



**Kaptien Farmers Ltd & 17 Others v Cheptililik Farmers Co-operative Society & 8 others
(Environment & Land Petition 6 of 2021) [2022] KEELC 2709 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 6 OF 2021
MN MWANYALE, J
JUNE 30, 2022**

BETWEEN

KAPTIEN FARMERS LTD & 17 OTHERS PETITIONER

AND

CHEPTILILIK FARMERS CO-OPERATIVE SOCIETY 1ST RESPONDENT

HON. HENRY KOSGEY 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

DISTRICT LANDS OFFICER -NANDI 5TH RESPONDENT

LAWRENCE K. SITIENEI 6TH RESPONDENT

ZETH KIRWA MISOI 7TH RESPONDENT

KIPTANUI NGOSOSI KAPSIKWA 8TH RESPONDENT

223 OTHERS 9TH RESPONDENT

RULING

1. Vide their Amended Notice of Motion dated 31st May 2022, the 2nd, 6th and 7th Respondents, in the Petition, now Applicants in the Notice of Motion, seek orders that the Court be pleased to strike out this petition.
2. The Notice of Motion is premised on grounds interalia that;
 - i) The issues for determination in this petition are res-judicata, having been heard and determined in a previous suit between the same parties being High Court Judicial Review Miscellaneous



No. 149 of 1994 Republic vs the Commissioner of Lands. (hereinafter referred to as “JR 149/1994”.)

- ii) The issues for determination in this suit were conclusively heard and determined and resulted in a consent between the parties dated 26th May 1995.
 - iii) In the circumstances the current suit is an abuse of the process of this Honourable Court.
3. The Amended Motion is supported by the Supporting Affidavit of Alan Kosgey Advocate who reiterates the grounds 2 (i) to (iii) above and depones that the parties in the said J.R. No. 149 of 1994 Republic vs Commissioner of Lands are the same or substantially the same as to the parties in this suit; and has annexed the proceedings in J.R. No. 149 of 1994 as well as the consent recorded between the parties on 26th May 1995.
 4. He depones in support of the application that this petition is thus res judicata, and a gross abuse of the Court process.
 5. In opposition to the application the Petitioner/Respondent filed a Replying Affidavit dated 16th March 2022 through James K. Chirchir, the Secretary of the Petitioner, and a Supplementary Affidavit, in reply to Mr. Allan Kosgey’s Supplementary Affidavit deponed on 25th May 2022.
 6. In the Replying Affidavit, Mr. Chirchir depones that the issues in the instant Petition were never raised in the J.R. No. 149/1994.
 7. He further depones that the order made on 25/5/1995 referred parties to arbitration of the District Commissioner Nandi, however matter was never arbitrated nor resolved and it is still alive today.
 8. The Petitioner in further response depones that the parties in the Judicial Review No. 149 of 1994 are not the same parties before the Petition.
 9. The Petitioner states that the Judicial Review 149/1994 case was not concerned with private rights or the merits of the decision being challenged but with the process of the decisions; and that the issue in the petition is the ownership of L.R. No. 12474 Nandi District now known as Mogobich/cheptililik Block 2.
 10. That the issues in the instant petition have not been resolved by a Court of Law hence there is no plea of res-judicata.
 11. That the arbitration process was not concluded, that Judicial Review number 149 of 1994 sought only an order of Mandamus in terms;

“An order of Mandamus compelling the Respondent to discharge and complete its obligation under the law and register the Applicant as proprietor of L.R NO. 12474 Nandi District.”
 12. That the current Amended Amended Petition seeks 8 substantive prayers to wit.
 - i) A declaration that the Petitioner’s Constitutional Right to property and/or interest in or over property L.R. No. 12474 Nandi District now known as Mogobich/cheptililik Lock 2 Cehptililik/1/225 on its subdivisions deserve the protection by the protection by the Honourable Court and the protection do issue accordingly and consequently conservatory and low protection orders are made over the said suit property.
 - ii) A declaration that the Petitioner’s right and fundamental freedom and in particular the protection of right to property and/or interest in a right over suit property parcel L.R. NO.



