



Mbaika v Mitaboni Katani Company Ltd; Mutisya (Legal Representative of the Estate of The Late David Mutisya Mumo) (Applicant) (Environment & Land Case 14 of 2022) [2022] KEELC 3283 (KLR) (3 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 14 OF 2022
JO MBOYA, J
AUGUST 3, 2022**

BETWEEN

ESTHER MBAIKA PLAINTIFF

AND

MITABONI KATANI COMPANY LTD DEFENDANT

AND

DAVIT KAVITA MUTISYA (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DAVID MUTISYA MUMO) APPLICANT

RULING

Introduction and Background

1. Vide the notice of motion application dated the June 16, 2022, the applicant/intended defendant herein has approached the court seeking for the following reliefs;
 - i.(spent)
 - ii. The instant suit be placed before the rightful and lawful forum being the Environment and Land Court at Machakos for its dispensation.
 - iii. The honourable court be pleased to set aside the judgment and decree emanating from the proceedings of March 1, 1994 and/or any other consequential orders arising therefrom.
 - iv. This case be re-opened and the same be subjected to fresh trial on merits.
 - v. The applicant/intended defendant be joined in this suit as the defendant in place of Matiboni Katani Company Limited with leave to file their defense.



- vi. This file be placed in the strong room custody pending the hearing and determination of this suit.
 - vii. This court be pleased to grant any other orders it may deem just and fit.
 - viii. Costs.
2. The subject petition is premised on the various grounds enumerated in the body thereof and same is further supported by the affidavit of David Kavita Mutisya, sworn on even date and to which the deponent has attached a total of 9 annextures.
 3. Upon being served with the subject application, the plaintiff/respondent filed a replying affidavit sworn on the July 12, 2022 and to which the deponent has attached 6 annextures, inter-alia, a copy of the judgment issued vide Court of Appeal Civil Appeal No 61 of 2017.

Depositions By The Parties:

Applicant's/ Intended Defendant's Case:

4. Vide supporting affidavit sworn on the June 16, 2022, one namely, David Kavita Mutisya, hereinafter referred to as the deponent, has averred that same is the duly appointed and/or constituted legal administrator of David Mutisya Mumo, now deceased.
5. Further, the deponent has averred that his brother, namely, Zakayo Matheka Mutisya, now deceased was tasked with the prosecution and/or follow up of cases involving the recovery and protection of the assets of (sic) their late father, namely David Mustisya Mumo.
6. Nevertheless, the deponent has averred that following the death of his Elder brother, namely, Zakayo Matheka Mutisya, same took out grant of letters of administration and has therefore acquired the requisite capacity to represent the estate of the deceased, namely, David Mutisya Mumo.
7. On the other hand, the deponent has averred that upon being constituted and/or appointed as the administrator of the deceased, namely, David Mustisya Mumo, same discovered that the defendant company had been conveniently sued in Nairobi by the plaintiff/respondent herein, culminating into the issuance of a judgment pertaining to and/or concerning the suit property.
8. Besides, the deponent has farther averred that despite the fact that the defendant company had been sued by the plaintiff/respondent, the defendant company was never afforded an opportunity to defend the subject suit and hence the judgment which arose was a default judgment entered against the defendant.
9. Other than the foregoing, the deponent herein has averred that the suit herein was conveniently filed and/or lodged before the High court sitting at Nairobi, even though there existed a High Court at Machakos, which ought to be the appropriate forum to handle and/or deal with the subject matter.
10. In the premises, the deponent has averred that the filing of the subject suit at the High Court at Nairobi and not the High Court at Machakos, was contrived to defeat the ends of Justice and to assist the plaintiff/respondent herein to perpetuate a mischief.
11. Be that as it may, the deponent has further proceeded to and averred that on or about January 18, 1994, justice s amin, judge set aside the interlocutory judgment that had hitherto been granted against the defendant company and ordered that the defendant be served afresh with summons to enter appearance.



