REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT ELDORET

ENVIRONMENT & LAND CASE No. 183 Of 2014

KARANI CHEPSONGOL.....PLAINTIFF/RESPONDENT

VS.

KIPSETIM CHEBOWO.....DEFENDANT/APPLICANT

RULING

There are two applications on record dated 4th Day of June 2014 and 16th June 2014, filed respectively, by the plaintiff seeking injunctive orders against the defendant from interfering with the suit land pending the hearing and determination of this suit, and by the Defendant seeking that the plaint herein be struck out with costs.

On 29/10/2014 the learned judge Munyao J. gave directions to the effect that the priority be given to the Application dated 16th July 2014 and that the same be heard first. In the premises the Application before the Honourable Court for determination is the Notice of Motion dated 16th July 2014 brought by the Defendant pursuant to **section 7 of the Civil Procedure Act and Order 2 Rule 15(1) of the Civil Procedure Rules and Section 7 of the Limitation of Actions Act** seeking that the plaint herein dated 4th June 2014 be struck out with costs. The application is supported by affidavit sworn by Kipsetim Chebowo on 11th July 2014. On the other hand the instant application is opposed by the plaintiff *vide* the affidavit sworn by Karani Chepsongol on 1st November 2014. The said Affidavit is entitled Supporting Affidavit, however in my view it ought to be the Replying Affidavit.

The instant application is premised on the grounds that the suit is an abuse of court process, bad in law in view of existence of an award of the Land Disputes Tribunal and judgment in Nakuru Resident Magistrate's Court No. 12 of 1984 which has not been challenged or appealed by the plaintiff and that the Defendant was issued with his title deed pursuant to the proceedings in the Land Disputes Tribunal and the Resident Magistrate's Court. That the dispute in the Resident Magistrates Court was between the same parties now before this court. That the matter directly and substantially in issue in the Land Disputes Tribunal and Resident Magistrate's Court was proprietary rights over the suit land. That this suit has been filed 30 years after tribunal's award was adopted as judgment of the court and is time barred. That the matter therefore is res-judicata and plaintiff cannot open it a fresh through this suit.

In his supporting affidavit the ***Defendant/applicant*** has expounded on the foregoing grounds and deposed that despite the agreement that they share the suit land equally, the ***Plaintiff/Respondent*** fraudulently processed the title in his favour for the entire suit land. The Land Disputes Tribunal later deliberated upon the matter and thereafter it was resolved that they share the said land measuring 34 acres on 50:50 basis. It is deposed that the said decision by the Tribunal was adopted by the Magistrate's Court at Nakuru and consequently decree was issued.

The Plaintiff/Respondent in his Replying Affidavit (though entitled as Supporting Affidavit) dated 1st

November 2014 is opposed to the instant application and swears that he is the dully registered owner of the suit land known as BARINGO/RAVINE 102/211 and that the Defendant/Applicant has never purchased the same. He denies having approached the defendant to purchase the said land and in any event such agreement if any offends the provisions of section 3 of the Law of Contract Act. The plaintiff/respondent deposes that the Defendant has never occupied the suit land as a result of purchase but on the basis of the plaintiff's continued consent through license. The plaintiff swears that he never consented to the said subdivision of land as he did a protest letter and that he fully acquired proprietary rights in the suit land measuring 34 acres after completing the loan repayment to Eldama/Ravine Settlement Scheme.

It is deposed that the Land Disputes Tribunal that purported to deliberate on this matter had no jurisdiction to entertain, hear and adjudicate the dispute over the suit land in question which had title issued and thus its decision was void *ab initio* and which illegality cannot be furthered by this court. The plaintiff swears that the decision of the panel was challenged and that it was the decision of the District Office to proceed with execution of the Land Disputes Tribunal decision yet proceedings to review its adoption by the court were still pending in court even with a hearing date in place. It is deponed by the plaintiff/respondent that the instant suit has merit being founded on the illegal and fraudulent acts of the instant applicant which led to the cancellation of the plaintiff's title and issuance of subsequent titles subdividing the suit land to the plaintiff's detriment. The plaintiff's swears further that the decision of the tribunal that was adopted by the Nakuru Magistrates Court *vide* case No. 12/1984 has been challenged contrary to the defendant's allegation's that the same was not challenged and that the said suit is still pending and hence it is not true that 30 years have lapsed without the same being challenged.

