**Muchoki & another v Muchoki & 3 others (Environment & Land Case 371 of 2017) [2022] KEELC 2915 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2915 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ENVIRONMENT & LAND CASE 371 OF 2017**

**LN GACHERU, J**

**JUNE 23, 2022**

**BETWEEN**

**GRACE WAMBUI MUCHOKI ..... 1ST PLAINTIFF**

**PAUL NJUGUNA ..... 2ND PLAINTIFF**

**AND**

**JOHN KARANJA MUCHOKI ..... 1ST DEFENDANT**

**DISTRICT LAND REGISTRAR ..... 2ND DEFENDANT**

**SAMUEL NJOROGE NGUGI ..... 3RD DEFENDANT**

**CAROLINE WANJIRU NJOROGE ..... 4TH DEFENDANT**

**RULING**

1. Vide a Notice of Motion Application dated 18th February, 2022, the 1st Defendant/Applicant sought for order that;

    1. Spent

    2. That this Honourable Court do allow the Law Firm of Wangui Gachango and Associates to come on record for the Applicant.

    3. That the honourable Court be pleased to re-open this file and direct the Land Surveyor, Muranga County Survey Office to repeat the subdivision exercise over land parcel No. LOC. 6/Gikarangu/3634.

    4. That the Honourable Court do empower the Officer Commanding Station, Muthithi Police Station, to provide security during the re-subdivision exercise.

5. That the Honourable Court be pleased to grant any such orders as it may deem fit and just to grant.

2. The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of John Karanja Muchoki, sworn on 18th Feb 2022. The Applicant deponed that being aggrieved by the Judgement delivered by this Court on 14th January 2021, and the Decree issued on 2nd January 2021, he lodged an Appeal being Nyeri Civil Appeal E028 of 2021, and sought for Stay of the Judgment, but the same was dismissed on grounds that part of the decree had already been executed. That on 11th February 2021, the suit land was subdivided and some of his trees were chopped. That he was dissatisfied with the mode of distribution as it had seen the 1st and 2nd Respondents take over his rental houses. That the Decree of the Court notwithstanding and without occasioning prejudice upon the 1st and 2nd Respondents, it was prudent that the said subdivision be repeated so that he does not lose his property.

3. Further, it is the applicant's case that he is informed by his advocate which information he verily believes to be true that a Court judgement should be effected in a way that ensures that no party is deprived off his investment. That the land surveyor in executing the Court Decree ought to have respected how the property is developed on the ground. That it was prudent that re-subdivision be done taking into consideration his rental houses as long as the Decree of the Court was complied with. That there had been no delay in bringing this application and the Respondents did not stand to suffer any prejudice if the orders sought were granted.

4. The Application is contested through the Replying Affidavit sworn by Paul Njuguna Muchoki, the 2nd Plaintiff/Respondent on 7th March 2022. It is his disposition that the Application as laid before this Court is frivolous, vexatious and the orders sought therein are not tenable. That the instant matter was filed in Court in 2003, and transferred to the ELC in 2015. That the issue in the instant application was already dealt with by the Judgment of the Court delivered on 14th January 2021, and the whole intent and purport of the instant application is to open up litigation that has already been concluded. That this Court has already declared itself on the issues raised in the instant application and it is therefore functus official, unless approached with an application for review. That the instant application is subjudice on account of the pending Appeal number E10 of 2021, and in particular the ruling of the Court delivered on 14th February, 2021.

5. The 2nd Respondent deposes further that there is no other logical way of subdividing the land as the surveyor did everything possible to preserve and maintain the integrity of the developments existing on the land, use and long occupation. That litigation has to come to an end and there can be no legal way to reopen the matter as sought by the applicant. That surveying and subdivision of the suit land was done legally, above board, fairly and in the most considerate way taking into account all the prevailing circumstances of the parties. The 2nd Respondent urged the Court to find that the instant application lacks merit and dismiss it.

6. In response to the Replying Affidavit by the 2nd Respondent, the Applicant filed a further affidavit deponed on 11th April 2022. In the said Affidavit, the Applicant reiterates his dispositions in the Supporting Affidavit deponed on 18th February 2022. It the Applicant's further disposition that since the impugned subdivision, the 1st and 2nd Respondents have gone ahead to harvest his avocado fruits and his efforts to stop them have been in vain. That the said Respondents were taking advantage of the Courts Judgement to deny him his harvest and rental houses. That it is his proposition that resurvey be done to ensure he gets his 0.9 acres as follow; 0.3 acres to be excised from the portion adjacent and bordering the road and 0.6 acres to be removed from where his children and himself have built. That

the Court in its judgment did not point out how acreage was to be excised and a resurvey was prudent to ensure occupation on the ground is not disturbed.