12474 is in real danger of being has been arbitrarily acquired by the 1st to and 2nd Respondents, 9th to 213th Respondent and their beneficiaries to the detriment of the Petitioners and that cannot be countenanced in law and in the circumstances the Court frowns upon the said act or acts.

- iii) An order of mandamus directed to the National Land Commission to perform its constitutionally mandated duty and complete the Land allocation of LR No 12474 Nandi District (Now known as Mogobich/cheptililik Block 2 (Cheptililik 1 – 225) to Petitioners by issuing them with their title deeds and generally settle the Petitioners on their legally allocated land above and if the property is not available to provide the Petitioners with alternative settlement.
 - iv) That in the alternative the 2nd, 3rd, 4th and 5th Respondents be and is hereby directed to honour their promises and/or representations made in the pat and settle the Petitioners seventeen (17) members who were outside the suit land on any other alternative settlement.
 - v) A declaration to issue that the acts of the 1st, 2nd, 3rd, 4th and 5th, 7th, 8th, 9th to.....231 Respondents of unlawful attempting and/or unlawful deprivation of the Petitioners of their allocated parcels of land in the light of the above was without any legal basis, was an act of illegality and unconstitutional and are liable to the Petitioners in compensation and/or damages for losses, for loss of use land and for breach of their Constitutional Rights or such compensation as shall be assessed by the Hon. Court.
 - vi) That together with the grant of the orders above, the Hon. Court do hereby forthwith cancel all the titles or any title issued and/or emanating from L. R. NO. 12474 Nandi District (now known as Mogobich/cheptililik Blocj 2 (Cheptililik 1 – 225 to the 1st Respondent Membership that is the 9th to 231st Respondents be rectified accordingly in favour of the Petitioners.
 - vii) Damages as against the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th to 231st Respondents jointly and severally for breach and/or violation of the Petitioners Constitutional right to properties and protection of the same in such sum of kshs 1,380,000,000/= as per the Afriland Valuers Limited dated the 10th September 2018 or such sums as shall be assessed by the Honorable Court.
 - viii)
 - a) Costs of valuation at kshs 6,557, 468.69
 - b) Costs of the Amended Amended Petition
13. The Petitioner/Respondent further depones that Judicial Review No. 149/1994 directed that the matter be settled under Arbitration of the District Commissioner Nandi District however matter was not settled as the Judicial Review Application was withdrawn.
14. For the above reasons, the Respondents pray that the application before Court be dismissed.
15. The 3rd, 4th and 5th Respondents in the application represented by Mr. Odongo learned Counsel for the Attorney General are not opposed to the Application and have filed submissions in support of the Application.
16. The parties herein were directed to file written submissions on the application.
17. The Applicant filed their submissions on 25th May 2022, the Respondent/Petitioner filed submissions on 10th June 2022, while the 3rd, 4th and 5th Respondents filed their submissions on 16th June 2022.



