



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 145 OF 2014**

ROSE NJERI MUNORU .....1<sup>ST</sup> PLAINTIFF  
HANNAH WANJA NDUNG’U.....2<sup>ND</sup> PLAINTIFF  
RAHAB NJERI KAMAU.....3<sup>RD</sup> PLAINTIFF  
MARY WAIRIMU NJOGO.....4<sup>TH</sup> PLAINTIFF  
LOISE WAMBUI CHEGE .....5<sup>TH</sup> PLAINTIFF  
PAULINE WAMBUI HARISON.....6<sup>TH</sup> PLAINTIFF  
CONSOLATA NYAMBURA KARANJA .....7<sup>TH</sup> PLAINTIFF  
ESTHER NYAMBURA NJOROGE .....8<sup>TH</sup> PLAINTIFF  
ALICE WARIGIA NGURE.....9<sup>TH</sup> PLAINTIFF  
TERESIAH NJANGO GATHUNGU.....10<sup>TH</sup> PLAINTIFF  
DORCAS NJERI MWAURA .....11<sup>TH</sup> PLAINTIFF  
MARY WAIRIMU KINYANJUI.....12<sup>TH</sup> PLAINTIFF  
ZIPORA WANJIKU KAMAU.....13<sup>TH</sup> PLAINTIFF

**VERSUS**

HANNAH MWIHAKI MUTURI.....1<sup>ST</sup> DEFENDANT  
MARY WANJIKU KIUNA.....2<sup>ND</sup> DEFENDANT  
MARGARET WAIHERA NG’ANGA.....3<sup>RD</sup> DEFENDANT

**MARGARET MUMBI MIAKO.....4<sup>TH</sup> DEFENDANT**

**REBECCA GAKENIA MUIGAI .....5<sup>TH</sup> DEFENDANT**

**RULING**

**CORAM: R.E Aburili J**

1. This ruling determines two applications. The first application is dated 23<sup>rd</sup> May 2014 and the other is dated 26<sup>th</sup> November 2014. The application dated 23<sup>rd</sup> May 2014 is brought by the plaintiffs against the defendants seeking for orders.

a. Spent

b. Spent

c. That the court do grant an interim prohibitory injunction and or conservatory orders restraining the defendants, their agents, servants, employees or whosoever from acting, occupying, transacting, holding, participating or in any way dealing with the assets, incomes and affairs of Lari Division Women Association pending hearing and determination of the suit.

d. That the court do order the defendants to immediately vacate office and the newly elected officials of LARI DIVISION WOMEN ASSOCIATION namely:

Rose Njeri Munoru – chairlady

Hannah Wanja Ndungu – Secretary

Rahab Njeri Kamau- Treasurer

Mary Wairimu Njogu- member

Take office pending hearing and determination of this suit.

e. That in the alternative, the court be pleased to order the defendant/respondent to call for and or give notice of a special general meeting of LARI DIVISION WOMEN ASSOCIATION within seven (7) days from the date of service of such orders for purposes of electing officials and rendering accounts of the society.

f. Costs of the application.

2. The grounds upon which the application is predicated are that elections of Lari Division Women Association were held on 8<sup>th</sup> August 2013 following a special general meeting requisitioned by the plaintiffs/applicants and the said plaintiffs/applicants were duly elected as new officials of Lari Division Women Association, as the society had not held any elections since 1989 and it was therefore expected that defendants vacate office immediately and hand over the office to the newly elected officials but the defendants have refused and remain in office which tenure is illegal, untenable and total abuse of the Association's Constitution and Rules. It is further stated that the defendants had been engaged in misusing and plundering resources/assets and income of the Association and that the Association risked deregistration for failure to hold annual general meeting/election, giving accounts and filing annual returns as required under the Societies Act and Constitution and Rules of the Society and finally, that the application satisfies the threshold for grant of the orders and reliefs.

3. The application is supported by the affidavit of Rose Njeri Munoru sworn on 23<sup>rd</sup> May 2014 who deposes that she is a member of Lari Division Women Association formed in 1989 wherein the defendants/respondents were elected as the society's office bearers at the inception. It is further deposed that ever since, no annual general meeting has ever been convened for election of office bearers and there has been no rendering of accounts of the monies received and paid by the society by way of audited books of accounts which is a violation of the Societies

Act and the Constitution of the Society. The applicants further contend that the only reason for such conduct on the part of the defendants is because of their engaging in massive plunder, misuse and mismanagement of the societies funds and assets which facts they fear may come to light if the management is subjected to scrutiny at a general meeting. Further, that despite the plaintiff's severally calling for an annual general meeting for purposes of elections and rendering of accounts. Following the resistance by the defendants, the plaintiffs called for a special annual general meeting which was held on 8<sup>th</sup> August 2013 in accordance with the society's Constitution which meeting was advertised and 410 members attended thereby electing the deponent Rose Munoru and other officials as shown by the copy of minutes as interim officials, by a resolution of the meeting but that the respondents had refused to vacate office and or call for an annual general meeting which is likely to cause deregistration of the society. She annexed copies of share certificates, the society's constitution, certificate of registration, and letter from Registrar of Societies showing office bearers and a search showing no annual returns had been made, notice of special annual general meeting, advertisements, list of attendees of the special annual general meeting.