7. The 1st and 2nd Plaintiffs/Respondents however objected to the filing of the Applicant's Further Affidavit via a Notice of Objection dated 28th April 2022. The said objection was premised on the following ground;

    a. That the said further affidavit is misplaced and unprocedurally filed devoid of any leave sought or granted

    b. That he law does not allow/ permit filing of evidence after the submissions (which is after the fact)

    c. That the Record of the Court should be respected.

    d. That the Court should thus disregard and strike out the so called 'further affidavit which has been mischievously sneaked into the record.

8. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated 11th April, 2022 through the Law Firm of Wangui Gachango & Associates Advocates. In the said submissions, the Applicant reiterates his averments and disposition in the affidavits filed in support. The Applicant relied on the case of Stephen Murithi M'Magiri v William Mwiti Magiri & another [2021] eKLR, where the Court stated that;

> "This Court observes that both the Applicants and the Respondents want to go ahead with the subdivision exercise and they both want to do it in a manner that maintains the status of what is already on the ground. Indeed, this is the correct manner to proceed with the subdivision."

9. In conclusion the applicant urged this Court to allow the application as prayed as the re-subdivision will be done in a manner that preserves the Properties and developments thereon.

10. The 1st and 2nd Respondents filed their written submissions dated 13th April 2022, through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates and submitted that the instant application is subjudice the Appeal filed by the Applicant being Nyeri Civil Appeal E028 of 2021. That this Court rendered a final judgment in this matter and therefore reopening it would be a gross misconception. That the surveyor who subdivided the land did everything possible to preserve the integrity and property of the existing occupiers and he also had a duty to consider the rights of other parties not parties to this suit, and who had purchased various portions of the suit land.

11. The 1st and 2nd Respondents urged this Court to dismiss the instant application as the issues raised herein were substantially canvassed by the trial court and are therefore res-judicata.

12. The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issues for determination are;

    i. Whether the notice of objection dated 28th April 2022 is merited

    ii. Whether the Application dated 18th February 2022 is merited

    i. Whether the Notice of objection dated 28th April 2022 is merited

13. The notice of objection dated 28th April 2022, seeks to strike out the Applicant's further affidavit filed in this Court on 20th April 2022, on grounds that the same was filed devoid of leave and the law does not permit filing of evidence after submissions.

14. Order 2 Rule 15 of the Civil Procedure Rules, 2010, has established clear principles which guide the court in the exercise of its power to strike out pleadings in the following terms;

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

15. It is evident from a reading of the above that striking out of pleadings involves exercise of discretion, which discretion should be exercised only in the clearest of cases and sparingly. The Court of Appeal in Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR held as follows in relation to Order 2 Rule 15;

> "The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". Order 2 rule 15 which retains word for word"

16. The question this Court must establish is whether the 1st and 2nd Plaintiffs/Respondents have made a case to warrant the exercise of this Court's discretion in their favor.

17. A perusal of the Court record show that the instant application having been filed under a certificate of urgency was placed before this Court exparte on 21st February 2022. On the said date the Court after considering the application gave directions that;

    a. The Applicant is directed to serve the Respondents within 7 days from the date hereof.

    b. The Respondents will have 14 days to file a Replying Affidavit if need be.

    c. The Applicant will have corresponding leave to file a supplementary affidavit if need be.

    d. Thereafter the Notice of Motion to be canvassed by way of written submissions.

    e. Applicant will have 14 days and the Respondent 14 days after service

    f. Mention on 10/5/2022 to confirm compliance and for further directions.

18. This Court notes further that when the matter came up for mention on 10th May 2022, both parties had complied with the above orders and sought a ruling date. The Respondents however drew the Court's attention to the instant Notice of Objection and it is on this premise that this issue lies for determination before this Court.

19. Based on the directions of this Court above cited, it is evident that the Applicant had leave to file a supplementary affidavit upon service of the Respondents Replying Affidavit. While this Court is not privy as to when the Applicant was served with the said Replying Affidavit, the Court notes that the same was filed in this Court on the 16th of March 2022. The above stipulated directions did not give

the applicant a time line within which to file a Supplementary Affidavit and as such it is presumed that the Applicant ought to have filed the same within a reasonable time.

