Gidjoy Investments Limited v Zero Point Construction Company Ltd & 70 others (Environment & Land Case 301 of 2018) [2022] KEELC 3933 (KLR) (3 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3933 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 301 OF 2018

JO MBOYA, J

AUGUST 3, 2022

BETWEEN

GIDJOY INVESTMENTS LIMITED ..... PLAINTIFF

AND

ZERO POINT CONSTRUCTION COMPANY LTD & 70 OTHERS ..... DEFENDANT

RULING

Introdction and Background

1. The Ruling herein relates to two (2) separate and distinct Applications, as well as two separate Preliminary objections filed; namely, one filed by the 68th Defendant, whilst the other has been filed and/or mounted on behalf of the 69th Defendant.

2. For ease of appreciation and to discern the nature of the Reliefs sought at the foot of each Application, as well as the Preliminary objections, it is therefore appropriate to reproduce the Reliefs and/ or Orders sought thereunder.

3. Vide the Notice of Motion Application dated the 18th March 2022, the 68th Defendant/Applicant herein has approached the court seeking for the following Reliefs;

    i. .....(Spent).

    ii. This Honourable Court do strike out the Plaint dated the 27 June 2018 and any amendment therein (if any) for being Res-judicata and/or Sub-judice.

    iii. This Honourable court do strike out the Plaint dated the 27th June 2018 and any amendment (if any) for being an abuse of the court process.

iv. This Honourable court do strike out the Plaint dated the 27th June 2018 and any amendment (if any) for being frivolous, vexatious and scandalous.

v. Costs of the Suit and Application be borne by the Plaintiff/Respondent.

4. The aforesaid Application is premised on various grounds which have been enumerated at the foot thereof and the same is further supported by the affidavit of one, Patrobas Awino sworn on the 18th March 2022 and to which the deponent has attached a total of 32 annextures.

5. Other than the foregoing Application, the 68th Defendant has also filed a Preliminary Objection dated the 21st March 2022 and in respect of which, same has outlined the following Grounds;

a. The Suit is time barred having been brought outside the Statutory limitation of 12 years in view of Section 7 of the Limitation Act, Chapter 22 Laws of Kenya.

b. The Suit being found upon Fraud is time barred having been brought outside the Provision of Section 4(2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

c. The Suit being found upon a Judgment already delivered touching on the suit Property, the suit before the court is time barred having been brought outside the provision of Section 4(4) of The *Limitation of Actions Act*, Chapter 22 Laws of Kenya, after judgment was delivered.

d. This Court therefore has no jurisdiction to hear and determine this matter.

6. On behalf of the 69th Defendant/Applicant, same has filed the Application dated the 11th March 2022, and wherein same seeks for the following Reliefs/ Orders:

i. .....(spent).

ii. The Plaint dated the 27th June 2018 be and is hereby struck out with costs on account of Res-judicata and abuse of the court.

iii. The Costs of this Application be paid by the Plaintiff/Respondent.'

7. The Application herein is anchored on the various Grounds highlighted at the foot thereof and same is supported by two affidavits sworn by Ann Khasoa. For clarity, the 1st affidavit is sworn on the 11th March 2022, while the Further Affidavit is sworn on the 16th May 2022.

8. Similarly, the 69th Defendant has also filed a Notice of Preliminary Objection and wherein same has raised the following Grounds;

a. The Plaint dated the 27th June 2018 offends Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and the Res-judicata rule as the issues herein were determined in HCC No 55 of 2002; Continental Developers Ltd v Donholm Jacaranda Housing Scheme & Another and Nairobi JR No 20 of 2018.

b. This suit Offends the Doctrine of Sub-judice and Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as Civil Case No. 336 of 2003, cites similar issues as those raised in this suit, Civil Case No 336 of 2003 was previously instituted and is pending before a Court having Jurisdiction to hear and determine the dispute.

c. This Proceedings are an abuse of the Court Process in view of the determination by the National Land Commission vide gazette notice dated the 9th November 2018.

9. Upon filing the named Applications herein the Plaintiff/Respondent and the rest of the Defendants, variously filed their responses to the subject Applications.

10. For clarity, the Plaintiff/Respondent responded to the various Applications by filing a detailed and elaborate Replying affidavit and in respect of which same sought to clarify the details and circumstances pertaining to the filing of the instant suit.

Submissions By The Parties:

a.submissions by the 68th Defendant/applicant:

11. The Learned Counsel for the 68th Defendant has submitted inter-alia, that the issues at the foot of the current suit had hitherto been ventilated and/or deliberated upon in a previous suit, namely, Nairobi HCC No. 55 of 2002, which suit was filed by Continental Developers Ltd as against the current 68th Defendant/Applicant and that the said suit touched on and/or concerned the question of Title to and or ownership of the suit properties.