The ***gravamen*** of the submissions of Counsel for the Applicant is that the suit is bad in law and that the same has been brought after 30 years and that the defendant/applicant is the title holder to the suit land. He submitted further that the plaintiff should have filed judicial review other than the instant suit.

On the other hand the respondent's counsel opposed the instant application and stated that he relies on the Replying affidavit sworn by the plaintiff/Respondent on 1/11/2014. He submitted that the High Court is the right forum to handle this case.

The instant application before this honourable court for determination is seeking one single salient prayer, that this suit be struck out. The applicant has contested that the instant suit is an abuse of the court process and that the same is *res judicata* having been filed 30 years after the adoption of the award by the Magistrate's Court. In view of the foregoing, the main issues for determination may include and not limited to the following;

1)Whether the instant suit is an abuse of the court process and hence be struck out?

2)Whether this suit is res judicata?

3)Whether this suit is time barred?

1) <u>Whether this suit is an Abuse of the Court Process And Hence Be struck Out.</u>

The instant application is brought pursuant to Order 2 Rule 15(1) **of the Civil Procedure Rules** among other provisions of the law. The said provision states as follows;

> **“15. (1) At any stage of the proceedings the court may order to be**
>
> **struck out or amended any pleading on the ground that—**
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> **(a) it discloses no reasonable cause of action or defence in law; or**
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> **(b) it is scandalous, frivolous or vexatious; or**

(c) it may prejudice, embarrass or delay the fair trial of the

action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be

entered accordingly, as the case may be. ”

The defendant/applicant having relied on the provisions of Order 2 rule 15(1), **of the Civil Procedure Rules,** it is important to note that abuse of the court process is one of the ground for striking out suit. Other grounds for striking out suit include; non disclosure of the reasonable cause of action; the suit being scandalous, frivolous or vexatious and the same being an embarrassment and or delay the fair trial of the action. These ingredients for striking out were extensively deliberated upon by the learned judge Emukule J. in the case of ***Kenya Airways Ltd v. Classical Travel and Tours Ltd.(2003) LLR 2704(CCK),*** *Found that* allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. In the case of ***G.B.M Kariuki V Nation Media Group Limited & 3 Others [2012] eKLR, H.C at Milimani,*** *Civil Suit 555 of 2009,* the learned judge Odunga J. observed that a pleading is scandalous if it consists of *inter alia*, matters that prejudice the opposing party while a pleading is vexatious if it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.

In the ***Kenya Airways Case***, the said learned judge Emukule J. on defining what **frivolous** means observed as follows;

> “...**Cases which are clearly unsustainable fall within this category (Day v. William Hill (Park Lane) Ltd 1949 All ER 219 CA). An action is frivolous when it is without substance or unarguable. A proceeding may be said to be frivolous when a party is trifling with the court (Chaffners v. Goldsmid(1894)1QB 186..., when to put it to forward would be wasting the time of the court (Dawkins v. Prince Edward of Saxe-Weimar (1876) QBD 499 per Mellor J, when it is not capable of reasoned argument or is unarguable; or it is without foundation; or where it cannot possibly succeed; or where the action is brought or the defense is raised only for annoyance; or to gain some fanciful advantage; or when it can really lead to no possible good; or when it can really lead to no possible good;-(Wills v. Earl of Beanchamp 1886 11 PD 59 per Bowen LJ at 65 described the action as hopeless...and would lead to no good result...”**

The learned Emukule J., ibid, while citing the holding in *Burstall v. Beyfus (1884) 26 Ch D 35*, reiterated that **pleading or an action is vexatious when it lacks bonafides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense.** In ***Knowles v. Roberts(1888)38 Ch D 263 at 270)*** the court explained on pleadings tending to **prejudice**, **embarrass** or **delay fair trial** as follows;

> **“It seems to me that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is of course, subject to this modification, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right.”**

While in the *Kenya Airways Ltd* case, supra, the learned judge Emukule J. opined that;

“A pleading is said to be embarrassing when:

a. **It is ambiguous or unintelligible, or**

b. **States immaterial matter and or so raises irrelevant issues which involve expense, trouble and delay and thus will prejudice the fair trial of the action,or**
c. **Contains unnecessary or irrelevant allegation, or**
d. **Involves a claim or defence which a party is not entitled to make use of, or**
e. **The defendant does not make clear how much of the statement of claim lie admits and how much he denies,or**
f. **Is a plea of justification leaving the plaintiff in doubt what the defendant has justified and what lies has not, or**
g. **Involves denials in a defence where they are vague or ambiguous or are too general**

And the learned judge Emukule J. further explained **Abuse of the Court Process** as follows;

> **"The term "abuse of process" is often used interchangeably with the term "frivolous", or "vexatious" either separately or more-usually in conjunction. An action is an abuse of the process, of court where it is "pretenceless" or "absolutely groundless" and the court has the power to drop it summarily and to prevent the time of the public and the court being wasted".** I entirely agree with these findings.