12. Notwithstanding the foregoing, the deponent has averred that the orders of Hon Justice S Amin, Judge, made on the January 18, 1994 were however set aside and/or varied in a mysterious manner by Hon Justice A B Shah, judge, who thereafter proceeded to and heard the matter culminating into a judgment in favor of the plaintiff/respondent.
13. On the other hand, the deponent has averred that the defendant herein only got to know of the entry of judgment against her on or about January 1995 and thereafter same instructed and/or engaged the law firm of M/s FM Mulwa Advocate to make an application to set aside the default judgment.
14. Be that as it may, the deponent has averred that though an Application was duly lodged and/or made by the firm of M/s FM Mulwa Advocate, same was neither prosecuted nor heard on merit and was ultimately, same was dismissed for want of prosecution.
15. Besides, the deponent has also averred that other than the attempt to set aside the judgment that was filed herein, M/s FM Mulwa Advocate also proceeded to and filed a suit vide Machakos HCC No 70 of 1995 (now presently Machakos ELC No 47 of 2013), in a bid to recover the suit properties from the plaintiff/respondent.
16. However, the deponent has further stated that the suit, ELC No 47 of 2013, was heard and determined vide judgment rendered by the court on the January 27, 2017, when same was dismissed.
17. Nevertheless, the deponent has further averred that the suit property, which was and is the subject of the suit herein lawfully belongs to the applicant/intended defendant, insofar as the plaintiff/respondent was never a member of the defendant company.
18. Owing to the foregoing, the deponent has averred that the Honourable court herein ought to join same as a defendant in lieu and/or in place of the defendant company, so as to enable the deponent to ventilate the interests of the estate of David Mutisya Mumo, now deceased.
19. On the other hand, the deponent has averred that the suit property was held by the defendant company herein, albeit on behalf of the deceased, who was the lawful member as opposed to the plaintiff/respondent.
20. In the premises, the deponent has averred that it would thus be appropriate and just, to allow same to be substituted in place of the defendant company, which is now non-existent and thereby allow same to address the issues as pertains to the interests of the estate of the deceased.
21. Finally, the deponent has averred that it is only such joinder and re-opening of the subject suit that will enable the deponent on behalf of the estate of the deceased to address the issues pertaining to whether or not the plaintiff/respondent was a lawful shareholder/member of the defendant company or otherwise.

Response By The Plaintiff/Respondent:

22. Vide replying affidavit sworn by Esther Mbaika, namely, the plaintiff/respondent, same has averred that she was a lawful shareholder and member of the defendant company, which has since ceased to exist.
23. By virtue of being a member and/or shareholder of the defendant company, the deponent has averred that same was entitled to be issued with a share certificate and by extension a share of land which was hitherto owned by the defendant company.
24. Further, the deponent has averred that when same was not issued with the requisite share certificate, same proceeded to and filed the subject suit against the defendant company, culminating into a judgment against the company and not otherwise.



25. Subsequently, the defendant company was enjoined to and indeed issued unto same the requisite certificate, culminating into herself being entitled to ownership of LR No's Mavoko Town/Block 2/8 and Mavoko Town/Block 2/112, respectively.
26. Notwithstanding the foregoing, the deponent has further averred that sane was subsequently sued vide Machakos HCC No 70 of 1995 (latter reassigned as Machakos ELC No 47 of 2013) by one Zakayo Matheka Mutisya, now deceased, who contested her rights and/or title to the named properties.
27. The deponent has further averred that the suit before Machakos Environment and Land Court was heard and disposed of vide Judgment rendered on the January 27, 2017, whereupon the Environment and Land Court found no merits in respect of same and proceeded to dismiss the suit.
28. On the other hand, the deponent has averred that upon the dismissal of the suit, namely, Machakos ELC No 47 of 2013, the plaintiff therein, namely, Zakayo Matheka Mutisya, felt aggrieved and/or dissatisfied and thereafter lodged an appeal to the Court of Appeal vide Nairobi Civil Appeal No 61 of 2017.
29. Be that as it may, the deponent has further averred that the appellant in the said appeal, that is, Zakayo Matheka Mutisya, passed on before the appeal could be heard and was substituted by the current applicant.
30. Other than the foregoing, the deponent has further stated that following the substitution of the appellant with the current applicant, the appeal was thereafter heard and disposed of vide judgment of the Court of Appeal, which determined all the issues pertaining to ownership and title in respect of the named properties.
31. For completeness, the deponent has stated that the Court of Appeal did not find merit in Appeal No 61 of 2017 and same was dismissed.
32. At any rate, the deponent has further averred that the Court of Appeal further held and authenticated that the deponent herein was the lawful and *bona-fide* owner of the named properties.