4. The defendants opposed the application by the applicants/plaintiffs and filed a replying affidavit sworn by Margaret Waithera Nganga on 20<sup>th</sup> June 2014 deposing that a similar application had been made vide SPM's court at Limuru and was determined in the defendant's favour as shown by annexed pleadings and order upon which that suit was withdrawn and that therefore this application is res judicata the Limuru SPM CC 374/2013 which was a matter determined by a court of competent jurisdiction. She maintains that she was the society's secretary and that they held elections every year and filed annual returns. Further, she deposed that the purported elections of 8<sup>th</sup> August 2013 were held to have been illegal and invalid by the court in SPM CC473/2013 and no appeal has been filed challenging that decision. The defendants further contend that the 1,2,3, plaintiffs were officials who were suspended by the Executive Committee for dishonesty and misconduct upon which they formed a splinter group with the sole aim of assuming leadership or destroying the Association.
5. The second application is dated 26<sup>th</sup> November 2014 filed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants seeking to discharge the order issued on 3<sup>rd</sup> June 2014 against the defendants and that the entire suit be dismissed for being an abuse of the court process of the court. The grounds in support thereof are that the said order was obtained fraudulently by non-disclosure of the fact that a similar order was denied by a subordinate court and no appeal was preferred against the order of the subordinate court. That the effect thereof had paralyzed operations of the association made up of 1533 members; and that unpaid rent of kshs 181,000/- had been lost between May and October 2014 since tenants in the invested fixed properties of the association had either vacated without paying rent or refused to pay rent altogether.
6. The application by the defendants is supported by the supporting affidavit of Margaret Waithera Nganga sworn on 26<sup>th</sup> November 2014 which reiterate the grounds thereof while annexing copies of documentation in Limuru SPM CC 374/2013 and setting out names of defaulting tenants. She further deposed that as members of the Association are elderly women and depend on rental income from their rental premises, the continued enforcement of the order will deprive them of their livelihood and render them destitute and ground the Associations operations on which many livelihoods depend.
7. The defendants filed grounds of opposition dated 18<sup>th</sup> June 2014 to the application by the plaintiffs stating that they would oppose the application for being an abuse of the court process as reliefs sought were denied by Limuru SPM CC 374/2013 and no appeal had been filed against the said decision and that the suit and application offends Section 7 of the Civil Procedure Act.
8. The parties' advocates agreed to dispose of the two applications by way of written submissions. The plaintiffs/ applicants filed theirs on 27<sup>th</sup> February 2014.
9. It should be noted that the court directed that the Notice of Motion filed in court on 26<sup>th</sup> November, 2014 be treated as a further affidavit to the Notice of Motion dated 23<sup>rd</sup> May 2014.
10. In their submissions filed in court on 26<sup>th</sup> January 2015 and dated 20<sup>th</sup> January 2015, the applicants through their legal counsel Kinyua Njagi and Company Advocates submitted

reiterating what is contained in the applications dated 23<sup>rd</sup> May 2014, the grounds thereof, supporting affidavit and annexures. They also replicated what is contained in the Notice of Motion dated 26<sup>th</sup> November 2014 the grounds and supporting affidavit which I have reproduced herein above. They aver that the respondents have totally failed to show that they have ever held elections or called for annual general meeting of the Association since 1989 and neither have they ever filed annual returns, contrary to clause 8 (a) (ii) (b) of the Society's Constitution. Further, it is contended that the purported financial statements prepared by Ngigi & Partners for 2011 and 2012 do not bear the signature of the accountant who prepared them contrary to accounting procedures and that there is no mention of minutes of the general meetings at which the said accounts were presented and adopted by members as per the societies Act and Constitution and rules of the society and that nothing is mentioned concerning the other years. The applicants also seriously contested the purported annual returns filed with Registrar of Societies since 1990 maintaining that the annexed receipt was issued on 13<sup>th</sup> September 2013 for consolidated returns from 1990 to 2012 a clear demonstration that no annual returns were filed since 1990 and that the respondents filed backdated returns in September 2013 after realizing that members had called/held a special general meeting in August 2013 threatening to remove them from office for failure to hold annual general meeting and file returns contrary to clear provisions of the Societies Act and Constitution Rules of the Society. The plaintiff/applicants also submitted that there was no evidence of minutes of their having been suspended by the Executive Committee of 40 members and that they invoked clause 8(d) of the Constitution and Rules of the Society which allows members to requisition a special general meeting after due advertisement and notice was given to members and after realizing that the society's assets and resources were being mismanaged and misappropriated and the society risking deregistration for flouting the Societies Act. They maintain that the special meeting was duly conducted in accordance with the Societies Constitution and denied being a splinter group.