12. Further, counsel for the 68th Defendant has submitted that even though Continental Developers Ltd filed the said suit, same were reluctant to prosecute the suit. Consequently, the suit by Continental Developers Ltd, was dismissed for want of prosecution vide a Ruling of the court rendered on the 24th November 2009.

13. Secondly, counsel for the 68th Defendant has also submitted that other than Nairobi HCC No 55 of 2002, there was also another suit, namely, Nairobi HCC No, 336 of 2003, which was filed against the 68th Defendant herein and which suit also touched on and or concerned the issue of ownership in respect of L.R No. Nairobi/Block 82/7333.

14. On the other hand, counsel for the 68th Defendant further submitted that in respect of the suit, namely, Nairobi HCC No 336 of 2003, an Application was made, wherein the said Continental Development Ltd sought to procure a temporary injunction, but the Application was dismissed by the court.

15. For the avoidance of doubt, counsel for the 68th Defendant has submitted that at the time when the Application for Temporary Injunction was dismissed, the Continental Developers Ltd did not have any title and/or registration documents in respect of LR. No. Nairobi Block 82/7333 at all.

16. Premised on the foregoing submissions, counsel for the 68th Defendant/Applicant has therefore contended that the current suit filed by the Plaintiff/Respondent, who alleges to have purchased the suit properties from Continental Developers Limited, is therefore barred by the doctrine of Res-judicata.

17. At any rate, counsel for the 68th Defendant/Applicant has further submitted that the issues pertaining to ownership of the suit properties were dealt with by the Court vide Nairobi HCC of 2002. Consequently, it has been submitted that this court cannot now purport to entertain the subject suit.

18. Secondly, counsel for the 68th Defendant further submitted that other than the suit, whose details have been enumerated vide the preceding paragraphs, the Dispute pertaining the suit property was also submitted to the National Land Commission, whereby both Continental Developers Company Limited, the Plaintiff and the 68th Defendant/Applicant were duly represented.

19. Further, it has been submitted that the Dispute was deliberated upon by the National Land Commission, who proceeded and decreed that the suit property belongs to the 68th and 69th Defendants herein.

20. In any event, it has also been submitted that the National Land Commission also found and held that the amalgamation of the suit properties and the subsequent subdivision in respect thereof, were found to have been fraudulent and illegal and thus an order was made to revert back the impugned Land to their former position, namely, LR. NO. Nairobi Block 82/7375 and Nairobi Block 82/7333, respectively.

21. Premised on the ruling and/or decision by the National Land Commission, counsel for the 68th Defendant has therefore submitted that the issue of the Title to and ownership of the suit properties has since been determined.

22. In view of the foregoing, it has therefore been submitted that the subject suit that touches on and/or concerns ownership of and or title to the suit properties, therefore constitutes an abuse of the Due Process of the Court.

23. Thirdly, Learned counsel for the 68th Defendant/Applicant has also submitted that the Continental Developers Limited having filed various suits hitherto and having lost all the said suits, same has now retreated to the background and ushered the current Applicant to propagate the subject suit even though the issues raised herein, are the same as the ones that underlined the previous suits.

24. Premised on the foregoing, counsel has added that the mere change of the name of the Plaintiff from that of Continental Developers Limited, which had hitherto filed the previous suit, does not take the subject matter outside the purview and scope of the Doctrine of Res-judicata.

25. Fourthly, counsel for the 68th Defendant/Applicant has also submitted that the current Plaintiff/Respondent has also filed another suit namely, Nairobi JR Misc. Application No. 20 of 2018, wherein same sought to challenge and or impeach the decision of the National Land Commission pertaining to and/or concerning ownership of the suit properties.

26. Be that as it may, Learned counsel has submitted that upon the filling of the said Judicial Review proceedings, the Plaintiff/Respondent came to the realization that the said proceedings were still-borne when the Judge preliminarily raised an issue that the Judicial review proceedings cannot be relied on to anchor a claim of ownership of title to land.

27. Nevertheless, Counsel for the 68th Defendant, has stated that even though the Judicial Review proceedings was finally dismissed, but same constitutes yet another attempt by the Plaintiff/Respondent herein to abuse the Due Process of the court.

28. Fifthly, Learned Counsel for the 68th Defendant/Applicant has also submitted that the 68th Defendant has been resident upon the suit properties for along time right from the 1970's to date, albeit without interruptions and/ or Disturbance.

29. Contrarily, counsel submitted that the Plaintiff/Respondent herein has not been resident on and/or in occupation of the suit properties. Consequently, it was contended that the 68th Defendant having been in occupation of the suit properties for more than 12 years, the subject suit which is primarily anchored on recovery of vacant possession, is therefore barred by the Provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

30. Sixthly, Learned Counsel for the 68th Defendant further submitted that other than the fact that the 68th Defendant has been resident on the suit properties since the year 1970's, members of the 68th Defendant were also issued with Letters of allotment over and in respect of the suit property in the year 1998 and the letters of allotment were further vindicated in the year 2006.