In the case of ***Metropolitant Bank v. Pooley (1885)10 AC 210 at 221)***, the learned judge Lord Blackburn observed that;

> **"The term abuse of the process of the court is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will allow its function as a court from being used as a means vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the court will intervene to order stay or even dismissal of the proceedings, although it should not be lightly done yet it may often be required by the very essence of justice to be done"**

In the instant case by dint of the plaint the plaintiff is seeking the following salient prayers; one, A declaration that the defendant is a trespasser on the plaintiff's land two, A prohibitory injunction restraining the defendant either by himself or by his servants or agents from continuing to interfere with the plaintiffs enjoyment of his piece of land. The plaintiff at paragraph 5 of the plaint dated 4th June 2014 has pleaded that his land was unlawfully, fraudulently and deceitfully alienated and sub-divided by the defendant's registration. The plaintiff has further enumerated particulars of fraud against the defendant. In view of the extensive holding by the learned judge Emukule J. in the case of *Kenya Airways Ltd vs. Classical Travel and Tours Ltd* supra, and considering grounds for dismissal as envisaged under Order 2 Rule 15(1), it is apparently clear that the instant suit does not qualify any of the ground thereof and hence ought not to be struck out on this grounds.

Be that as it may, over and again it has been held that jurisdiction to strike out suit must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. In ***G.B.M Kariuki V Nation Media Group Limited & 3 Others[2012]eKLR, H.C at Milimani,*** *Civil Suit 555 of 2009*, the learned judge Odunga J. delivered himself at length as follows;

> "As already indicated the application was primarily under Order 2 rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a

triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless of fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

In The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

> "The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did"

In Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 **the same court expressed itself thus:**

> "A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so

hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendmen"

In D T Dobie vs. Muchina **(supra) the Court of Appeal expressed itself *inter alia* as follows:**

> "'Reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint…A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved…It is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face…The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of that power…Whereas no evidence is permitted in the case of Order 6 rule 13(1)(a), it is permitted in the case where there is an allegation that it is an abuse of the Court process…A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal…If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it."

In Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, it was held *inter alia* that:**

> "If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

Whereas the Court retains the jurisdiction to strike out pleadings in deserving cases, the advantage of the Civil Procedure Rules, 2010 over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. *In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 1A and 1B of the Civil Procedure Act. The Court still retains an unqualified discretion to strike out pleadings; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives. See* Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009.

The law is that a statement of claim should not be struck out and the plaintiff driven from the judgement seat unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavit, it is not a plain and obvious case on its face. In this case the court is urged to find that the transcript exhibited by the defendants is the correct transcript. To do so, I am afraid, would amount to make a determination of this case based

on affidavit evidence. I would have to make a finding that the plaintiff's allegations with respect to the actual words published in the plaint are untrue. It must be noted that the plaintiff's cause of action is based on both audio and video publication.

Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating this suit at this stage. The defendants' version is yet to be tested as against the plaintiff's evidence before the court can arrive at a just determination. Under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence and that in appropriate cases hearing may take form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases."

2) <u>Whether this suit is *Res-Judicata*</u>

The Defendant Applicant has also premised the instant application on section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya and submitted that the instant suit is *res judicata.* ***The Black's Law Dictionary (7th Edition) defines Res Judicata as follows;***

"Latin "a thing adjudicated" 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been- but was not – raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties..." *(See Black's Law Dictionary, ibid, at pg 1312)***.**

In view of the foregoing definition of *Res Judicata,* the foot notes to Section 7 of the Civil Procedure Act,(Cap 21), is entitled *Res Judicata.* This is by virtue of the Legal Notice No. 22/1984. This section provides as follows;

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court..." (Cap 21, ibid Section 7)

The foregoing section goes further to give various explanations and the applicability of the fore-stated provision. These explanations are as follows;

Explanation. (1)—The expression "former suit" means a suit

which has been decided before the suit in question whether or not it

was instituted before it.