11. The applicants also maintained that the Limuru SPM CC 374/2013 was withdrawn under Order 25 Rule 1 of the Civil Procedure Rule and such discontinuance or withdrawal cannot be a defence in a subsequent suit. In the applicant's view, this matter cannot be res judicata Limuru SPM 374/2013 since the latter only handled preliminary application for interim injunctive orders and the suit was never set down for hearing and determination of substantive issues. In addition, that interim orders issued in the lower court lapsed with the withdrawal of the suit. The applicants further submitted that if the orders are not granted they stand to suffer irreparable loss as the defendants will continue to utilize the societies assets and income or their own personal benefit to detriment of the society membership. In addition that they had established a prima facie case with a probability of success as the defendants failed to call elections for over 20 years contrary to Societies Act and the Constitution and Rules of the society.
12. Finally, it was submitted that the balance of convenience tilted in favour of grant of interior injunctive orders to safeguard the society assets and incomes for the benefit of all parties and the general membership of the society pending hearing and determination of the substantive suit. The applicants relied on **JR Miscellaneous 78/2011 Mauled Jasho & Others vs Registrar of Societies and 3 others** where the court declined to quash decision of the Registrar confirming the interested parties as bona fide officials of Pangani Mosque Shauri Moyo Society after they had been elected at a special general meeting requisitioned after the applicants who were former officials had refused to hold any elections and or proper elections over 20 years. The applicants also relied on **JR Misc 636/2005 Nairobi –Petalis Mwanda Oduk & 2 Others V Registrar of Societies & 3 Others** where the court observed that **Musanda Holy Ghost Church of EA** had not held elections for 17 years and failure to do so was in violation of the Societies Act and could render the society deregistered. It held that it was upto members of society to call for elections and hold the same as the registrar has no legal mandate to direct the society to hold elections.
13. In their submissions dated 6<sup>th</sup> February 2015 and filed on the same day, the respondents submitted that the entire suit herein and the notice of motion dated 23<sup>rd</sup> May 2014 have no merit in law and contravened the law and are an abuse of the court process for being Resjudicata Limuru SPM CC 374/2013 wherein the plaintiffs sought similar orders of injunction and declaratory orders as the orders being sought herein and that after that court dismissed the plaintiff's application that they rushed to this court to file these proceedings and