Submissions By The Parties:

a. Applicant's Submissions:

33. On behalf of the applicant, learned counsel submitted that at the time when the suit herein was filed at the High Court registry in Nairobi, there existed a High Court at Machakos, which was the best and most suitable place for the filing of the subject suit.
34. Based on the foregoing, counsel for the applicant contended that the filing of the subject suit at the High Court registry at Nairobi and not at Machakos, was therefore intended to achieve a mischief and essentially to defeat the interests of the applicant who was the legitimate shareholder in the defendant company.
35. Secondly, it was further submitted that the plaintiff/respondent herein was never a member and or shareholder of the defendant company and hence same was not entitled to partake of and/or benefit from ownership over a portion of the land that was owned by the defendant company.
36. To the extent, that the plaintiff/respondent was not a member/shareholder of the defendant company, the defendant company herein could not allocate any portion of the land registered in her name to the plaintiff/respondent.



37. Thirdly, the counsel for the applicant has further submitted that to the contrary it is the estate of David Mutisya Mumo, currently represented by the applicant, who ought to have been allocated the properties, which currently inhere in the name of the plaintiff/respondent.
38. Fourthly, it was submitted that the allocation, transfer and ultimate registration of the named properties to and in favor of the plaintiff/respondent, was never done by the defendant company, but instead the impugned allocation was procured by deceit and fraud.
39. Premised on the foregoing, counsel for the applicant has further submitted that as a result of the fraud, the chairman of the defendant company, has sworn an affidavit wherein same has denied and/or disputed that the company allocated the named properties to the plaintiff/respondent.
40. On the other hand, counsel for the applicant has submitted that based on the fraud attendant to the allocation of the named properties to the plaintiff/respondent, same has since been charged and arraigned court vide Mavoko Criminal Case No E106 of 2021 between Republic v Esther Mbaika. However, it was clarified that the said Criminal proceedings are still pending before the court.
41. Fifthly, counsel for the applicant further submitted that though the defendant herein filed an application seeking to set aside and/or discharge the default Judgment issued herein, the application to that effect was never prosecuted and same was ultimately dismissed for want of prosecution.
42. Finally, counsel for the applicant contended that even though the Defendant company was sued, the issue at the foot of the subject matter touched on and/or concerned the interests of David Mutisya Mumo, now deceased and hence same ought to have been the one sued.
43. In the premises, counsel has therefore contended that the applicant herein, who represents the estate of David Mutisya Mumo, now deceased, therefore ought to be substituted in place of the defendant company and thereafter be allowed to defend the subject suit.

b.Plaintiff's/Respondent's Submissions:

44. On behalf of the plaintiff/respondent, counsel submitted that the applicant herein in his individual or representative capacity, is separate and distinct from the defendant company and therefore same cannot by law substitute the company as the defendant.
45. Secondly, counsel for the plaintiff/respondent also submitted that the issues that was in dispute in respect of the subject matter related to ownership of the named properties, whose details were enumerated at the foot of the plaint and which properties were at the material time registered in the name of the defendant company and not otherwise.
46. Premised on the foregoing, counsel for the plaintiff/respondent has submitted that the impugned titles/properties having been registered in the name of the defendant company, there is no way the intended defendant/ applicant can claim to have been entitled to same.
47. Thirdly, counsel for the plaintiff/respondent further submitted that at any rate, the issues pertaining to ownership and title over and in respect of the two properties herein, was deliberated upon and/or canvassed before the Machakos Environment and Land Court vide ELC No 47 of 2013 and the applicants claim to and in respect of the suit properties was dismissed.
48. Further, counsel for the plaintiff/respondent has submitted that arising out of the decision/judgment of the Environment and Land court vide Machakos ELC No 47 of 2013, an appeal was mounted to the Court of Appeal vide Nairobi Court of Appeal Civil Appeal No 61 of 2017, which appeal was similarly, heard and determined.



49. For completeness, counsel for the plaintiff/respondent submitted that the appeal was heard and dismissed and that the Court of Appeal underscored that the two named properties, which forms the basis of the subject suit lawfully belonged to the plaintiff/respondent.
50. In the premises, counsel for the plaintiff/respondent contended that the subject application and by extension the intended joinder, are merely meant to circumvent and or negate the decision of the Court of Appeal, which decision is binding on the parties, as far as ownership of the suit properties are concerned.
51. In a nutshell, counsel for the plaintiff/respondent submitted that the subject application was not only misconceived but constituted an abuse of the due process of the court.

Issues For Determination:

52. Having reviewed the application dated the June 16, 2022, the supporting affidavit thereto and the replying affidavit filed in opposition thereto; and having similarly considered the oral submissions ventilated on behalf of the respective parties, the following issues are pertinent and thus germane for determination;
 - i. Whether the applicant herein had any known interests and/or claim to the named properties, which were hitherto registered in the name of the defendant company.
 - ii. Whether the applicant can be substituted in place of the defendant company for purposes of (sic) prosecuting/ defending the subject matter on behalf of the company.
 - iii. Whether this court can revisit and re-agitate the issue pertaining to the legality or otherwise of the titles touching on and/or concerning the suit properties herein on the face of a final determination by the Court of Appeal vide Nairobi Civil Appeal No 61 of 2017.