31. Based on the foregoing, Learned counsel for the 68th Defendant has therefore submitted that the Plaintiff/Respondent's claim pertaining to the alienation of portions of the suit property to the 68th Defendant is therefore time barred.

32. Seventhly, Counsel for the 68th Defendant has also submitted that to the extent that the suit property has previously been litigated upon by Continental Developers Limited, the subject suit, which is premised on a Judgment already delivered, is therefore barred by the provisions of Section 4(4) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

33. In view of the foregoing, counsel for the 68th Defendant/Applicant has therefore contended that the entire suit, filed and/or mounted by the Plaintiff/Respondent herein, is therefore not only misconceived, but constitutes an abuse of the Due process of the court and is therefore legally untenable.

34. In a nutshell, the 68th Defendant/Applicant has implored the Court to find and hold that same is an abuse of the Due process of the court and thus ought to be struck out with Costs.

b. Submissions By the 69thDefendant/applicant

35. Vide Submissions dated the 20th May 2022 and 16th June 2022, respectively, Counsel for the 69th Defendant/Applicant has submitted that the subjects suit, touching and or concerning the suit properties, replicates and/or resembles to the previous suit, namely, Nairobi HCC No. 55 of 2002 between Continental Developers Limited v Donholm Jacaranda Housing Scheme & Another, which suit was dismissed for want of prosecution.

36. Counsel has further submitted that the dismissal of the previous suit, namely, Nairobi HCC No. 55 of 2002 for want of prosecution, is tantamount to a determination on Merits and hence such a determination would render the subject suit Res-judicata.

37. Secondly, Counsel has further submitted that though the previous litigation was by Continental Developers Limited, it is evident that Continental Developers Ltd have engaged in a fraudulent scheme, whereby same has technically ceded her rights to the Plaintiff herein, merely to change the complexion of the parties, yet the issue herein remain the same.

38. In this regard,Learned counsel for the 69th Defendant/Applicant has contended that by purporting to change the character of the Plaintiff/Respondent and the details of the suit properties, the Plaintiff herein was seeking to evade the snares of the doctrine of Res-judicata.

39. Thirdly, Counsel for the 69th Defendant/Applicant has submitted that the issues pertaining to and/or concerning the amalgamation and subsequent subdivisions giving rise to the suit properties, was the subject of proceedings before the National Land Commission, which found and held that the impugned amalgamation and the consequential subdivision giving rise to the suit properties were illegal and untenable.

40. Premised on the foregoing, Learned Counsel for the 69th Defendant has therefore submitted that the issue having been dealt with by the National Land Commission, this court is therefore deprived of the requisite jurisdiction to entertain and or adjudicate upon the subject suit.

41. Fourthly, counsel for the 69th Defendant has also submitted that there exists another suit, namely, Nairobi HCC No. 336 of 2003 between Stanley Mwaura & Another versus Continental Developers Ltd, which suit touches on and/or concerns ownership of L.R No Nairobi Block 82/7333. For clarity, it has been pointed out that the 68th Defendant herein is the Defendant in the said suit.

42. Nevertheless, Counsel has added that the said suit is still pending hearing and determination and hence the subject suit is barred by the Doctrine of Res sub-judice and therefore contrary to the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

43. Finally, Counsel for the 69th Defendant/Applicant has submitted that the mere changing of the Parties of the subject matter, does not take the dispute outside the scope of the doctrine of Res-judicata.

44. Based on the foregoing, counsel for the 69th Defendant has therefore contended that the suit before the court is barred by the Doctrine of Res-judicata as well as Res sub-judice and same ought to be struck out.

Plaintiff's/respondent's Submissions:

45. The Plaintiff/Respondent filed written submissions dated the 13th April 2022 and same has raised five pertinent issues for determination. First and foremost, the Plaintiff/Respondent has submitted that the issues which have been raised at the foot of the Preliminary Objection by both the 68th and 69th Defendants/Applicants, do not exhibits pure issues of law, which can be canvased and/or disposed of in limine.

46. Premised on the foregoing, counsel for the Plaintiff/Respondent has therefore contended that the two sets of preliminary objections are therefore premature, misconceived and legally untenable.

47. Secondly, Learned counsel has further submitted that the Doctrine of Res-judicata which has been amplified by the 68th and 69th Defendants, does not apply to the instant suit.

48. For clarity, Counsel for the Plaintiff/Respondent pointed out that the previous suit, which has been alluded to, namely, HCC No. 55 of 2002, touched on and/or concerned separate and distinct parties, to the extent that the Plaintiff herein was never a party thereto.