20. What then is reasonable time? The High Court in the case Jagdish Sonigra V Medical Practioners & Dentists Board & 2 Others [2008] eKLR stated as follows with regards to reasonable time;

> "*The Constitution* does not define what a reasonable time means. Section 58 of the *Interpretation and General Provisions Act* Cap 2 Laws of Kenya provides that where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and or often as due occasion arises.

21. There being no definition of what a reasonable time, I think it is left to the courts discretion to consider what a reasonable time would entail considering the particular circumstances of each individual case. That is why the Court of Appeal in Kazungu Kasiwa Mkunzo V Rep C AP 239/04, said that *the constitution* does not set out what 'reasonable time' is because it has to take into account several factors in determining what a reasonable time is and each case should be considered on its peculiar facts"

21. Further, in Republic v Attorney General & another, Baps International Limited (Interested Party) Ex parte [2020] eKLR, it was stated-

> "The concept of what is reasonable time is flexible, and will depend on the circumstance of a case, as held in Law Society of Kenya v Attorney General & 2 others [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision make, and adverse consequences of delay, and the need to ensure fairness. In the present case it is not disputed that the 2nd Respondent sought to extend the time in which to issue directives on change of name after a period of eight (8) years from the date of registration of the Applicant. The 2nd Respondent did not give any reasons for the delay in so acting, and the only explanation given was that there was an inadvertent error on its part in registering the name."

22. Persuaded by the above decisions, this Court will employ the same measure to calculate reasonable time. It is unclear when the Applicant was served with the Replying Affidavit of the 1st and 2nd Respondents. What is clear however is that he filed his further affidavit on 20th April 2022. Given the above circumstances and the very elaborate direction of this Court issued 21st February 2022, Court finds and holds that the Applicant indeed had leave to file the Further Affidavit deponed on 11th April 2022. Further the Court finds and holds that the same was filed within reasonable time and no prejudice was occasioned to the Plaintiffs/Respondents herein.

23. The Respondents have also sought that the Applicants further affidavit should be struck out as it was filed after they had filed their submissions and the law does not permit the filing of evidence after submissions. This position adopted by the Respondents is misleading and bad in law based on the fact that submissions are not pleadings. Submissions are usually based on pleadings, evidence adduced and nothing more. It is therefore this Courts holding that the further affidavit having been filed after the 1st and 2nd Respondents had filed their submissions does not occasion them any prejudice.

24. In addition, the directions of the Court were clear and the Respondents were supposed to file submissions after the Applicant filed his Further Affidavit and Submissions in support of the Application. The Respondents however, voluntarily filed their submissions on 14th April 2022. This Court cannot therefore strike out a pleading that was filed in strict compliance of the directions of the Court and the Court finds and holds that the impugned further affidavit is properly on record.

25. The upshot of the above is that the Notice of Objection dated 28th April 2022, is found not merited and the same is dismissed.

**Whether the Application dated 18th February 2022 is merited**

26. The Application dated 18th February 2020, is an omnibus application seeking inter alia that; this Honourable Court do allow the Law Firm of Wangui Gachango and Associates to come on record for the Applicant, this honourable Court be pleased to re-open this file and direct the Land Surveyor, Murang'a County Survey Office to repeat the subdivision exercise over land parcel no. LOC. 6/ Gikarangu/3634, and an inhibition order over the suit land pending hearing and determination of the instant application.

27. It is not in dispute that the instant suit has already been substantively heard and Judgment delivered by this Court on 14th January 2021. The said Judgment was entered in favor of the Plaintiffs in the following terms;

> "a. It is hereby declared that the sub-division of land parcel Number LOC.6/ Gikarangu/3634 into subsequent title numbers:
>
> -LOC.6/Gikarangu/4311
>
> -LOC.6/Gikarangu/4313
>
> -LOC.6/Gikarangu/4458
>
> -LOC.6/Gikarangu/4459
>
> Was tainted by fraud and illegality and a further order that those titles be cancelled for the land to revert to its original status and registration as LOC.6/Gikarangu/3634 in the name of the 1st Defendant, John Karanja Muchoki as trustee.
>
> b. It is hereby ordered and declared that the trust binding and encumbering land parcel LOC.6/Gikarangu/3634 be dissolved and the land be shared out as follows;
>
> Grace Wambui Muchoki to get 2.0 Acres to hold in trust for herself and the daughters namely Eunice Njeri, Mary Muthoni and Felister Wanjiru.
>
> Paul Njuguna Muchoki – to get 2.0 Acres
>
> John Karanja Muchoki – to get 0.9 Acres
>
> c. The Deputy Registrar of this Court is hereby ordered and authorised to sign all documents and forms on behalf of the 1st Defendant to facilitate the subdivision and transfer as above and the District Land Registrar, Murang'a be allowed and authorized to dispense with the production of the old title number LOC.6/Gikarangu/3634 retained by the 1st Defendant if he does not cooperate.
>
> d. The costs shall be in favour of the Plaintiffs.
>
> It is so ordered."