Analysis And Determination:

Issue Number 1: Whether The Applicant Herein Had Any Known Interests And/or Claim To The Named Properties, Which Were Hitherto Registered In The Name Of The Defendant Company.

53. It is important to note that the subject suit touched on and/or concerned ownership of two (2) properties, namely, plots No 8 and 112 in Mitaboni Katani Farm, which were hitherto registered in the name of the defendant company.
54. It appears that the plaintiff/respondent herein had a stake and/or claim over and in respect of the two properties, herein referred to as the suit properties and premised on the claim, same filed and/or lodged the subject suit, seeking *inter alia*, an order to compel the defendant company to deliver titles in respect of the suit properties unto her.
55. Subsequently, the suit herein was heard and determined culminating into the delivery of a judgment rendered on the March 1, 1994 and whose terms have been captured vide a preliminary decree extracted on the March 24, 1994.
56. It is also important to note that after the judgment had been rendered and/or delivered, an attempt was made by and/or on behalf of the defendant company to set aside and/or discharge the judgment. However, the attempt by and/or on behalf of the company to set aside the judgment was dismissed for was of prosecution.



57. Be that as it may, what is important to note and or underline was that the suit properties herein belonged to and were registered in the name of the defendant company and not otherwise.
58. In any event, the issue before the court was a claim by the current plaintiff to be entitled to the suit properties and hence the reliefs which were sought herein, sought that the defendant company be compelled to deliver apt titles in respect of the suit plots.
59. For coherence, the suit properties, which were the subject of deliberations before the court, were never registered in the name of David Mutisya Mumo, now deceased and hence same could not have been impleaded either as a defendant or otherwise, at the inception of the subject suit.
60. On the other hand, given that David Mutisya Mumo, now deceased, did not own the suit property at the inception and could not have been impleaded, by extension, the applicant herein who is the legal administrator of the said estate, cannot contend that same has a legitimate interests and/or claim, capable of being ventilated in the subject suit.
61. At any rate, if the applicant herein contends that the suit properties lawfully belonged to the estate of David Mutisya Mumo and that the company should have allocated same to the said David Mutisya Mumo or by extension to his estate, then the applicants claim, if any, laid against the defendant company, during her existence, albeit in a different suit and not otherwise.
62. Be that as it may, the point that I am making is to show that the applicant herein, who is separate and distinct from the defendant company had no known interest in the suit properties for as long as same belonged to and were registered in the name of the defendant company.
63. In the premises, I am afraid that the applicant herein has not supplied and/or exhibited any known legal interests to the suit properties, which could have warranted his joinder into the subject suit, either at the inception or in the manner sought vide the current application.
64. Premised on the foregoing, my answer to issue number one is in the negative and essentially, that the applicant has not established any scintilla or iota of rights to the suit property, to warrant his joinder in the subject proceedings.

Issue Number 2 - Whether The Applicant Can Be Substituted In Place Of The Defendant Company For Purposes Of (sic) Prosecuting/ Defending The Subject Matter.

65. Other than the fact that the applicant has not established and/or exhibited any interests and or rights over the suit property, to warrant his joinder in the subject suit, there is the flipside of this matter that also requires to be addressed.
66. For the avoidance of doubt, the applicant herein seeks to have the court decree that same be substituted as the correct defendant in place of the defendant company, to enable same defend the subject suit on behalf of the company.
67. Owing to the nature of the order being sought, the question that arises is whether the applicant in his personal/representative capacity can be substituted in lieu of the defendant company and whether the applicant can indeed speak for and or on behalf of the defendant company.
68. The starting point to resolving this issue is the observation that the suit properties, at the time of the inception of the suit were registered in the name of the defendant company and not otherwise.
69. Owing to the fact that the suit properties, were registered in the name of the company, the only person who could speak to and or defend any rights and/or interests over the said properties, was therefore the defendant company and not any member or shareholder thereof.