18. The parties did not file any agreed issues for determination, although the 3rd, 4th and 5th Respondents in their submissions alluded to some issues, they deemed to be issues for determination.
19. As can be gathered from the application the Responses and submissions, the main issue herein is whether the Petition is res-judicata.
20. Res-judicata as a principle of law is provided for under Section 7 of the Civil Procedure Act. They are many decisions that have been delivered by our Courts on the said principle.
21. The Applicants and the 3rd, 4th and 5th Respondents in their submissions has placed reliance on the decision in Civil Appeal No. 105/2017, the Independent Electoral and Boundaries Commission vs Maina Kiai and 6 Others, a Court of Appeal decision.
22. The Respondent/ Petitioners have on their part cited the decision of the Supreme Court in John Florence Maritime Services and Another vs Cabinet Secretary, Transport and Infrastructure and 3 others, as their leading authority on Res-judicata.
23. The Supreme Court in the John Florence Maritime case cited by the Petitioner/Respondent, determined that for Res- judicata to apply in a civil matter, the following elements must be demonstrated.
 - a) There is a former judgement or order which is final.
 - b) The judgement or order was on merit.
 - c) The judgement or order was rendered by a Court having jurisdiction over the subject matter and the parties.
 - d) There must be between the first and second action, identical parties subject matter and cause of action.”
24. Guided by the decision in John Florence Maritime, as well as Section 7 of the Civil Procedure Act. This Court frames the issues for determination as follows; -
 1.
 - a) whether the relief’s sought in this Petition are similar to the reliefs sought in J.R. No. 149/1994.
 - b) if answer to 1 (a) above is in the affirmative is the petition Res-judicata?
 - c) if answer to 1(a) above is in the negative, do the relief’s sought flow the issue of ownership of L.R. No. 12474 Nandi District?
 2. Whether the parties in this petition are the same as in J.R. No. 149/1994
 3. Whether the issues in J.R. No. 149/1994 were heard and finally determined?
 4. Whether Res-judicata applies in Constitutional Petition? If so this petition Res-judicataa?
 5. Who bears the cost of this petition?

Analysis and Determination: -

25. On issue no 1 (a) in paragraph 24 above, the Petitioner/Respondents submits that the relief’s sought in the petition are different from the relief’s that were sought in Nairobi High Court Miscellaneous



No 49/1994. It is the Respondent/Petitioners submission that the relief's in paragraph 12 (1 – viii (b) above are entirely different from the sole relief that was sought in J. R. No. 149/1994, where the sole relief sought was;

“An Order for Mandamus to compel the Respondent to discharge and complete its obligations under the law and register he applicant as proprietor of L. R. NO. 12474 Nandi District.” It is the Respondents submissions thus the reliefs sought are different from the ones that were sought in J. R. No. 149/1994, Republic of Kenya vs the Commissioners of Lands.

26. The Petitioner/Respondent cites the Supreme Court decision in the case of *John Florence Maritime Services Limited and Another vs Cabinet Secretary, Transport and Infrastructure and 3 Others* (2021) Eklr; where the Court said “.....The Court when determining a Constitutional Petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court can do when determining a Constitutional Petition. Further the Court is further empowered to grant not only judicial review orders, but any other relief it deems fit to remedy any denial or fundamental freedom in this Bill of Rights....”
27. It is the Applicant submissions that the reliefs sought herein are the same or substantially the same as the orders that were sought in J. R. No. 149/1994.
28. To demonstrate this the Applicant's submits that the relief for a declaratory order and/or compensation in lieu thereof in respect of L.R. 12474 was also before the High Court Miscellaneous Application No. 149/1994, which culminated to a consent order dated 26th May 1995 before Hon. Lady Justice Joyce Aluoch.
29. In their submissions on the issue the 3rd, 4th and 5th Respondents in support of the application submit that, whereas the instant litigation seeks numerous reliefs which were not part of the former litigation the common thread running through these reliefs is a determination of ownership of Land Parcel No. L.R. No. 12474 (Now known as Mogobich/cheptilil Block 2 (Cheptililik 1 – 225)). Reliefs such as declaration that the right to own property, Mandamus against the 3rd Respondent, cancellation of titles as well as compensation for violation of rights are secondary reliefs that flow from the primary relief of ownership of L.R. No. 12474.
30. To buttress this point, the 3rd, 4th and 5th Respondent have cited the decision of the Supreme Court in Kenya *Commercial Bank Limited vs Mleiri Coffee Estate and Another* Motion No. 42 of 2014 (where the Court held;

“That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res-judicata principle was judicially remarked in E.T. vs Attorney General 2 Another thus; The Courts must always be vigilant to guard litigants evading the doctrine of res-judicata by introducing a new cause 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 held by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others (2001) E. A. 177, the Court held that.....” parties cannot evade the doctrine of res-judicata by merely adding other parties of causes of action in a subsequent suit.
31. Indeed, there are new reliefs sought in the Petition before Court. The order for Mandamus sought in this petition is identical to the order of Mandamus sought in the Nairobi H 149/1994.