Explanation.(2)—For the purposes of this section, the competence

of a court shall be determined irrespective of any provision as to right

of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

In ***Nicholas Njeru v Attorney General & 8 others [2013] eKLR***, the learned Judges of Appeal, Alnahir Visram, M.K Koome, & J.O Otieno JJA. while referring to the doctrine of *res judicata* as envisaged under section 7 of Cap 21 reiterated as follows;

"This doctrine has been applied in a number of cases including; *Reference No.1 of 2007, James Katabazi and 21 Others -vs- The Attorney General of the Republic Of Uganda EACJ* where the Court stated that for the doctrine to apply:

> ***1)- the matter must be 'directly and substantially' in issue in the two suits,***
>
> **2)-** ***the parties must be the same or parties under whom any of them claim, litigating under the same title; and***
>
> *3)- The matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd. - v- Central Bank & 2 Others – Civil Appeal No. 36 of 1996)..."*

The foregoing principles were applied in the case of ***Christopher Mwangi Gakuru vs. Kenya National Highway Authority & 5 Others [2013]eKLR,*** when the learned judge Lenaola J. Opined as follows;

"...For *res judicata* to be invoked in a matter, the issue in the present suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title - See the case of *Karia and Another v the*

Attorney General and Others (2005) 1EA 83. **It therefore follows that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was also the holding in *Omondi v National Bank of Kenya Ltd and Others (2001) EA 177*..."**

The foregoing proposition of the law was also echoed in the case of Kolaba ***Enterprises Limited v Shamshudin Hussein Varvani & another [2014] eKLR*** where the learned judge F. Gikonyo J. reiterated as follows;

"...The test to determine whether a matter is *res judicata* was stated in BERNARD MUGO NDEGWA -VS- JAMES NDERITU GITHAE AND 2 OTHERS (2010) eKLR, and the Applicant must show that:

1. **the matter in issue is identical in both suits**
2. **the parties in the suit are the same**
3. **sameness of the title/claim**
4. **concurrence of jurisdiction**
5. **Finality of the previous decision..."**

In ***Nicholas Njeru v Attorney General & 8 others [2013] eKLR, Court of Appeal at Nyeri,*** *Civil Appeal No. 110 Of 2011* the learned judges Visram, Koome and Odek JJ.A, observed as follows;

> "This doctrine has been applied in a number of cases including; *Reference No.1 of 2007, James Katabazi and 21 Others -vs- The Attorney General of the Republic Of Uganda EACJ* where the Court stated that for the doctrine to apply, *the matter must be 'directly and substantially' in issue in the two suits, the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit*

In ***Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR, H.C at Nairobi,*** *Civil Suit No. 275 OF 2013* the learned judge Gikonyo J. observed as follows;

> **"Succinctly put, the High Court has no jurisdiction to overturn its own decision except on reviewing its own decision, a procedure that the plaintiff has not pursued. See the case of** E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR **where it was held that:**
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> > "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata….." (Emphasis added)"

The learned judge observed further as follows;

> **"I do not want to re-invent anything. I wish only to adopt the following passage in the dictum of Wigram V-C, in** HENDERSON V HENDERSON (1843) 67 ER 313 **as it summarizes *res judicata*:**

> ***'' … where a given matter becomes the subject of litigation in, and 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 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 judgment, 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.***
>
> **[26] Is this case *res judicata*? Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings-of the previous case and the instant case- to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction. The test in determining whether a matter is *res judicata* was stated is summarized in Bernard Mugo Ndegwa -VS- James Nderitu Githae And 2 Others (2010) E Klr, as follows that: 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision. The more fundamental proposition in the circumstances of this suit and which will determine the issue of res judicata without going into the other details is; Whether the decision of the court in setting aside the arbitral award is a decision of finality in the sense of res judicata?"**

In ***Mwanaisha Kiriale Mohamed & another v Alfred Wafua Okuku & 2 others [2014] eKLR, H.C at Mombasa Civil Cas No. 129 of 2010*** the learned judge Muriithi J. while citing Mulla on Civil Procedure Code observed as follows;