70. Nevertheless, if I understand the applicant well, what the Applicant is saying is that one David Mutisya Mumo, now deceased was the lawful shareholder/member of the defendant company and not the plaintiff/respondent.
71. Further, the applicant seems to be stating that to the extent that David Mutisya Mumo, now deceased was the lawful shareholder/member of the defendant company, same ought to have been sued so as to defend the issues pertaining to ownership of the suit properties, even though same were registered in the name of the defendant company.
72. To my mind, what the applicant seems to suggest is that even though the suit properties were registered in the name of the defendant company, same belonged to and in favor of David Mutisya Mumo, now deceased, whose estate is represented by the applicant.
73. Sadly though, it is imperative to recall that whether or not David Mutisya Mumo, now deceased, was a member/shareholder of the defendant company, same was nevertheless separate and distinct from the defendant company. Consequently, the applicant herein cannot lawfully claim that a property which was registered in the name of the company could very well be deemed to belong to David Mutisya Mumo, now deceased.
74. Suffice it to point out that a limited liability company, like the defendant company herein, is a separate and distinct legal entity from her subscribers, shareholders/members- and thus same has a legal capacity to own property in her own name.
75. Contrarily, where the property belongs to and is registered in the name of the company, like the defendant company herein, same cannot be claimed by any shareholder and/or member of that company. Simply put, the company is separate and distinct from her shareholders/members.
76. To underscore the foregoing observation, it is imperative to recall and take cognizance of the ageless dictum in the case of *Salmond v Salmond & Co Ltd* (1897) AC in which it was stated *inter alia* as follows:
- “The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”
77. On the other hand, if the property belonging to and registered in the name of the company, in this case the defendant company, is illegally taken away from the company or better still the company, is defrauded by someone, in this case (sic) by the plaintiff (which is not the case) the best person who ought to complain would be the company and not otherwise.
78. To this extent, it is appropriate to invoke and restate the holding in the case of *Moir v Wallersteiner* [1975] 1 ALL ER 849 at p 857, where Lord Denning MR, held as hereunder;
- “It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by



outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

79. In respect of the subject matter, if the plaintiff herein was not the lawful shareholder/member of the defendant company, but has ended up benefiting from the shares of the company, then it is the company herself that ought to have been complaining and not otherwise.
80. Notwithstanding the foregoing, it has been stated that the defendant company made an attempt to challenge and/or set aside the judgment and the resultant decree, but the attempt abated when the application was dismissed for want of prosecution.
81. In my considered view, the moment the attempt by the company to set aside and/or impeach the judgment and the resultant decree abated for want of prosecution, the interest of the company, pertaining to and/or concerning the suit property lapsed and/or extinguished, unless an appeal was proffered, which is not the case herein.
82. Back to the claim by the applicant herein, it is my finding and holding that even if David Mutisya Mumo, now deceased, who is represented by the applicant was a shareholder/member of the defendant company (which now non-existent), same cannot act and/or be substituted on behalf of the defendant company.
83. For clarity, the dichotomy between the defendant company and the applicant is poles apart and the applicant cannot purport to represent and/or act on behalf of the defendant company, either in the manner sought or at all.
84. In the premises, I find and hold that the prayers by the applicant to be substituted as the defendant in place of the defendant company, with a view to defending the suit on behalf of the company, is not only misconceived, but is legally untenable and contrary to the known tenets of company law.

Issue Number 3 - Whether This Court Can Revisit And Re-agitate The Issue Pertaining To The Legality Or Otherwise Of The Titles Touching On And/or Concerning The Suit Properties Herein On The Face Of A Final Determination By The Court Of Appeal Vide Nairobi Civil Appeal No 61 Of 2017.

85. Notwithstanding the foregoing deliberation, it is common ground that the applicant herein is seeking to be joined in the subject matter in lieu of the defendant company, to enable same to contest the legality and or validity of the plaintiff/respondent’s title to the suit property.
86. Indeed, it is the applicant’s contention that the plaintiff/respondent was not the lawful member/shareholder of the defendant company and hence ought not to have been entitled to ownership of the suit properties.
87. Further, the applicant is keen to contend that the allocation, transfer and registration of the suit properties to and in favor of the plaintiff/respondent, was procured and/or obtained by deceit and fraud.
88. Finally, the applicant herein is keen to ultimately (if at all), to persuade this court to find and hold that the suit properties ought to have been registered in the name of David Mutisya Mumo, now deceased or by extension his estate.
89. Be that as it may, there is no gainsaying that the dispute as to the ownership and title of the suit properties, was the subject of another suit, namely Machakos HCC No 70 of 1995 (latter ELC No 47



of 2013), wherein the court found and held that the suit properties lawfully belonged to the current plaintiff/respondent.