32. Save for relief number 3 in this Amended Amended Petition which is identical to the relief sought in J. R. No. 149/1994, the Court finds the reliefs sought to be different. Thus, in answer to issue no 1 (a) above the same is answered in the negative.
33. Having answered issue no 1 (a) in the negative, the Court now analyses issue number 1 (c) to wit, whether the reliefs sought herein flow the issue of ownership of L.R. No. 12474Nandi (District).
34. The 3rd, 4th and 5th Respondent submit that the reliefs sought herein all flow from the ownership of L.R. NO. 12474 and have cited the decision in *Africa Oil Turkana Limited vs Permanent Secretary, Ministry of Energy*; where the Court of Appeal held, “It becomes immediately clear from the foregoing that the basis upon which interstate instituted the previous judicial review application is essentially the same basis upon which the subsequent judicial review application was based.”
35. On this issue the Applicant submits that the reliefs sought in the petition emanates from the same issue that was in J. R. No. 149/1994, which was the ownership of L.R NO. 12474 as captured in the consent order dated 26th May 1995, in J.R. No 149/1994.
36. For good measure the Applicant’s have annexed a copy of the said consent order, which I hereby produce.
- “ 1. That the Applicant do and hereby withdraws this suit.
2. The Applicant and Cheptililik Co-operative Society shall under the arbitration of the District Commissioner Nandi district amicably settle the dispute of money owed to the Applicant, if any and the mode of payment.
3. That the Commissioner of Lands be at liberty to issue title deeds to the entitled members.”
37. The Petitioner/Respondent submits that the Judicial Review matter dealt with the process and not on the merits of the case. That what is raised in the instant as petition are on the merits, on the ownership pf the suit property. That these issues have never been resolved by a Court of Law.
38. The Petitioner/Respondent cites the decision in *Republic vs Chesang (ms) Resident Magistrate and 2 others ex-parte Paul Karanja Kamunge t/a Davisco Agencies* where the Court observed as follows; -
- “However, it is important to remember that judicial review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal.”
39. It is the Applicants submission thus the issue in controversy, was the ownership of L.R.No. 12474 as the pleaded relief J. R. No. 149/1994 and the ownership of L.R. No. 12474 between Kaptien Farmers and Cheptililil farmers as the consent order.
40. The Petitioner/Respondent submit that since J. R. 149/1994 was a Judicial Review matter, the issues for consideration herein were never raised in the Judicial Review, as the Judicial Review case sought only for a Mandamus. While the present petition is a land dispute and was clearly not a matter for judicial review (rehearing) on the merits.
41. The Petitioner/Respondent thus submits that the reliefs sought herein are on the ownership of L.R. No. 12474,while the Judicial Review 149/1994 dealt with question of Mandamus, orders against a public body.