- withdrew the proceedings from the Limuru Court without appealing against the orders in Limuru SPM CC 374/2013.
14. In the defendant's view, the suit herein together with the plaintiff's Notice of Motion dated 23<sup>rd</sup> May, 2014 offends Section 7 of the Civil Procedure Act. Further, that Order 25 Rule 1 of the Civil Procedure Rules allows a plaintiff withdraw a suit before it is set down for hearing, not where a determination by way of a ruling has been made after inter partes hearing on merit like in the Limuru case which outcome is tantamount to dismissal of the entire suit and since the reliefs sought were the same as those being sought in the instant suit.
  15. In addition, it was contended that the issue of elections allegedly held by the plaintiffs on 8<sup>th</sup> August 2013 was dealt with by the Limuru court and the court did pronounce itself that the plaintiffs' meeting was not properly convened. The Limuru court thereby declined to declare the 1-4 plaintiffs as duly elected officials of Lari Division Women Association. From that decision, no appeal has been filed challenging it. Further, that in any event, the Association has held annual elections since 1989 and filed annual returns.
  16. The defendants maintained that the orders issued by the Limuru Court on 14<sup>th</sup> May 2014 did not lapse after the withdrawal of the SPM CC 374/2014 on 20<sup>th</sup> May 2014. That to grant the orders sought herein is tantamount to sitting on an appeal that is not before this court, challenging the orders issued by the SPM'S Court in Limuru, which is a court of competent jurisdiction.
  17. Finally, it was submitted that the plaintiffs' intention is to usurp the leadership of Lari Division Women Association by force and urged them to make an appropriate complaint to the Registrar of Societies under Section 18(1) and (2) of the Societies Act. The defendants urged this court to dismiss this court and application with costs.
  18. I have carefully considered the two notices of motion, the grounds in support thereof and the supporting affidavit as well as annexures thereto. What I have considered above is a consolidation of two applications one by the applicants/plaintiffs for an injunction and the other by the defendants/respondents seeking to discharge the injunction granted in the interim and have the suit and application by the plaintiffs dismissed.
  19. Both applications raise very serious points of law for consideration I propose to start with the defendant's application seeking to discharge the injunction and for dismissal of the application and the suit for no disclosure of material facts and for being Resjudicata Limuru SPM CC 374/2013 as that serves as a preliminary point of law which takes precedence to all other matters, and if found to be merited, it will dispose of the entire suit.
  20. First, it is contended that the issue of injunction had been rejected by the subordinate court on the same facts between same parties in Limuru SPM CC 374/2013. That no appeal was lodged against that refusal as shown by the annexed order and pleadings and instead, the applicants herein purported to withdraw that case and filed this one, seeking the same orders that had been rejected by the Limuru Court in SPM CC 374/2013, and which in the defendant's view, is an abuse of the court process.
  21. On the other hand, the applicants contend that they had withdrawn the Limuru suit hence that withdrawal cannot be used as a defence in this subsequently filed suit, citing Order 25 Rule 1 of the Civil Procedure Rules. Further, that the Limuru court only dealt with a preliminary injunctive application not a determination of the suit.
  22. To enable this court conclusively deal with that issue/plea of Resjudicata, it is convenient to set out the prayers of the applicant's previous application made before SPM Limuru in C.C. 374/2013, compare those prayers with the prayers in the Notice of Motion dated 25<sup>th</sup> May, 2014 to establish the commonality thereof and whether the suit and impugned application for injunction/declaratory orders is Resjudicata the Limuru case which was allegedly withdrawn before filing of this suit and application. The annexed copy of plaint dated 16<sup>th</sup> December 2013 filed before Limuru on 17<sup>th</sup> December 2013 simultaneous with an application by way of Notice of Motion dated 17<sup>th</sup> December 2013 has the same plaintiffs and same defendants as the parties to this suit. The prayers sought in that plaint against the defendants were:
    - a. *A permanent injunction to restrain the defendants, their servants, agents, employees, or whosoever from acting, occupying, transacting, holding, participating, or in any way dealing with the affairs of Lari Division Women Association.*

b. *A declaration that the following are the duly elected and bonafide officials of Law Division Women Association.*

- i. *Rose Njeri Munoru – Chairlady.*
- ii. *Hannah Wanja Ndungu – secretary*
- iii. *Rahab Njeri Kamau - Treasurer*
- iv. *Mary Wairimu Njogu – Member*

c. *Costs of the suit.*

The application filed and anchored on the said plaint sought for orders

1. ....
2. *That this Honourable court be pleased to order the defendants to immediately vacate office and the newly elected officials mentioned below to take office pending hearing and determination of this application*

- i. *Rose Njeri Munoru – Chairlady.*
- ii. *Hannah Wanja Ndungu – secretary*
- iii. *Rahab Njeri Kamau - Treasurer*
- iv. *Mary Wairimu Njogu – Member*

3. *That this Honourable court be pleased to grant an interim prohibitory injunction to restrain the defendants, their servants, agents, employees or whosoever from acting, occupying, transacting, holding, participating, or in any way dealing with the affairs of the Lari Division Women Association pending the hearing and determination of the application.*
4. *That this Honourable court be pleased to grant an interim prohibitory injunction to restrain the defendants, their servants, agent, employees or whosoever from acting, occupying, transacting, holding, participating or in any was dealing with the affairs of the Lari Division Women Association pending the hearing and determination of the suit.*
5. *That in the alternative, this Honourable court be pleased to order the defendants to immediately call for a special general meeting or Lari Division Women Association within 14 days from the date of service of such orders.*
6. *Costs of this application.*

23. The application was premised on the grounds that :

1. Elections were held on the 8<sup>th</sup> August 2013.
2. The plaintiffs were duly elected the new officials of Lari Division Women Association.
3. The defendant's were to vacate office immediately and hand over to the newly elected officials.
4. The defendants are reluctant to vacate office.
5. The defendant's action is illegal untenable and total abuse of the Association's Constitution and Rules.
6. *The application satisfies the threshold for grant of the orders and reliefs sought.*

24. The application was supported by an affidavit sworn by Rose Njeri Munoru as shown by annexure MWN1, (b) annexed to the replying affidavit of Margaret Waithera sworn on 20<sup>th</sup> June 2014.