28. It is also not in dispute that the Applicant herein being aggrieved by the aforementioned judgment, proceeded to file a Memorandum of Appeal which was allocated Nyeri Civil Appeal E028 of 2021. That in the said Nyeri Civil Appeal E028 of 2021, the Applicant filed an application for stay of execution under Rule 5 (2) b of the Court of Appeal Rules and on 4th February 2022, the Court of Appeal delivered a ruling dismissing the said application.

29. Further, it is uncontroverted that the Judgement delivered in this matter on 14th January 2021, has already been partially and/or wholly executed as the suit land has already been resurveyed and subdivision done in accordance with the said judgement. In fact, it is this subdivision that is the root of the instant application.

30. Having stated the above, this Court notes the curious timing this application was filed in this Court. As stated above, the Applicant herein has already instituted an Appeal against the Judgement of this Court delivered on 14th January 2021. Further via an application dated 26th February 2021, filed at the Court of Appeal, the Applicant herein sought for stay pending Appeal, which application was dismissed via a Ruling delivered on 4th February 2022. It is only after the Court of Appeal dismissed the Applicant's Application for stay pending Appeal that he filed the instant application.

31. Further, a period of over one year had lapsed between the time this Court delivered Judgment on 14th January 2021, and the time the Applicant filed the Instant application. No explanation whatsoever has been given by the Applicant to explain the said delay of about a year. It appears the Applicant is forum shopping as he was only jolted into action when the Court of Appeal delivered its ruling dismissing his application for stay of execution pending Appeal.

32. Be that as it may, this Court will proceed to determine the issues arising from the instant application. The first issue for consideration is the prayer to allow the Law Firm of Wangui Gachango and Associates to come on record for the Applicant after judgement.

33. The Applicant was previously represented by the firm of Christopher & Gachango Company Advocates. That Applicant on 18th February, 2022, filed a Notice of Change of Advocates dated 18th February 2022. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

34. As per Order 9 Rule 9, of the Civil Procedure Rules, the correct procedure to be followed where an advocate wishes to come on record to replace another after judgment, is to seek leave to come on record, then file and serve the Notice of Change of Advocates. In the present case, the Applicant's Counsel filed a notice of change of Advocates dated 18th February 2022, on the same day and concurrently filed the instant application. The Court notes that the said Notice of change was filed without leave of the Court and as such it is not properly before Court. As stated above, the applicant on the said 18th February, 2022 also filed the instant application and therein he seeks leave for the Law Firm of Wangui Gachango Advocates to come on record on his behalf.

35. This Court finds that the Applicant did not comply with the requirements of Order 9 Rule 9 of the Civil Procedure Rules as the Advocates are already on record before the leave anticipated therein is granted.

36. Even if this Court were to overlook the procedure and finds that the application for leave was timely, the Applicant did not serve the instant application on the Law Firm of Christopher and Gachango

Advocates which previously represented the Applicant until judgment was delivered. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

> "A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

37. Unless and until a Notice of Change of Advocate is filed and duly served, an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

38. In the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR as cited by the applicant, where the judge observed as follows:

> "...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

39. Further, In Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi [2012] eKLR, the Court held that:

> "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure, the court may well be entitled to conclude that failure to comply therewith was deliberate."

40. The court went further to quote with approval the holding in Monica Moraa vs Kenindia Assurance Co. Ltd. [2010] eKLR, where the Court held that: -

> ".....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached....."

41. Based on the above, the Applicant non-compliant with both Order 9 Rule 5 and Rule 9 of Civil Procedure Rules which clearly offends the law as the procedure set out therein. The provisions of Order 9 Rule 9 of the Civil Procedure Rules are couched in mandatory terms and thus cannot be termed as a mere technicality Article 50 (2)(b) of *the Constitution* protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change

of Advocate should comply with the rules. Anarchy would reign if parties can change advocates at will without notifying the Court and the other parties

42. Having stated the above, this Court rejects the Applicant's prayer for leave as the Applicant has not complied with the strict requirements of Order 9 Rules 5 and 9 of the Civil Procedure Rules 2010.