90. It is also common ground that after the delivery of the Judgment vide Machakos ELC 47 of 2013, one Zakayo Matheka Mutisya, now deceased filed an appeal to the Court of Appeal vide Nairobi Court of Appeal civil appeal No 61 of 2017.

91. Suffice it to note that the appellant therein, namely, Zakayo Matheka Mutisya, passed on during the pendency of the said appeal and was latter on substituted by the current applicant. Consequently, the current applicant became and was duly constituted as the appellant in respect of the said appeal.

92. Be that as it may, the said appeal was heard and determined by the Court of Appeal, who proceeded to and dismissed same for want of merits. For clarity, the Court of Appeal held *inter alia* as hereunder;

“In our view, the facts of this appeal are fairly straight forward. The original plaintiff filed suit against the respondent and alleged deceit and/or fraud against her. However, as rightly pointed out by the trial judge, the appellant failed to prove deceit and or fraud on the part on the respondent”

93. For coherence, it is worthy to underscore that the Court of Appeal also declared and/or decreed that the suit properties, which were/are the subject of the suit herein, were found to lawfully belong to the plaintiff/respondent herein.

94. In short, the issue pertaining to the ownership and title over and in respect of the suit properties, (which have since been registered under the [Land Registration Act](#)), has since been determined by the Court of Appeal.

95. Having been so determined, the question that remains outstanding is whether the issue as pertains to title and/or ownership of the suit properties can be re-agitated anew, before this honourable court, in the manner proposed and/or sought by the applicant.

96. To the extent that the Court of Appeal addressed the issue as to whether or not the acquisition of the suit properties by the plaintiff/respondent, accrued by virtue of deceit or fraud and ultimately upheld the finding that fraud had not been established by the applicant’s predecessor, it is apparent that the decision by the Court of Appeal, became final in all respects.

97. In any event, it also imperative to restate that the judgment and the resultant decree by the Court of Appeal, was a judgment *in rem*, touching on and/or concerning ownership of the suit properties and hence the said judgment, is binding against the whole world, the current applicant not excepted.

98. To buttress the import, tenor and consequence of a judgment in rem, as opposed to a judgment in personam, it is appropriate to take cognizance of the decision of the Court of Appeal vide the case of [Telkom Kenya Ltd v John Ochanda \(suing on behalf of 996 former employees of Telkom K Ltd\)](#) [2014] eKLR, where the court observed as hereunder;

“The terminology employed was not entirely correct in terms of the exact meaning of the two types of judgment. As commonly understood, a judgment in personam is one that is entered against a specific person and is enforced against that person directly while an in rem judgment declares rights over property or status and is said to be against the whole world.”

99. Other than the foregoing, the current application and the intended proceedings (if the court were to allow the application), would amount to an attempt to circumvent and/or otherwise defeat the decision of the Court of Appeal through the backdoor.



100. Consequently, it is my finding and holding that this court is not seized of the requisite capacity to undertake further proceedings, whose net effect, would amount to impugning, challenging and/or otherwise questioning the decision of the Court of Appeal which decision is binding on this court.
101. Similarly, I also find and hold that the issue pertaining to the ownership and title to and or in respect of the suit properties (which have since been registered under the *Land Registration Act*) is *res judicata* and hence a closed chapter.
102. To underscore aforesaid legal statement, I find succor in the holding of the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, where the court observed as hereunder;

“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 common-sensical 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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

103. To my mind, the foregoing excerpt, answers the intention of the current applicant in his bid to revive, revitalize and reagitate the issues pertaining to the validity or otherwise of the titles of the suit properties, which issues has since been settled by the Court of Appeal.
104. In the premises, to allow the subject application would be tantamount to affording the applicant an avenue to take this court in a circus, which *ipso jure* amounts to an abuse of the due process of the court.

Final Disposition:

105. Having addressed and/or analyzed the thematic issues which were identified and outlined in the body of the ruling, it is now appropriate to make the final and dispositive orders.
106. Nonetheless, it must have become evident and/or apparent that in the course of the discourse herein above, that the subject application is not only misconceived, but is calculated to defeat a binding decision of the Court of Appeal by side-wind.
107. In the premises, I come to the conclusion that the subject application is devoid of merits and thus deserving of dismissal.
108. In a nutshell, the application dated the June 16, 2022, be and is here dismissed with costs to the plaintiff/respondent.
109. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF AUGUST, 2022.

HON JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant



Mr. Ander for the applicant/ intended defendant.

Mr. Ngolya for the plaintiff/ respondent.

