REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 779 OF 2009

MULTI TRACK

KENYA PLANTERS COOPERATIVE UNION LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1st DEFENDANT

HARVEN GADHOKE.....2ND DEFENDANT

DANIEL MUTISYA NDONYE.....3RD DEFENDANT

ROBERT KINUTHIA MUNGAI T/A KAHONOKI ESTATE.....4TH DEFENDANT

FIKAH ACRES LIMITED.....INTERESTED PARTY

AND

DAVID NJEHIA NGUGI &

7 OTHERS.....APPLICANTS/INTENDED INTERESTED PARTIES

RULING

1. On 1st February,2015, I delivered a ruling in this matter in which I expressed myself *inter alia* as follows:

> **"The 4th Defendant has pursuant to the agreement dated 23rd November 1988 recovered some of the parcels which were mortgaged to the Plaintiff and which parcels were only supposed to be re-conveyed to him on consideration that the Plaintiff also got some of the suit parcels. The 4th Defendant having disposed of the said parcels now seeks from this Court an order depriving the Plaintiff the benefit of the same agreement whose benefit he has enjoyed with the result that the plots which accrued to him have changed hands. In my view to grant the orders sought herein would be inequitable."**

2. That ruling arose from two applications dated 17th February, 2015 and 18th December 2014 by the 4th Defendant and the Plaintiff respectively. In his application, the 4th Defendant sought inter alia the

following orders:

> **1. THAT pending the hearing and determination of this Application and the suit herein, the Land Registrar Nairobi do enter a Caveat against all that parcel of land commonly referred to as Kahonoki Estate being L.R Number:1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33,**
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> **2. THAT pending the hearing and determination of the main suit herein, the Plaintiff/Respondent, the Proposed Interested party, their servants and/or agents or otherwise howsoever be restrained from trespassing, entering upon, transferring or dealing any further in any way with all that piece of property commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 ("the suit property").**
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> **3. THAT an order compelling the Plaintiff/Respondent and the Interested Party/Respondent to surrender for cancellation any Title or Registration Certificate over the land Parcel commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 ("the suit property").**
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> **4. THAT an order do issue compelling the Registrar of lands to rectify the Registry Index Map to reflect that the 4th Defendant/Applicant is the registered proprietor of all that parcel of land commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33, ("the suit property").**

3. On its part the Plaintiff sought orders to the effect that the interim orders granted by this Court on 18th December 2014 restraining the Applicant and Interested Party from trespassing, entering upon or dealing with the property known as Kahonoki Estate be lifted.

4. Suffice it to say that the 4th Defendant's application dated 18th December, 2014 was hereby struck out and the application dated 17th February, 2015 was allowed and the orders granted herein on 18th December, 2014 were thereby set aside and vacated.

5. The applicants herein, have now filed an application dated 5th August, 2016 in which they substantially seek an order that they be joined to these proceedings as interested parties and that this Court's ruling dated 1st February, 2016 be stayed pending the determination of their prayer for orders injuncting the Interested Party herein, **Fikah Acres Limited**, from alienating the suit properties and the counterclaim.

6. Before this application could be heard, the Plaintiff filed a Notice of Preliminary objection that the applicants' cause of action lies outside the jurisdiction of this Court. The interested party similarly filed a preliminary objection that taking into account this Court's ruling of 2nd February, 2016 the applicants' present application is *res judicata*. It is the Interested Party's objection that is the subject of this ruling.

7. As the applicants have not been joined to these proceedings, it is my view that the Court is not properly seised of the prayers seeking orders other than the prayer for the joinder of the applicants.

8. But before I deal with the issues herein it is important to determine whether or not *res judicata* can be raised as a preliminary objection. In **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining**

both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

9. I therefore hold that the doctrine of *res judicata* can properly taken be as a preliminary point where the proceedings relied upon are properly before the Court but not otherwise. In these proceedings, the objection is properly taken. Whether it is merited or not is another matter.

10. It is important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.

11. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

12. In the case of **Gurbachan Singh Kalsi vs. Yowani Ekori [1958] EA 450** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

13. In the case of **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

"**A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments".**

14. However, I must say here that the mere addition of parties in a subsequent suit does not necessarily

render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

15. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

> "However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:
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> **"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.".**

16. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

17. In this case, the issue before me at this stage is whether the applicants can be joined to these proceedings. However, in this ruling the issue is not the joinder of the applicants but whether their application for joinder is *res judicata*. If I agree that their application is *res judicata* the whole application must fail. If on the other hand if I disallow the preliminary objection then I will proceed to hear their prayer for joinder on merits. The parties hereto and in particular the interested party seemed to have misconceived what is before me since its counsel concentrated on arguing the application for joinder instead.

18. In the proceedings the subject of this ruling, the interested party was obliged to prove, firstly that the matter directly and substantially in issue in these proceedings was directly and substantially in issue in the former proceedings. Obviously the issue of the joinder of these applicants was never in issue in the former proceedings. Secondly, the present applicants were not parties to those earlier proceedings and I am not satisfied at this stage based on the material disclosed in the preliminary objection that the applicants' are privies to or claiming under the parties to the earlier proceedings much less that they are litigating under the same title. Whereas there can be no doubt that the Court was competent to hear and

determine the earlier proceedings, it is clear that the joinder of the applicants herein has never been an issue in these proceedings and cannot be said to have been heard and finally decided in the former proceedings.

19. Consequently, the plea of *res judicata* cannot be sustained. The preliminary objection as based on that plea therefore fails and is dismissed. As the applicants are yet to be formally joined to these proceedings, there will be no order as to costs.

20. It is so ordered.

Dated at Nairobi this 18th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Chege for the Applicants and holding brief for Mr Wandugi for the 4th Defendant

Mr Chege for Mr Njenga for the interested party

CA Mwangi