> **"A judgment by a court that did not have jurisdiction cannot operate as *res judicata*. As the learned authors of Mulla, *The Code of Civil Procedure,* 18th ed. (2012) at page 285 observe:**
>
> > ***"Judgment of a Court not competent to deliver it. A judgment delivered by a court not competent to deliver it cannot operate as*** res judicata***, since such a judgment is not of any effect. It is a well-settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, it does not operate as*** res judicata ***between the same parties in subsequent proceedings….The Supreme Court has held that an order passed by a court without jurisdiction would be a nullity. It will be*** coram non judice***. It is*** non est ***in the eye of the law. Principles of*** res judicata ***would not apply in such cases."***

In ***Vincent Kipsongok Rotich v Orphah Jelagat Ngelechei [2014] eKLR, E&L Court at Eldoret,*** *E&L NO. 543 OF 2012* ***Formerly HCC No 124 of 2009,*** *the learned judge Munyao J. delivered himself at length as follows;*

> ***"13. That said, it is apparent from a reading of S.7 of the Civil Procedure Act, that res judicata will not apply where the former suit was heard by a court or tribunal which did not have jurisdiction. This was indeed one of the holdings in the case of Damaris Kondoro vs Gachanja Gitere & Another Nakuru HCCC No. 127 of 2004, (2005) eKLR in which Musinga J (as he then was) affirmed that the doctrine of res judicata cannot apply where the tribunal in the former suit did not have jurisdiction.***

14. A similar decision was reached in the more recent case of *Mwanaisha Kiriale Mohamed & Another v Alfred Wafua Okuku & 2 Others, Mombasa HCCC No. 129 of 2010, (2014) eKLR*. In this case, a matter with a pecuniary jurisdiction of Kshs. 10 Million was filed and determined in the Mombasa Magistrate's Court. The maximum pecuniary jurisdiction for magistrates at the time the matter was filed was Kshs. 3 Million. A determination was made in favour of the plaintiff in that case. The defendant filed a fresh suit in the High Court (as plaintiff) and the defendant (plaintiff in the Magistrate's Court) raised the plea of *res judicata*. Muriithi J, in an elaborate decision, held that the plea of *res judicata* could not be sustained as the former suit was determined by a court which did not have jurisdiction.

15. This same point has also been applied outside our jurisdiction where provisions similar to our Section 7 of the Civil Procedure Act are in operation. In the American case of *Lloyd vs American Motor Inns, Inc 343 S.ED.2d 68 (1986)*, the Supreme Court of Virginia stated as follows on the doctrine of *res judicata* and jurisdiction.

> ***"It is well settled that a judgment of a court of competent jurisdiction is conclusive respecting the same cause of action in a subsequent suit between the same parties.* Corprew v. Corprew, 84 Va. 599, 602, 5 S.E. 798, 799 (1888). *For a prior judgment to preclude a subsequent action, however, the court in the first proceeding must have had jurisdiction over the subject matter of the controversy and the precise issue upon which the judgment was rendered.* Linkous v. Stevens, 116 Va. 898, 906-07, 909-10, 83 S.E. 417, 419-21 (1914); Seamster v. Blackstock, 83 Va. 232, 234, 2 S.E. 36, 37 (1887).**
>
> ***In the present case, the Industrial Commission acted within its authority when it received evidence and determined that Lloyd's accident did not arise out of and in the course of her employment with the Inn. Having made this threshold finding, however, the Commission had no jurisdiction to adjudicate the merits of Lloyd's claim. Therefore, the Commission's finding of no causation was made without jurisdiction and could not bar Lloyd's subsequent action for damages."***

16. This position is also affirmed in Mulla, *The Code of Civil Procedure*, 18th Edition at page 285, where it is written as follows :-

> ***" A judgment delivered by a court not competent to deliver it cannot operate as res judicata, since such judgment is not of any effect. It is a well-settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, does not operate as res judicata between the same parties in subsequent proceedings."***

In the instant case the main contention advanced on res judicata by the Defendant/Applicant is to the effect that this matter was deliberated upon by the Land Dispues Tribunal and the award thereof was adopted by the magistrates court at Nakuru and hence decree being issued of which has not been challenged at the appellate level. The Defendant/Applicant in his supporting affidavit at para 13 & 17 states as follows;