43. The second issue is for consideration is whether to re-open this file and direct the Land Surveyor, Muranga County Survey Office to repeat the subdivision exercise over land parcel no. LOC. 6/ Gikarangu/3634.

44. It is the Applicant's contention that after Judgment of this Court was delivered on 14th January 2021, and a decree extracted on 22nd January, 2021, a subdivision of the suit land was conducted in line with the said judgment. That as a result of the said subdivision, the Applicant had lost some of his property including rental houses and avocado trees. The Applicant therefore urges the Court to allow the instant application to allow subdivision to be done considering the actual occupation on the ground.

45. The 1st and 2nd Respondents oppose the application entirely on grounds that the same is res Judicata as this Court had already pronounced itself conclusively on the issues raised in its Judgement delivered on 14th January, 2021. The Respondents contend that litigation must come to an end and the Applicant had the option of approaching this Court with an Application for review as opposed to the instant application. That the Applicant had already filed an Appeal after being dissatisfied with the judgment of 14th January 2021, and therefore the instant application was also subjudice the said Appeal.

46. It is the Respondents further contention that the Applicant's application for stay was dismissed by the Court of Appeal and therefore the Court had no locus entertaining the instant application as the issues raised herein are similar.

47. Does the instant application meets the requirements set down to warrant re-opening of an already closed file?

48. The Court will investigate further consider whether the instant application is resjudicata the Judgment of this Court delivered on 14th January 2021, and/or subjudice Nyeri Civil Appeal EO28 of 2021.

49. On whether the instant Application is res judicata, the principle of res judicata is embedded under Section 7 of the *Civil Procedure Act*. The same provides as follows:

> "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."

50. In the case of John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 others [2015] e KLR the Court of Appeal set out the ingredients of res judicataas follows:

> "From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was

competent and determined the suit finally (see Karia & Another v the Attorney General & others [2005] 1 EA 83."

51. Further in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) the Court of Appeal held that:

> "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

52. The Court went on to set out the rationale for res judicata as:

> "The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

53. In a nutshell, res judicata is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence it saves precious judicial time and protects the sanctity of the court to do just what it should do. In sum, it prevents the abuse of the court process.

54. Has the instant application met the threshold for the application of the doctrine of res judicata?

55. This Court in answering this question in the affirmative notes that in the Judgment for the instant suit delivered on 14th January, 2021. That the parties and the subject matter then are clearly the same in the instant application. Based on the above, the Court finds that the instant application is res-judicata based on its Judgement delivered on 14th January, 2021. Further after delivering its judgment, this Court became functus officio and in considering the instant application, it would be sitting on its own Appeal, a position not allowed in law.

56. In addition to being res judicata, this court also finds that the instant application is subjudice Nyeri Civil Appeal E028 of 2021. Section 6 of the *Civil Procedure Act* sets out the threshold for holding that a suit is *res subjudice*. Section 6 of the *Civil Procedure Act* provides that: -

> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between

the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

57. The Supreme Court while discussing the principle of sub judice in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others(Interested parties) [2020] eKLR opined as follows:

> "(67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

58. Basically, for the doctrine of res sub judice to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya.

59. In the instant suit, the Applicant being dissatisfied with the Judgement of this Court touching on the subject matter herein preferred an Appeal. It is not in dispute that the said Appeal has already been filed and application for stay has already been heard and dismissed by the said Appellate Court.

60. The Upshot of the forgoing is that the instant application is Res Judicata as this Court has already pronounced itself conclusively on the issue in question in its judgment delivered on 14th January 2021. Further, the instant application is subjudice Nyeri Civil Appeal E028 of 2021, which is pending determination by the said Appellate Court.

61. Even though this Court were to consider the Application to re-open the file to order a fresh subdivision, the same would still fail. The law does not provide for an instance where a file can be reopened to amend and /edit its orders unless an application for review is made in Accordance with Order 45 of the Civil Procedure Rules. It appears as if the Applicant via the instant application, is seeking to review the Judgment of this Court, but has not appropriately approached the Court and therefore his application fails for failure to comply with the substantive law.

62. Having now carefully considered the Notice of Motion Application dated 18th February 2013, the Court finds it Resjudicata and Subjudice. Consequently, the instant Application lacks merit and the same is dismissed entirely with costs to the Plaintiffs/Respondents.

63. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE, 2022.**

**L. GACHERU**

**JUDGE**

In the presence of; -

Joel Njonjo - Court Assistant

1st and 2nd Plaintiffs – Absent

1st – 4th Respondents – Absent

**L. GACHERU**

**JUDGE**