all, by the 2nd Respondent.

90. Arising from the foregoing, the common denominator is to the effect that the Petitioners herein have had a bite on the issue beforehand. Nevertheless, despite having partaken of the bite on the cake of justice, the Petitioners do not appear to have been satisfied and are yearning to have a second bite on the cherry.

91. However, it is not lost on this Honourable court that the Rule of Law only provides one single opportunity for a Party, the Petitioners' not excepted, to approach the seat of Justice; and if same (read Petitioners) are not satisfied, then the only recourse is to appeal the decision of the Court.

92. Further and in any event, where the Claimant, the Petitioners not excepted, have hitherto appealed the decision on a particular facts/issues, then the Petitioners cannot revert to the lower tier court, [the Environment and Land court], not excepted and seek to re-litigate the same issue.

93. Surely, such kind of conduct, denotes abuse of the Due process of the court and thus cannot be countenanced. To the contrary, such conduct must not only be frowned upon but must be discouraged at all cost.

94. To buttress the foregoing position and essentially, what constitutes abuse of the Due process of the court, it is appropriate to adopt and amplify the holding of the Court in the case of Satya Bhama Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR, where the court held thus;

> 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
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> 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
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> (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
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> (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
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> (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
>
> (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
>
> (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
>
> (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
>
> (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
>
> (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse

or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

95. In view of the foregoing, I similarly come to the conclusion that the Petition beforehand constitutes and amounts to an abuse of the Due process of court and thus merits summary termination, nay, striking out.

Final Disposition:

96. Having calibrated on the various thematic issues, that were enumerated in the body of the Ruling, it must have become apparent that the Petition beforehand, is not only premature and misconceived, but same is equally bad in law.

97. Consequently and in the premises, I come to the conclusion that the Application dated the 19th September 2023; and the Notice of Preliminary Objection of even date, are meritorious and thus ought to and are hereby allowed.

98. In a nutshell, I proceed to and Do hereby make the following orders;

    i. The Application dated the 19th September 2023; and the Preliminary Objection of even date be and are hereby allowed.

    ii. The Petition dated the 19th June 2023; be and is hereby struck out.

    iii. Costs of the Application and the Petition be and are hereby awarded to the 2nd and 3rd Respondents to be agreed upon and/or in default, to be taxed by the Deputy Registrar in the usual manner.

99. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Adoli for Petitioners/Respondents.

Mr. Gregory Otieno for the 2nd Respondent/Applicant.

Mr. Maranga for the 3rd Respondent.

N/A for the 1st Respondent.

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