49. In any event, Counsel for the Plaintiff/Respondent has further contended that the issues that were dealt with in the previous suit were also separate and distinct from the ones in the subject matter.

50. Further, it has also been pointed out that the previous suit, namely, ELC HCC 55 of 2002, was similarly never heard and determined on merits. In this regard, counsel for the Plaintiff/Respondent has pointed out that the said suit was struck out on account of luck of extraction and service of summons.

51. Thirdly, Counsel for the Plaintiff/Respondent has submitted that the issues raised vide ELC JR No 20 of 2018, are also separate and distinct from the subject dispute. For clarity, it was pointed out that JR No. 20 0f 2018 concerned the quashing of the proceedings before the National Land Commission, which related to private properties and to which it was contended that the National Land Commission had no jurisdiction to deal with and or entertain.

52. Fourthly, counsel for the Plaintiff/Respondent submitted that the current Plaintiff/Applicant bought and acquired title to the suit properties on or about the year 2003 and thereafter took vacant possession in respect of same. For clarity, counsel has pointed out that at the time when the current Plaintiff bought and took possession of the suit property, neither the 68th nor the 69th Defendants, were in occupation of the suit properties.

53. Consequently, Learned counsel has submitted that the issues of the suit being defeated vide the provisions of Section 7 of the *Limitation of Actions Act*, does not therefore arise, either in the manner alluded to or at all.

54. Fifthly, it has been submitted that the impugned encroachment and the cause of action complained of arose and/or accrued when members of 68th and 69th Defendants procured and obtained titles, which were supper imposed onto the suit property by way of fraud.

55. In this regard, counsel has submitted that the fraud complained of arose and/or accrued in the year 2018 and hence the provisions of Section 4(2) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya, are irrelevant and inapplicable.

56. Finally, counsel for the Plaintiff submitted that the cause of action herein has nothing to do with the proceedings and (sic) decision that was issued vide Nairobi HCC NO. 55 of 2002. Consequently, it has been stated that the subject suit is neither founded nor anchored on the previous judgment, either as alleged or at all.

57. Contrarily, counsel has submitted that the subject suit is premised and/or based on the fraudulent alienation and issuance of titles to various Defendants, inter alia, the 68th and 69th Defendants, albeit over portions of the suit property, without the knowledge and permission of the Plaintiff/Respondent.

58. Premised on the foregoing, Counsel foR the Plaintiff/Respondent has theRefore submitted that both the Preliminary Objections and the Applications, proffered on behalf of 68th and 69th Defendants, are therefore misconceived and devoid of any legal basis.

a. Submissions By The 63rd, 64th, 65th and 66th Defendants/applicants

59. On behalf of the said Defendants, the Honourable Attorney General filed written submissions dated the 9th May 2022 and in respect of which Learned counsel has itemized four issues for consideration.

60. First and foremost, learned counsel Mr. Allan Kamau submitted that the doctrine of Res-judicata does not arise where the issues involved in the previous suit and the current are dis-similar. In this regard, learned counsel pointed out that the issues which were raised vide Nairobi HCC No 55 of 2002, were separate and distinct from the issues beforehand.

61. Further, learned counsel also submitted that the current Plaintiff was also not a Party to the previous suit, namely, Nairobi HCC No. 55 of 2002. Besides, it has also been pointed out that neither were the Defendants represented by the Attorney General parties to the previous suit.

62. At any rate, Counsel further submitted that Nairobi HCC No. 55 of 2002, was in any event not heard and determined on merits. For clarity, counsel has pointed out that the said suit, whose issues were dissimilar to the subject one was admittedly struck out for want of Summons and for being an abuse of the Due process of the court vide the Order rendered on the 24th November 2009.

63. Consequently, it was the considered submissions on behalf of the Attorney General that the Doctrine of Res-Judicata, which has been raised by the 68th and 69th Defendants is therefore in applicable to and in respect of the subject proceedings.

64. The second issue that was raised and ventilated on behalf of the Attorney General was that the Doctrine of Res sub-judice similarly, does not apply in respect of the subject matter insofar as the suit, namely, Nairobi HCC ELC No. 336 of 2003, which forms the basis of sub-judice, does not concern the same Parties in respect of the subject matter.

65. For the avoidance of doubt, learned counsel on behalf of the Attorney General pointed out that before this Court can invoke and or rely on the Doctrine of sub-judice, it must be pointed out that there exists a similar suit and touching on the same dispute, either before the same court or any other court of Competent Jurisdiction.

66. Consequently, learned counsel for the Attorney General submitted that as pertains to the subject matter, no material has been placed before the court to show that indeed HCC No. 336 of 2003, which is alluded to, touches on and/or concerns the same issues as the ones which are before the Honorable court.