> ***"...That despite the above arrangements, the plaintiff secretly went behind my back and obtained the title of the entire 34 acres (Annexed and marked 'KC6' is a copy of the green card). ...That went back to the settlement officer and the district officer who constituted tribunal to settle the dispute (annexed is a copy of a letter from the District Officer marked 'KC7a' and 'KC7b'. ...That the panel of elders constituted heard our earlier arrangements of 50:50 (annexed is the decision marked 'KC8' dated 1984). ...That the decision of the panel of elders was adopted in court on 13th September 1984 (annexed and marked 'KC9' is the decree from court. ...That the decision was forwarded to the District officer and the District Land Registrar Eldama Ravine who acted on it and the subdivision was done with both transfer and subdivision being executed by the court (annexed are copies of consent and mutation form marked 'KC 10C')"***

Section 3 of the Land Disputes Tribunal (LDT) Act, Cap 303A now repealed states as follows;

> ***"3.(1) Subject to this Act, all cases of a civil nature involving a dis putes as to-:***
>
> ***(a) the division of, or the determination of boundaries to land,***
>
> ***including land held in common;***
>
> ***(b) a claim to occupy or work land; or***
>
> ***(c) trespass to land,***
>
> ***shall be heard and determined by a Tribunal established under section 4. "***

Over and again both the Court of Appeal and High Court have held that the Land Disputes Tribunal lacks Jurisdiction over the registered land and especially where the matters at hand touches on the title of the land. See ***Wachira Wambugu and Two Others vs. Central Province Lands Dispute Appeals Committee and three Others, Court of Appeal at Nyeri Civil Appeal No. 257 of 2006*** *and* ***Julius Mburu Mbuthia vs. John Kariuki Kiboro E & L Court at Nyeri, Civil Appeal No. 89 of 2009.*** *It follows therefore that the instant issues are not Res judicata due to the fact that they were deliberated upon and determined by incompetent tribunal that lacked jurisdiction over the same.*

Explanation 2 under section 7 of the Civil Procedure Act, states that;

"Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right *of appeal from the decision of that court."*

In view of the above provision of the law and in view of the holdings cited above, jurisdiction of the Court or rather the competence of the court to determine an issue must be put under scrutiny and consideration once the issue of jurisdiction is raised. And therefore a decision and or a judgment by a court and or tribunal that did not have jurisdiction cannot operate as res judicata. In the case of Vincent Kipsongok Rotich v Orphah Jelagat Ngelechei [2014] eKLR, supra, the learned judge Munyao J declined to declare the suit therein res judicata despite the existing decision/order that had been made by the LDT and adopted by the Honourable Magistrates Court. The learned judge observed as follows;

> **"19. A more or less similar scenario, to that before me, emerged in the case of *Stephen Ntokoiwuan Koikai vs Raphael Lekishon Koikai , Nakuru HCCC No. 111 of 2007 (2007)eKLR*. In the matter, the plaintiff filed suit seeking orders that he is entitled to a land parcel CIS-Mara/Ololunga/3492. The defendant raised a preliminary objection that the suit was *res judicata* as the matter had been adjudicated by the Land Disputes Tribunal and a decree issued which had not been set aside. The court (Kimaru J), did not buy this argument. He held that the tribunal was not a "competent court" whose decision could attract the application of the doctrine of *res judicata* in a subsequent suit.**
>
> **20. I have no doubt in my mind that the Land Dispute Tribunal, in the circumstances of this case, delved into a matter in which it had no jurisdiction. That decision was rendered by a court that was not a "competent court" and the decision and all subsequent proceedings, are prima facie a nullity. This subsequent suit, having been filed in a court of competent jurisdiction, cannot be *res judicata.***
>
> *21. For the above reasons, I decline to declare this suit as being res judicata."*

The Land Disputes Tribunal herein acted ultra vires by deliberating upon the suit land that had a title deed and hence their decision that was later adopted by the Magistrates Court at Nakuru is null and void, in my view. In Republic v Judicial Commission of Inquiry Into the Goldenberg Affair & 3 others Ex Parte Mwalulu & 8 others [2004] eKLR, H.C at Nairobi, Miscellaneous Civil Application No 1279 Of

2004, the learned judges Nyamu, Ibrahim & Makhandia JJ. cited the holding in DDP V. Hutchings [1990] AC 783 and reiterated as follows;

> **"In addition if rule (i) is ultra vires the commission and the Act as shall appear shortly it is void ab initio and of no effect see DPP v HUTCHINGS [1990] AC 783 House of Lords, where Lord Lowry stressed this important point of principle:**
>
> > "The basic principle is that an ultra vires enactment, such as a bye law, is void ab initio and of no effect." **We also apply the maxim *ex nihilo nihil fit* – "out of nothing comes nothing".**
>
> **...**
>
> *We find that it would be serious abdication of jurisdiction and powers of this court if we were to shy away from quashing a nullity because in essence the doctrine of ultra vires permits the courts to strike down decisions or acts made or done by bodies exercising public functions which they have no power to make. The courts have a specific mission and a duty to uphold the rule of law. Indeed the doctrine of ultra vires was one of the original pillars upon which judicial review was founded."*

In light of the above holdings, it is quite clear that the instant suit is not res judicata.