42. The main relief/sought in the J.R. No. 149/1994 was for an order of Mandamus to compel the commissioner of Lands (The Respondent) to discharge and complete its obligation under the law and register the Applicant as proprietor of L.R. No. 12474 Nandi District.
43. That relief in the Court's view dealt a claim of proprietorship of L.R. No. 12474 Nandi District by the Petitioner. The consent order dated 26th May 1995, as set out in paragraph 35 above included the issue of dispute of money owed to Kaptien Farmers by Cheptililik Co-operative Society and issue of title deeds to entitled members.
44. It is the Courts finding thus that genesis of the Judicial Review 149/1994 was not only the proprietorship of L.R. No 12474as can be garnered from the relief's sought but also a dispute as to what money was payable to Kaptien by Cheptililik Co-operatives.
45. The Petitioner/Respondent having submitted that the issue in dispute herein is the ownership of L.R. No 12474;the Court thus finds that the issue herein was the same as the issue before in J. R. 149/1994, and accordingly the relief's sought herein flow directly from the issue of ownership of L. R. No. 12474. Hence the Court finds that the issue in this petition was also an issue in J. R.149/1994.
46. Thu in answer to issue no 1 (c) it is the Courts finding and holding that the relief's sought herein flow from the issue of ownership of L.R. No. 12474 Nandi District.
47. The Court now proceeds to consider issue No. 2, whether the parties in the petition are the same and litigating under the same title. In submission on this issue it is Applicants submission that the parties herein are the same, the Petitioner herein Kaptien Farmers Ltd was the Applicant in the Judicial Review 149/1994, and the 1st Respondent herein was the one pleaded to have infringed the Petitioners rights in the 149/1994, being Cheptililik Farmers' Co-operative Society.
48. The 3rd, 4th and 5th Respondent submits that the parties in this litigation and former suit are the same. It is their submission that in J. R. No. 149/1994 was instituted by the Petitioner herein, although the amended petition has brought in 17 natural persons as Petitioners. The said 17 natural members are nonetheless members of Kaptien Farmers Ltd., thus the Petitioner was still the Applicant in the former suit they submit.
49. The 3rd, 4th and 5th Respondent further submit that the Commissioner of Lands is sued herein on behalf of Government of Kenya and that Cheptilil Co-operative Society joined the proceedings in J. R. No. 149/1994 as an interested party. That in this Petition Cheptililil and its members are also parties, as well as the 3rd, 4th and 5th Responders hence parties herein are Kaptien, Farmers, the Government of Kenya and Cheptililil Co-operative Society, and thus the parties are the same, litigating under the same title.
50. The Petitioner/Respondent on their party have not submitted on the issue of whether the parties are the same or a different, but have in the Supplementary Affidavit deponed on 9th June 2022, paragraph 5 thereof stated that the parties are not the same.
51. Whereas this instant petition has 17 natural persons as Petitioners in addition to Kaptien Farmers Limited the 2nd to 18th Petitioners are described in the Amended Amended Petition paragraph 1 a as members of the 1st Petitioner.
52. While the 9th to 213st respondents in this petition are described in paragraph 1 (i) as residents in L.R. No. 12474 Nandi District, and are described in the annexure AKI appearing at page 24 of the Amended Notice of Motion as Members of Cheptililik Farmers' Co-operative Society.



53. It follows therefrom, save for the addition of the new parties, the primary parties are Kaptien Farmers' Co-operative Society, the Commissioner of Lands (Government of Kenya and Cheptililik Farmers' Co-operative.
54. As observed in paragraph 30 above, the issue of addition of new parties does not constitute a cause of Action.
55. In both ET vs Attorney General quoted in paragraph 30 above as well as the decision in the case of Diocese OF Eldoret Trustees (Registered) vs Attorney General on behalf of the principal Secretary Treasury and Another 2020 Eklr). The Court were held that "additional or subtracting parties in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit."
56. The Court finds therefore that the parties litigating in this petition are the same parties in J. R.149/1994 and answers issue No. 2 as such.
57. On the issue as whether the issues in J. R. No. 149/1994 were heard and finally determined. It is the Applicants submission that by dint of the consent ordered dated 26th May 1995 ordering an arbitration, over the money payable and mode of payment of the same, then the issues were heard and finally determined by consent in the arbitration that followed.
58. The Applicant has annexed the proceedings before the arbitrator and the same appear on page 53 of the Amended Notice of Motion. The proceedings were chaired by the then D.C. Nandi Mr. F. S. K. Baya and were attended by 3 representatives of Cheptililik and 4 representatives of Kaptien, who all appended their signatures. The proceedings indicate as follows;