67. Premised on the foregoing, learned counsel for the Attorney General therefore submitted that no basis had been laid to enable the court to come to a conclusion that the subject suit is barred by the Rule of sub-judice, on the basis of a previous suit, or at all.

68. The third point that was raised and ventilated by learned counsel for the Attorney General was whether the subject suit filed by and or on behalf of the Plaintiff is barred by dint of Section 4(1) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya, which underpins the duration under which a claim anchored on fraud must be filed.

69. On behalf of the Attorney General, learned counsel pointed out that the cause of action in respect of the subject matter is stated to have arisen or accrued on or about the year 2018, when the fraudulent titles which are complained against were stated to have been issued.

70. Based on the fact that the cause of action of fraud is stated to have arisen on or about the year 2018, it was submitted that the subject suit was timeously filed and/or lodged in accordance with the Limitations of Actions Act, Chapter 22, Laws of Kenya.

71. Lastly, learned counsel on behalf of the Attorney General submitted that striking out of a suit is draconian measure and that same ought to be resorted to only in the clearest of cases, where the court discerns that there is certainly no iota or semblance of a triable issue.

72. In any event, learned counsel further added that prior to and/or before striking out a suit, the court must be convinced that the impugned suit is hopelessly or irredeemably bad and hence beyond redemption vide any Amendment.

73. Be that as it may, Learned counsel pointed out that the subject suit which has raised a plethora of issues and essentially; touching on the manner the titles claimed by the 68th and 69th Defendant/Applicants arose, cannot be classified as an abuse of the Due process of the Court.

Issues For Determination:

74. Having reviewed the two Applications, the affidavit in support thereto, the responses filed in respect thereof; and having reviewed the two sets of Preliminary Objections filed and having considered the various submissions and the attendant case law filed on behalf of the various Parties, the following issues are pertinent and do arise for determination.

    i. Whether the subject suit is barred by the Doctrine of Res-judicata by dint of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

    ii. Whether the current suit is barred by the Rule of Res Sub-judice vide Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

    iii. Whether the subject suit was filed outside the prescribed duration under the law and is thus contrary to the Provision of Sections 4(2) and Section 7 of the *Limitation of Actions Act*.

    iv. Whether the suit by the Plaintiff constitutes and/or amounts to an abuse of the Due Process of the Court.

Analysis and Determination:

Issue Number 1 Whether the subject suit is barred by the Doctrine of Res-judicata by dint of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

75. The 68th and 69th Defendants have assailed the suit filed by and/or on behalf of the Plaintiff/ Respondent on the basis that same replicates and or raises substantially the same issue for determination as those that were raised, canvased and dealt with vide a previous suit, namely, Nairobi HCC No. 55 of 2002.

76. It has further been contended that because the issues herein are similar or substantially similar to the ones which were raised in the previous suit, then the current suit is barred and prohibited by the Doctrine of Res-judicata. In this regard, the 68th and 69th Defendants have therefore implored the court to strike out the suit and to permanently non-suit the Plaintiff/Respondent from reverting to court on the same issues that have hitherto been determined.

77. Premised on the contention that the subject suit is prohibited by the Doctrine of Res-judicata, it is therefore appropriate to discern the legal import, tenor and scope of the Doctrine of Res Judicata.

78. In the premises, the starting point is by appreciating the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. For convenience, it is appropriate to reproduce the said provisions and same are reproduced as hereunder;

> 7. Res judicata:
>
> 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.
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> Explanation —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> Explanation —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
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> Explanation —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
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> Explanation —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

79. Other than the foregoing provisions, it is also imperative to appreciate that the Doctrine of Res-Judicata has received extensive explication and deliberations by various courts, inter-alia, the Court of Appeal, as well as the Supreme Court of Kenya.

80. In view of the foregoing, I am obliged to refer to just a few. First and foremost, I beg to invoke the holding of the Court of Appeal in the case of John Florence Maritime Ltd v The Cabinet Secretary, Transport, Infrastructure & Public Works & Another (2015)eKLR, where the Court of Appeal stated as hereunder;

> " 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 and Others [2005] 1 EA 83.
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> Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-
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> > ".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....."

81. The Doctrine of Res-Judicata was re-visited by the Court of Appeal in the case of Kenya Commercial Bank Ltd versus Benjoh Amalgamated Ltd (2017) eKLR, where the Court of Appeal held as herein;

> 'Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu (1978) KLR 69* Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra)stated:
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> > " Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence,

inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time" (emphasis added).

82. On its part, the Supreme court of Kenya rendered itself on the import, tenor and scope of the Doctrine of Res-judicata in the decision of Kenya Commercial Bank Limited versus Muiri Coffee Estate Limited & another [2016] eKLR, where the Court observed as hereunder;

(57) The essence of the Res judicata doctrine is further explicated by Wigram, V-C in Henderson v. Henderson (1843) 67 E.R. 313, as follows:

> " ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case¾to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

83. Having taken cognizance of the foregoing corpus of case law which have duly and exhaustively delineated the scope and tenor of the Doctrine of Res-judicata, it is now appropriate to interrogate whether the issues raised herein replicate and or are substantially the same as the issue which were raised in the previous suits.