3)Whether the Instant Suit is Time Barred

The instant application is further premised on section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. The defendant applicant has argued that this matter having been settled by the Land Disputes Tribunal in 1984, has been brought to this court after a period of 30 years. On the other hand the plaintiff/respondent contends that this matter has never been competently settled by the alleged Land Disputes Tribunal and that in any event the said Land Disputes Tribunal lacked jurisdiction to deliberate upon this matter. The plaintiff/respondent contents further that the defendant/applicant has been residing on the suit land by virtue of license/continued consent granted to him by the plaintiff and that it is high time the defendant/applicant be declared a trespasser and be restrained by a prohibitory injunction from continued interference of the plaintiff/respondent's quiet enjoyment of the land in question.

Section 7 of the Limitation of Actions Act, ibid, states as follows;

> *"7. Actions to recover land*
>
> *An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. "*

While section 9 of the Act states as follows;

> *"9. Accrual of right of action in case of present interest in land*
>
> *(1) Where the person bringing an action to recover land, or some person*
>
> *through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance. "*

Section 13 of the Act stipulates as follows;

> *"13. Right of action not to accrue or continue unless adverse possession (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour*

the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. "

Having made a finding to the effect that the LDT lacked jurisdiction to deliberate upon the suit land herein in 1984, it is not right to say that the claim herein stands expired having arose in the said1984. This is so because, as observed above the decision made by the LDT is null ab initio. Nothing comes out of Nothing.

In ***John Otim Omara v Kazungu Karisa Ngari [2015] eKLR in the Environment Court at Malindi,*** *ELC Appeal NO. 10 OF 2013 the learned judge Angote J., at para 33 opined as follows;*

> ***"The reading of Section 7, 9 and 13 of the Limitation of Actions Act shows that one can only raise a defence of limitation of action if he has dispossessed the owner of land for a period of more than twelve years or if the owner of the land has discontinued possession of his land for over 12 years, and within which period the person raising the defence of limitation has been in possession of the land."***

It appears from the foregoing that Limitation of Action with regard to recovery of Land is hinged on Adverse Possession. This is so because by dint of provisions of section 13(1) of Limitation of Actions Act, the limitation of time of 12 years in relation to right to recover land as contemplated by section 7 of the Act cannot accrue unless the said right is founded on adverse possession. In the instant case therefore, the claim filed herein by the Plaintiff is founded on fraud. It follows therefore that section 7 of the Limitation of Actions Act is not relevant. This is so because the plaintiff/respondent has pleaded fraud and not adverse possession. Section 4(2) as read together with section 26 of the Limitation of Actions Act, states that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. On the other hand section 26 of the Limitation of Actions Act state as follows;

> *"26. Extension of limitation period in case of fraud or mistake*
>
> *Where, in the case of an action for which a period of limitation is prescribed,*
>
> *either—*
>
> *(a) the action is based upon the fraud of the defendant or his agent, or of*
>
> *any person through whom he claims or his agent; or*
>
> *(b) the right of action is concealed by the fraud of any such person as*
>
> *aforesaid; or*
>
> *(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:*
>
> *Provided that this section does not enable an action to be brought to recover,*
>
> *or enforce any mortgage upon, or set aside any transaction affecting, any property*
>
> *which—*
>
> *(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any*

fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made. ” (Underlining supplied)

In his plaint dated 4th day of January 2014, the Plaintiff/Respondent at para 5 of the plaint pleaded particulars of fraud against the Defendant/Applicant as; obtaining the title of parcel No. Baringo/Ravine 102/267 by fraud; Fraudulently causing sub-division of land parcel No. Baringo/Ravine 102/211; Forgery and Misrepresenting to the National Commission that the Applicant had consented to the said sub-division. It is not clear as to when did the plaintiff discover the foregoing fraud. However in light of the letter dated 28th August 1985, the plaintiff/respondent protested the sub division of the suit land that led to the Defendant's/Applicant's title herein. (See Annexture marked 'KC 3', attached to Plaintiff's/Respondent's Replying Affidavit dated 1st of November 2014').