"In furtherance of the resolutions passed during the meeting held in this office under the Chairmanship of P.L.N. Kiilu the then District Commissioner, Nandi District on 25th August 1985, Cheptililik Farmers' Co-operative Society has to today refunded Kaptien Farmers Company Ltd. One hundred and ninety-two Thousand Shillings (192,000) consequently Kaptien Farmers Company ltd has renounced all rights and/or claims in L.R. NO. 12474."
59. A copy of the cheque for kshs 192, 782 is equally exhibited. The Applicant and, 3rd 4th and 5th Respondents submits that the issues having been settled were settled by consent of the parties which was binding, and has not been appealed from.
60. The Petitioner/Respondent however submits that no arbitration ever process was ever concluded and that the 2nd Respondent never honored the promise at all.
61. The Arbitration proceedings as captured in paragraph 58, do suggest that the issue of ownership of L.R. NO. 12494 was resolved by consent of the parties, upon payment of a cheque of kshs. 192,782/ = as well as a renunciation of rights by the Petitioner to any interest and/or claim in plot number L.R. NO 12494.
62. The Court finds that the issues were finally resolved by consent of the parties pursuant to an arbitration by the Court, and therefore the Court in J.R. No. 149/1994 answers that the issues were heard and fully settled by the said consent.
63. On the issue of whether Res-judicata applies to constitutional petitions, the Applicants submissions are silent on the same, while the 3rd, 4th, and 5th Respondents submits that juridical opinion on the same is divided.



64. On their part, the Petitioner/Respondent have equally not submitted on it but have lengthily submitted on the issue of fair hearing, urging the Court to grant a fair hearing and the right to be heard to the Petitioner, in this regard the Petitioner has the cases of *William Kabogo Gitau vs Ferdinand Waititu and Edward Okongo Oyugi and others vs Attorney General*.
- On the proposition that the application of the principle of Res-judicata has the potential of locking out a person from the doors of justice or even reaching the outstretched arms of justice.....
65. In the *John Florence Maritime* case, at paragraph 65, the Supreme Court held as follows; “We accordingly do not accept the proposition that constitution-based litigation cannot be subjected to the doctrine of res-judicata. However, we must hasten to add that it should only be invoked in constitutional litigation. In the clearest of cases, it must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating and assuming multifaceted dimensions.”
66. From the above it follows that constitutional litigation can be subjected to the doctrine of Res-judicata and the Court finds and holds so.
67. On the issue raised in the Petitioner/Respondent’s submissions as whether the Right to be heard shall be curtailed, If the Court finds thus petition res-judicata, the issue was not responded to by the 3rd, 4th and 5th Respondents as well as the Applicant, but the Supreme Court in the case of Kenya Commercial Bank Limited vs Muiru Coffee Estate Limited cited by the 3rd, 4th and 5th Respondents at paragraph 52, rendered itself thus; “Res – judicata is a doctrine of substantive law, its essence that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights..... It emerges that contrary to the Respondents argument that his principle is not to stand as a technical limiting to scope of substantial justice, the relevance of res-judicata is not affected by the substantial justice principle of Article 159 of *the Constitution* intended to override technicalities of procedure, res-judicata entails more than procedural technicality and lies on the place of a substantive legal concept.”
68. From the above, it follows that the plea by the Petitioner that their constitutional right to be heard will be curtailed if the Court were to find the petition res – judicata, is nothing more than a red-herring.

Disposition: -

69. The Court has found that the parties, litigating in this petition are the same, in J. R. No. 149 of 1994, the issues being the same and were heard and determined by a Court ordered arbitration, the Court finds that this petition, is a sparingly case to invoke the doctrine of res-judicata and holds that his petition is res-judicata.
70. The upshot is that the Amended Notice of Motion dated 31st May 2022 is hereby allowed and this petition is dismissed for being Res- judicata with costs to the Applicant and the 3rd, 4th and 5th Respondents.
71. The Court wishes to acknowledge the industry of Counsels who appeared in this mater especially Mr. Odongo Senior State Counsel for his robust submissions.

DATED AND DELIVERED IN KAPSABET THIS 30TH DAY OF JUNE, 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of;



Mr. Letting holding brief for Mr. Odongo for 3rd, 4th, and 5th Respondent

Ms. Martin holding brief for Mr. Arusei for Petitioner/Respondent

Mr. Kosgey for 2nd, 6th and 7th Respondent/Applicant