84. To this end, it is imperative to reproduce the crux of the suit vide Nairobi HCC NO. 55 of 2002. For clarity, paragraph 4 of the said Plaint read as hereunder;

4: "at all material time the Plaintiff is the registered owner of the suit property known as Nairobi Block 82/4265 by virtue of a lease from the government of Kenya for a period of 99 years commencing from the 1st July 1977 as well as owners of L.R No's Nairobi/Block 82/4265, Nairobi/Block 82/7836 to 7855 and Nairobi/Block 7814, 6194 and 7856 (hereinafter referred to as the suit premises)"

85. Other than the foregoing, it is also appropriate to reproduce the reliefs that were sought at the foot of the said suit. For convenience same were as hereunder;

    i. An injunction do issue restraining the Defendants, their agents, servants or any other person trespassing upon the suit premises.

    ii. General damages on trespass.

    iii. Interest on (ii) at court rates from the date of filing of suit.

86. Having reproduced the pertinent aspects of the previous suit, it is now appropriate to compare and contrast the issues which were raised therein as against the issues raised in the subject suit.

87. To my mind, the issues and the details of the properties which were being addressed and/or deliberated upon in the previous suit are separate and distinct from the issues that underpin the current suit by the Plaintiff/Respondent.

88. Secondly, it is also important to appreciate that the Plaintiff in the previous suit was between Continental Developers Ltd versus Donholm Jacaranda Housing Scheme and Savanah Jua Kali Association.

89. Clearly, the Plaintiff herein, whose stakes a claim to ownership of the suit properties, which I have pointed out are different from the suit property in the previous suit, was not a Party to the said suit.

90. In any event, the affidavit of Patrobas Awino in support of the Application dated the 18th March 2022 has also clearly pointed out that the Plaintiff herein was neither a Party to Nairobi HCC No. 55 of 2002 nor HCC NO. 336 of 2003, which are the suits that premised the contention based on Doctrine of Res-judicata.

91. To be able to understand the import of the supporting affidavit, it is appropriate to reproduce paragraphs 18 and 20 thereof. For ease of reference, same are reproduced as hereunder;

    18: "That it is notable that the two cases being Nairobi HCC 55 of 2002 (against the 69th Defendant) and HCC No. 336 of 2003 (against the Applicant) all proceeded up to 2010, the Plaintiff/Respondent herein was not a party and all along ownership of the suit property was claimed by CDL who in any case do not have any title/registration douments"

    20: "That the dismissal of HCC NO. 55 of 2010 (the quite distince from 55 of 2002) happened in 2010 and at no time was the Plaintiff/Respondent herein ever a party to the said suit and CDL claimed that it was the proprietor of the suit property which claim subsisted until 2010 when his suit was dismissed"

92. Without belaboring the point, there is no gainsaying that the 68th Defendant/Applicant concedes that the Plaintiff/Respondent was never a Party to the previous suit. In this regard, how then can the same 68th Defendant/Applicant, now turn and purport that indeed the Plaintiff/Respondent herein can be bound by the proceedings and/or outcome to which same was neither Party to nor privy to.

93. Other than the foregoing, there is the third critical ingredient which one must establish or satisfy, before the Doctrine of Res-judicata can be successfully invoked and/ or operationalized.

94. For clarity, the said 3rd ingredient is the necessity to show that the purported previous suit, if any, was indeed heard and determined on merits by a court of competent Jurisdiction.

95. Towards vindicating that the previous suit, for which the current Plaintiff was not a party, was determined on merits, the 68th and 69th Defendants have placed before this court a copy of the duly

extracted order issued on the 24th November 2009 by Hon Justice Mbogholi Msagah, Judge (as he then was).

96. To my mind, the order that was made and issued by the judge read as follows;

    i. This suit be and is hereby struck out for being an abuse of the due process of the court.

    ii. The costs be and are hereby awarded to the 2nd Defendant/Applicant.

97. Quite contrary to the averments contained in the two sets of the supporting affidavits filed by the 68th and 69th Defendants/Applicants, who have contended that the previous suit was dismissed, it is evident that the said suit was struck out for reasons that have been clearly indicated.

98. To my mind, there is a serious dichotomy between striking out of a suit and dismissing a suit. The former arises where the impugned suit suffers from a legal defect or infraction and hence same is not heard on merits.

99. Contrarily, a suit is only dismissed after same has been heard on its merits and the Rights of the Parties thereto effectively and effectually determined by the court.