25. Comparing that suit and application in the suit and application herein as filed by the same plaintiffs on 23<sup>rd</sup> May 2014 dated the same day, they are the same in all material particulars with a few variations/additional words. The grounds in support as well as the affidavit depose the same facts and circumstances. That fact is not disputed by the plaintiffs. Their only contention is that they withdrew that suit hence they were at liberty to file similar/same proceedings before this court. However, as stated earlier, the defendants maintain that as the suits and application was the same as the one herein before a court of competent jurisdiction, the withdrawal thereof was immaterial since the application therein had been heard and determined on its merits before the

suit was withdrawn and a fresh one filed herein hence the suit herein and application by the plaintiffs is Resjudicata.

26. This court has also seen the order of SPM Honourable G.H. Oduor Esq SPM Limuru given on 6<sup>th</sup> day of May 2014 and issued on 14<sup>th</sup> May 2014. That order as extracted and conceded by the plaintiffs to be a genuine order from Limuru Court shows that the application dated 17<sup>th</sup> December 2013 was heard and determined inter partes and on merit and ruling delivered on 6<sup>th</sup> May 2014 dismissing it with costs in the cause.
27. In the verifying affidavit sworn by Rose Njeri Munoru on 23<sup>rd</sup> May 2014 verifying the correctness of the plaintiff subject matter of this suit, she deposed at paragraph 4 as follows:-

*“ That there is no other suit pending and there has been no previous proceedings in any court of law as between the plaintiffs and the defendants herein relating to the subject matter of this suit.*

Similarly, paragraph 18 of the plaint hereto avers that:

*The plaintiff states that there is no suit pending and there have been no previous proceedings between the plaintiffs and the defendants.*

28. I have meticulously perused the application and supporting affidavit of Rose Njeri Munoru dated /sworn on 23<sup>rd</sup> May 2014 and I have not seen any single statement or deposition by the plaintiffs disclosing that there had been previous proceedings before Limuru Court which were withdrawn. That is the application upon which the plaintiffs obtained interim injunctive (prohibitory) orders against the defendants, and which the defendants despite being served and required to comply, disobeyed giving rise to contempt proceedings and conviction by this court of some of the defendants herein who were cited for contempt of court.
29. When the defendants filed replying affidavits to the application of 23<sup>rd</sup> May 2014, that was the first time they disclosed to this court the aspect of a previous suit between the same parties over the same subject matter before Limuru SPM CC 374/2013 annexing pleadings, affidavits, Notice of Motion, notice of withdrawal and orders dismissing the application before the entire suit was withdrawn. The notice of withdrawal is dated 15<sup>th</sup> May 2014 under Order 25 Rule 1 of the Civil Procedure Rules, 2010 and served on the defendant's advocates on 14<sup>th</sup> May 2014, before the instant suit was instituted on 23<sup>rd</sup> May 2014.
30. The question is, is this suit and application by the plaintiffs Resjudicata Limuru SPM CC 374/2013? Order 25 Rule 1 of the Civil Procedure Rules provide ways in which a suit can be withdrawn from court, where a suit has not been set down for hearing and the plaintiff wishes to withdraw the suit against all or any of the defendants. Such plaintiff or applicant is free to withdraw suit by giving notice which shall be served on all the parties. However, under Order 25 Rule 2 thereof, a suit that has been set down for hearing may be discontinued or any part of the claim withdrawn by consent signed by all the parties otherwise leave of the court would be required to discontinue the suit or withdraw any part of the claim. In the case filed in Limuru SPM's court, the Notice of Motion attached had already been fixed for hearing and it was heard and determined inter partes and dismissed. It follows that that suit was not open to a withdrawal without the consent of all the parties or without leave of court. It further follows that as far as this court is concerned, that purported withdrawal of the Limuru suit is null and void and of no effect.
31. A reproduction of the provisions of Order 25 on withdrawal/discontinuance of suits is instructive.

***25(1) at any time before the plaintiff setting down a suit for hearing, the plaintiff may by notice in writing which has to be served on all the parties wholly discontinue his suit against all or any of the defendant or may withdraw any party of his claim and nay such a withdrawal shall not be a defence to any subsequent action.***

32. According to the plaintiffs, the withdrawal of the Limuru suit was not a bar to any subsequent suits/action and that is why they filed this suit. On the other hand, the defendant's maintain that the withdrawal was inconsequential since the suit had been set down for hearing and an