It is evident that the Plaintiff/Respondent had been issued with a title to the land parcel Baringo/Ravine-102/211 measuring 13.1 Ha., on 17/12/82. (See annexture marked KC1 attached to the plaintiff's affidavit dated 1st November 2014). On 31.5.85, the said land parcel was subdivided into two despite the plaintiff's/respondent's protest and thereafter on 10.1.86 the title was issued to the Defendant/Applicant vide land parcel Baringo Ravine/102/267 measuring 6.8 Ha. It is very clear therefore that the plaintiff's land parcel known as Baringo/Ravine-102/211 measuring 13.1 Ha no longer exist as the same was subdivided into two parcels of land; Baringo/Ravine-102/211 measuring 13.1 Ha, registered in the name of the Defendant/Applicant and the rest being left for the Plaintiff/Applicant. (See certificate of serach dated 3rd June 2014, Annexture marked KC 1b, Attached to the Applicant's supporting affidavit) The said subdivision as pointed earlier was done in 1985 and the title issued in 1986.

It appears that the plaintiff/applicant became aware of the alleged fraud against the defendant in 1985. This is so because in his aforementioned letter dated 28th August 1985, addressed to the Lad Registrar Kabarnet, protested the said subdivision and stated that he was the absolute owner of the land parcel Baringo/Ravine 102/211. It appears therefore that the plaintiff/respondent went into slumber until 4th June 2014 when he filed this cause of action. This is proximately 30 years down the line. Considering strict interpretation of section 4(2) as read together with section 26 of the Limitation of Actions Act, it is apparently clear that the plaintiff /respondent was indolent and hence the claim based on fraud herein technically speaking is time barred.

Be that as it may, the said subdivision was as a result of the decision made by Land Disputes Tribunal and later adopted by the Magistrates Court at Nakuru. The plaintiff in his Affidavit dated 1st November 2014, has deposed that the said adoption is subject of litigation and hence still pending in court. In his affidavit dated 1st of November 2014 at para 19, the plaintiff/respondent deposes as follows;

“THAT the instant applicant's allegation in para 23 that The Nakuru Resident Magistrates Court Case No. 12/1984 has not been challenged on appeal by myself is both false and misleading as the same was challenged with even an application for stay of its decision pending the hearing and its determination on record. (Annexed and marked K.C 7 is a letter dated 21st of November 1984 addressed to the Resident magistrate Nakuru raising concern over continued execution of the LDT''s decision yet there were still proceedings going on in court)”

The letter referred to above is dated 21st November 2014 written by Mbugua & Co. Advocates on behalf of the Plaintiff/Respondent and addressed to the Resident Magistrates Law Courts, Nakuru. The said letter read in part;

“RE: RMCC (Land Case) No. 12 of 1984

…

We are concerned that your honour has asked the D.O to implement the order of 13th September with knowledge of the foregoing facts, and with our application already pending for hearing. Justice requires that our client's application be heard and disposed off before the execution of the order of 13th September."

In view of the foregoing it is very clear beyond peradventure that the decision by the Land Disputes Tribunal that led to the subdivision of the suit land herein was challenged before the Resident Magistrates Court at Nakuru. However according to the record placed before this honourable Court, it is not clear as to whether the said challenge was heard and determined or is sill pending. The letter above shows that the application contesting the Land Disputes Tribunal decision was still pending as at 21st November 1984. It follows therefore that with no evidence contrary to the facts stated in the foregoing letter, it may be presumed that the said application is still pending before the Nakuru Magistrates Court which technically lacks jurisdiction in view of my earlier finding. In this regard the instant claim cannot be time barred due to the fact that time stopped running after the award given by Land Disputes Tribunal was contested in Nakuru Resident Magistrates court in 1984 by the Plaintiff/Applicant. In my view, due to the foregoing, the claim herein is not time barred,

The upshot of the above is that the instant application ought to fail. The instant suit raises issues related to fraud on both parties. This court is therefore the right forum to deliberate on the same. It is in the interest of justice that this matter proceeds for full hearing. Orders accordingly.

DATED AT ELDORET THIS 21ST DAY OF MAY 2015

ANTONY OMBWAYO

JUDGE