100. Premised on the foregoing dichotomy, where a suit is struck out for whatever reason, the victim of the striking out order, is at liberty to revert to court, subject to the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

101. On the other hand, where a suit is dismissed on merit, the victim and or aggrieved party can only mount an Appeal or where applicable apply for Review.

102. Be that as it may, the doctrine of Res-judicata could only come into play where a suit has been heard and determined on merits and not where same was struck out, the latter, being situation portrayed vide the extracted Order issued by the Court therein.

103. In the premises, even if I would have found and held that the Plaintiff/Respondent herein was a Party to the previous suit (which is not the case), I would still have found and held that the Doctrine of res-judicata does not apply to and in respect of the subject suit.

104. Premised on the foregoing observation, I am of the considered view that the invocation and ventilation of the Doctrine of Res-judicata by the 68th and 69th Defendants herein was anchored on misapprehension of the underlying ingredients, which ought to have been proven.

105. In a nutshell, my answer to issue number One, is that the Doctrine of Res-judicata was improperly invoked and is in any event, is inapplicable to and in respect of the suit.

Issue Number 2 Whether the current suit is barred by the rule of Res sub-judice vide Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

106. In respect of the second issue herein, it is important to appreciate that the Doctrine of Res sub-judice is anchored and or predicated on the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

107. Consequently, the starting point to understanding and appreciating the import and tenor thereof is by reproducing the foregoing provisions. For convenience the same are reproduced as hereunder;

    6. Stay of suit:

    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.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

108. Other than the foregoing reproduction, it would also be appropriate to highlight the holding of the Supreme court vide Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)[1] where the Court had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

> (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.

109. Having underscored the foundation upon which the rule of Res sub-judice is anchored, it is now imperative to venture and ascertain whether same applies to and/or in respect of the subject suit.

110. It was contended by the 69th Defendant that there existed a civil suit, namely Nairobi HCC No. 336 of 2003, which was filed against the 68th Defendant herein and which touched on and/or concerned the suit property.

111. Nevertheless, despite having adverted to the existence of the said suit, namely Nairobi HCC No 336 of 2003, the counsel for the 69th Defendant however conveniently, failed to exhibit copies of the pleadings and/or any orders arising therefrom.

112. For the avoidance of doubt, the existence of (sic) Nairobi HCC NO. 55 of 2002 and 336 of 2003, have been alluded to vide Paragraph 4 of the Further affidavit sworn on the 16th may 2022, but thereafter only the pleadings relating to HCC NO. 55 of 2002, have been annexed and marked as "AK 1" and not otherwise.

113. It is not clear, why counsel for the 69th Defendant would fail to annex and/or exhibit such a critical pleading, if truly the issues thereto replicated and or were substantially the same as the issues in the subject matter,.

114. Suffice it to point out that the doctrine of Res sub judice, would require this court to compare and contrast the pleadings in the previous suit, if any, as against the pleadings in the current suit, to be able to ascertain their similarities or otherwise.

115. Consequently, in a situation where pleadings of the main suit are conveniently, albeit deliberately excluded from the court, it becomes difficult, nay impossible to undertake the comparison and thereafter came up with a conscious and deliberate finding on the issue of similarity or otherwise.

116. To my mind, the failure to exhibit and or annex the pleadings in respect of the said suit, which was purported to be still in existence, attracts and adverse inference and essentially underscores the fact that the allegations pertaining to (sic) the alleged similarity, are non- existent.

117. Notwithstanding the foregoing, it is also appropriate to mention that the absence of the pleadings in respect of the previous suit, are fatal to a determination as to the applicability or otherwise of the rule of Res sub-judice.

118. In this regard, I can do no better than to quote the apt observation of the Supreme Court in the Decision in the case of John Florence Maritime Services Limited & another versus Cabinet Secretary for Transport and Infrastructure & 3 others [2019] eKLR, where the court stated as hereunder;

> "It is contended that the respondents raised the issue of res judicata, which issue needed material determination by a court of law through presentation and examination of material evidence, something that the Petitioner alleges was not done by the High Court. Further it is contended that while there were allegations of the Appellants being parties to the previous case, no material evidence was provided to confirm that indeed the Appellants were parties."

119. Lastly, whereas the 69th Defendant contends that Nairobi HCC No. 336 of 2203 (whose pleadings have been withheld from the court), is still pending, the 68th Defendant against whom the said suit is said to have been filed has stated vide paragraph 18 of the supporting affidavit that the said suit proceeded up to 2010. Clearly, the said suit, if indeed it existed terminated in the year 2010.

120. Be that as it may, something is not adding up, is it that the purported suit vide Nairobi HCC No. 336 of 2003 is still pending as posited by the 69th Defendant or is it, that is is terminated in 2010 as stated by the 68th Defendant.