- application heard and determined interpartes.
- 33.Indeed, the plaintiffs withheld all that information from this court when they approached this court under certificate or urgency and obtained interim prohibitory injunctive orders whose disobedience led to the citing of the defendants for contempt of court.
- 34.An injunction is a discretionary equitable remedy. Whoever cometh to equity must come with clean hands. Non-disclosure of all material facts is one of the grounds upon which an injunction granted under Order 40 Rule 1, 2 may be discharged on an application under Order 40 Rule 7 of the Civil Procedure Rules. On that ground alone, I would find the defendant's application dated 26<sup>th</sup> November 2014 seeking to discharge the injunction granted by this court merited and I proceed to grant it and discharge that injunction/granted by this court for reasons that the same was obtained as a result of misrepresentation or concealment of material facts. Had those material facts been disclosed to the court at the time of considering the application under certificate or urgency and ex parte in the first instance, this court would not have granted those orders of injunction ex parte and it would have directed that the plaintiffs effect service of the application upon the defendants for interpartes hearing.
- 35.It follows that the plaintiff's failure in their application for injunction to satisfy the requirements for an injunction by concealing material facts did them a deservice hence their application cannot be granted and the same fails on all fours, with the injunction granted being discharged forthwith.
- 36.But the above situation is not enough. The defendants further contend that the entire suit and therefore the application for injunction is Resjudicata and therefore they should be dismissed for contravening the provisions of Section 7 of the Civil Procedure Act. I have already given a detailed comparison between the suit before Limuru Court vide SPM CC 374/2013 which was purportedly withdrawn vide a notice of withdrawal and the effect of such purported withdrawal after hearing and determination of the Notice of Motion. I have also found that the suit before Limuru Court having been set down for hearing, it was incapable of being withdrawn unilaterally by the plaintiffs without consent or an order of the court and that therefore the purported notice of withdrawal was null and void and of no consequence. That being the case, and having compared the two cases I find that they arise from the same cause of action, the same parties are litigating under the same title and seeking the same orders/prayers. Therefore, the latter suit is in my view, sub judice the Limuru SPM CC 374/2013. However, as the application in the Limuru suit was heard and determined interpartes by a court of competent jurisdiction, the application herein for an injunctive orders is no doubt Resjudicata the application in the Limuru SPM's court and must on that ground fail and be dismissed forthwith. In addition, as the prayers sought in the suit herein as well are a replica of the prayers that were sought and denied by the Limuru court in application before the suit therein was purportedly withdrawn by a notice of withdrawal, no doubt, this suit is Resjudicata the application that was dismissed by the Limuru court. There is no dispute that the Limuru Court was a court of competent jurisdiction. There was in my view, therefore, no compelling reason for seeking to withdraw the Limuru suit after failing to get the orders sought in the dismissed application. If the plaintiffs were dissatisfied with that dismissal, the remedy available to them was to file an appeal or seek for a review. In any case, the dismissal of the interlocutory application at that stage did not discharge the entire suit. The applicants could still have set down the main suit for interpartes hearing. Instead, the plaintiffs purported to withdraw that suit and file this suit. In my humble view, the plaintiffs were abusing and they have indeed excessively abused the court process. They engaged in judicial malpractice called "**Forum shopping for a possible friendly court.**" They were lucky and indeed they hood winked this court by concealing the existence of the Limuru court case to the Duty Judge who granted them interim ex parte orders which they used to cite and cause the defendants to be punished for contempt of court.
- 37.The court believed the plaintiffs at first because court orders must be obeyed whether irregularly or unjustifiably obtained or not. But finally, the time has come when this court must rise to the occasion of its highest calling and call a spade a spade and not a big spoon. Upon those concealed facts coming to the fore, they have laid bare the plaintiffs' malafides and dishonesty. First the plaintiffs swore false verifying affidavits that there had been no previous proceedings between the same parties over the same subject matter which was false, and replicating that deposition into the averment in their plaint. Secondly, by concealing the said material facts of

- the existence of a similar suit, they made the court believe that they deserved the ex parte orders which were granted, for it to turn out that the plaintiffs were estopped from bringing a similar application like the one which had been heard on merit and dismissed by the Limuru SPM's court of competent jurisdiction.
38. In my humble view, even if I was wrong on my interpretation of the Resjudicata rule the suit herein is also subjudice Limuru SPM CC 374/2013 for reasons that in the Limuru suit, only the application for injunctive orders was heard and determined on merits, not the whole suit. The suit, as I have stated, was never withdrawn as the purported withdrawal notice did not take effect since the suit had been set down for hearing and therefore a withdrawal could only take effect if there was a consent filed by the parties and endorsed as an order of the court or an application made by the plaintiff and determined by the court between the parties.
39. It is not the business of this court to cage parties to suits which they do not wish to prosecute or to be party to. The law has given the parties the freedom to either prosecute their suits or withdraw or discontinue them at any stage, provided that they comply with the requirements of the law for such withdrawal or discontinuance.
40. In my view, the purpose of the requirement for notification of withdrawal of suit after it has been set down for hearing like in the case before this court was to prevent mischief like the one that it witnessed in those proceedings and to prevent abuse of the court process to stop parties moving from court to court with the same cause of action trying to relitigate after losing at the interlocutory stage under the pretext that such withdrawal does not operate as a bar or defence to another suit. I am equally unable to find that Article 159 (2) (d) of the Constitution and Section 1A and 1B of the Civil Procedure Act are available to the plaintiffs herein who have gravely abused the court process. I am fortified by the Court of Appeal decision in the case of **Nicholas Keptoo Arap Korir Salat V IEBC & Winfred Rotich Lesan & 2 Others CA Nairobi 228/2013** per Ouko Mohammed & Kiage JJA that:

*“ I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines service to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot and in the bending and circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of rules and courts give assurance that there is clear method in the manner which things are done so that outcomes can be anticipated with a measure of confidence, certainly and clarity where issues of rules and their application are concerned.”*

41. The Supreme Court of Kenya also added its voice to the above principle of application of Article 159(2) (d) of the Constitution when it stated in the cases of **Shabbir Ali Josab V Annar Osman Gamray (C APP SC.N.1/2013** citing with approval its own decision in **Raila Odinga V IEBC & 4 Others Petition SC 5/2013** that

*“The court is guided by rules and regulation and urges all parties to follow the same since they guide the courts and the parties in obtaining justice. However, the essence of Article 159(2) (d) is that a court of law should not allow the prescription of procedure and form to triumph the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause.”*

42. The Court of Appeal in **Hinter Trading Co. Ltd V Elf Oil (K) Ltd CAPP6/2010** reiterated the need to guard against arbitrariness and uncertainty when applying the oxygen principle and insisted that rules and precedents that are oxygen compliant must be fully complied with to maintain consistency and certainty. The Court of Appeal warned that “ *If improperly invoked, the oxygen principle could easily become an unruly horse, and that it was the duty of the courts to tame it by application of sound judicial principles.*”
43. In this case, my view is that the sound judicial principle applicable in the instant case is that despite the merits of this case, the failure by the plaintiffs to disclose material facts and or their concealment of material facts of the existence of previous similar proceedings disentitles them to discretionary equitable orders of the court.
44. Indeed, a suit or application that is res judicata is void in limine and cannot be saved by the application of Article 159(2) (d) of the Constitution or Section 1A and 1B of the Civil Procedure Rules. The duty of this court is to let the law take its course. A court of law would have no jurisdiction to entertain a claim that is Resjudicata since the commencement words in Section 7 of the Civil Procedure Act are “*No court shall*”.....” And since jurisdiction is everything, a court of law acts in vain if it proceeds to hear any other evidence including determining the merits of the dispute/claim. (See **Owners of Motor Vessel “Lilian S” V Caltex Oil (K) Ltd (1980) KLR 1.**

40. A matter that Resjudicata can thus not be cured with some form of amendment to inject life in it. It is void in limine. Section 7 of the Civil Procedure Act provides:

***“ 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 been the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of competent jurisdiction to try such subsequent suit or the suit in which such issue has been subsequently raised, or has been heard and finally decided by such court.”***

41. The explanatory notes 1-6 set out under the said Section 7 explain the Resjudicata doctrine/rule. The rule applies as was stated by Wing ram V- C in the case of **Henderson Vs Henderson [1843] 67 ER 313** as follows:

***“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction the court requires the parties to a litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of matter which might have been brought onward, 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 Resjudicata applied, 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 property belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at that time.”***

42. I reiterate that in the application by the plaintiffs herein dated 23<sup>rd</sup> May 2014, the same is a replica, with a few additional words in the grounds and supporting affidavits, of the application before the Limuru court dated 17<sup>th</sup> December 2013. The plaintiffs having been unsuccessful before the lower court could only approach this court by way of an appeal and not to file a fresh application for an injunction in a new suit. In that case, the application would be as I have already found, Resjudicata, whereas the suit would not only be subjudice the Limuru suit whose “withdrawal” is ineffectual, but also an abuse of the court process. The plaintiff having hit a snag in the Limuru court opted to open a fresh front attack herein in the expectation that this court may never know of what transpired in that court or may overlook critically evaluating the previous application in the suit before Limuru Court and in the process fail to discern that indeed the application herein dated 23<sup>rd</sup> May 2014 is Resjudicata and thereby give the plaintiffs

a second bite at the cherry. Majanja J in **E.T.V. Attorney General & Another [2012] e KLR** called upon courts to be 'hawk eyed' to avoid suits that are otherwise Resjudicata from being instituted by employing devious means. The Learned Judge observed and I agree with him entirely that:

***“The courts must always be vigilant to guard litigants evading the doctrine of Resjudicata 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.***

43. In the case of **Omondi V National Bank of Kenya Ltd & Others [2001] EA 177** the court held that,

***“Parties cannot evade the doctrine of Resjudicata 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 Njanja V Wambugu and Another Nairobi HCC 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 court of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of Resjudicata.....”***

44. In this case, the plaintiff having lost their application in the Limuru Court, panel beat the facts to take a new shape by simply adding a few words and changing from SPM's Court to High Court for purposes of instituting this suit and application on basically the same facts and same issues as determined by Limuru SPM's court. This court must resist and it does refuse to be hoodwinked into believing that this is a different suit and application based on different facts and or cause of action. This court conclusively finds that the plaintiff's application dated 23<sup>rd</sup> May, 2014 is Resjudicata the application as dismissed by the Limuru SPM's court on. I accordingly order it struck out. The limits of discharging the injunction therefore falls by the way side.

45. On the other hand, assuming that the Limuru suit was withdrawn and that the withdrawal notice took effect since courts should not be seen to cage parties into court after the hearing and dismissal of the application by the plaintiff, the suit herein would indeed be Resjudicata Limuru suit and therefore the only available option for this court if to dismiss this suit since as I have stated, the two suits even with some cosmetic make up to the High Court suit are one and the same thing in all material particulars.

46. Albeit the plaintiff's counsel maintained that a Limuru suit was withdrawn and therefore order 21 Rule 1 applies to the extent that such withdrawal shall not afford a defence to a future suit, that would only be the case if the Limuru suit was withdrawn before setting it down for hearing. Undoubtedly, an application that had been heard and dismissed is a step and process in a suit, of setting it down for hearing.

47. In **Rev Madara Evans Okanga Dondo V HFCK Nairobi HCC 262/2005** [unreported] the plaintiff had previously filed a case in the High Court at Kisii and had sought some interim orders but that application and suit were dismissed. Instead of pursuing an appeal, he opted to file a fresh suit in Nakuru and failed to make disclosure of the previous suit. The High Court in Nakuru found that that was an abuse of the court process and proceeded to dismiss the second suit.

48. In **Hoystead and Others V Taxation Commissioner [1925] ALL ER Re 56 at page 6:-**

***“ The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact:.....parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents of the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a***

***principle of law that this cannot be permitted.”***

49. I reiterate that the plaintiffs' application in the Limuru court having been fully argued before that court and a ruling eventually delivered when the application similar to the one hereto by the plaintiff was dismissed, that dismissal in my view was not affected by the withdrawal of the suit. In other words, the withdrawal of that suit did not in any way affect that ruling and that ruling remains a valid order of the court and it continues to subsist. That was the holding by the Court of Appeal in CA 136/1996 [unreported] in **Commercial Exchange Limited and Francis Njoroge Mwangi V Barclays Bank of Kenya Ltd.** In that case, parties had reached consent where the plaintiff was to make certain payment for an order of injunction to subsist. The plaintiff failed to make that payment and instead chose to withdraw the action and filed a fresh action where the previous suit and orders were not disclosed. The latter action was described by the Court of Appeal as ***“legal ingenuity.”*** The Appellate Court held that the consent orders in the previous withdrawn suit subsisted even after the withdrawal of the suit. Based on the above decision of the Court of Appeal, this game is shot. I hold that the ruling in the Limuru court case dismissing the plaintiff's application still subsists and continues despite the purported withdrawal of the suit which I have nonetheless found was non consequential.
50. I am therefore of undoubted view that on all fours, the application by the plaintiff dated 23<sup>rd</sup> May, 2014 is Resjudicata to the application which was heard and determined by the Limuru court and I would proceed to dismiss it.
51. In the end, I uphold the objections raised by the defendants and proceed to strike out this entire suit and dismiss it together with all the consequential orders. Costs follow the event. However I note that the dispute herein is between and among the membership and over the leadership of the Lari Division Women Association. I had the occasion to see the old ladies who appeared in court from either divide of the dispute. These are a community of senior citizens of this nation who organized themselves for the benefit of the residents of their locality. They need to be assisted and accorded proper legal advice to resolve their dispute amicably. They have lived together and in the same community for a long time. Most likely, they are related in one way or another, whether as neighbors, or by affinity or consanguinity. They all seem to have lacked a consultant on matters concerning the running of a registered society and or a business manager. They can nonetheless be assisted by their now advocates on record. In the premise, I order that each party shall bear their own costs of this suit.

Dated, signed, and delivered in open court at Nairobi this 30<sup>th</sup> day of October, 2015.

**R.E. ABURILI**

**JUDGE**