121. To my mind, there is some doubt as to the existence, if any and the status of Nairobi HCC No. 336 of 2003, which doubt can only be addressed, interrogated and investigated vide plenary hearing.

122. Finally, I also wish to point out, that even if I had found and held that the subject suit was sub-judice (sic) Nairobi HCC No. 336 of 2003 (whose pleadings have been withheld from the court), yet again I would not have proceeded to strike out the suit, premised on the Rule on Sub Judice.

123. Perhaps, I need to state it clearly, that the doctrine of Res sub-judice can only be used for staying the subsequent suit, pending the hearing and determination of the prior and previous suit and not otherwise.

124. Put differently, the Rule on Res Sub-judice cannot be applied for purposes of striking a suit, either in the manner impleaded by the 69th Defendant or at all. In this regard, I beseech counsel for the 69th Defendant to have a second glance at the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, and to discern the under noted import and tenor therein.

125. Be that as it may, I come to the conclusion that the Rule on sub-judice, is similarly, inapplicable to and in respect of the subject suit.

Issue Number 3 Whether the subject suit was filed outside the prescribed duration under the law and is thus contrary to the Provision of Sections 4(2) and Section 7 of the *Limitation of Actions Act*.

126. Other than the invocation and reliance on the Doctrine of Res-judicata and the twin sister, namely, the Rule on Res-sub-judice, the 68th and 69th Defendants, have also sought to negate the subject suit on the basis that same is barred by Sections 4(2) and 7 of the *Limitation of Actions Act*, Chapter 21 Laws of Kenya.

127. To discern whether or not the suit has been filed outside the statutory duration, one needs to look at the Pleadings filed by the Plaintiff, in this case, the Plaint filed and no other document.

128. Premised on the foregoing it is now appropriate to reproduce Paragraphs 18 and 19 of the Plaint dated the 27th June 2018, which states as hereunder;

> 18: "The Plaintiff has had possession of the suit properties for over 15 years after acquiring them in 2003 and has complied with all the terms and conditions of ownership including payments of rates to the Nairobi county government to date"
>
> 19: "Recently, on or about the 27th April 2018, the 1st to 67th Defendants purported to acquire illegal titles as enumerated at paragraph 21 below and recently with no color of right have threatened to disposes the Plaintiff"

129. My reading of the aforesaid paragraphs contained in the plaint connotes that the impugned actions and/or omissions, which premised the filing of the suit herein arose and/or accrued in April 2018 and not otherwise.

130. I must confess that I am not Einstein, the reputed mathematician, but my elementary knowledge of Mathematics drive me to the conclusion that by the time the subject suit was filed only Two Months had accrued and/or lapsed from the date of the cause of action.

131. In the premises, I am unable to find any substance, in the contention by the 68th and 69th Defendants that the Plaintiff's suit is barred or prohibited by dint of Section 4(2) and 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

132. Notwithstanding the foregoing, it is also appropriate to recall that the issues of limitations of actions Act, were raised vide preliminary objections and therefore this court is not called upon to interrogate any facts and issues of evidence, either as contained in the Witness Statements and/or affidavits filed by the 68th and 69th Defendants.

133. To underscore what constitutes a Preliminary objection, it suffices to quote the holding in the case of Oraro v Mbajja [2005] eKLR , where the court stated as hereunder;

> "... I think the principle is abundantly clear. A preliminary objection correctly understood is now identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.
>
> Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am

in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

134. Be that as it may, I come to the conclusion that the Plaintiff's suit herein was timeously filed and or lodged before the court and same is not therefore barred by the impugned provisions of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Issue Number 4 Whether the suit by the Plaintiff constitute and/or amounts to an abuse of the Due Process of the Court.

135. The Plaintiff/Respondent herein has contended that despite being the lawful and registered proprietor of the suit properties, the 1st to the 62nd Defendants, have purported to acquire illegal titles over and in respect of portions thereof.

136. Further the Plaintiff has also contended that the impugned titles which have been stated to have been acquired by the 1st to 62nd Defendants are said to be superimposed on the suit properties.

137. On the other hand, the Honorable Attorney General who represents the 63rd, 64th, 65th and 66th Defendants has on his part filed a Statement of Defense, which at paragraphs 2, 3, 4 and 6, confirm that the suit properties belong to the Plaintiff /Respondent.

138. Other than the foregoing, the Attorney General has also stated at paragraph 7 that the purported subdivision of the suit property and the creation of the impugned titles that are claimed by the 1st to 62ND Defendants, as well as the 68th and 69th Defendants, are unlawful, illegal and void.

139. Be that as it may, the 68th and 69th Defendants had also contended that the ownership of what comprises the suit property had been addressed and finalized by the National Land Commission, who is the 70th Defendant herein.

140. However, the 70th Defendant herein has filed a Statement of Defense and same has stated at paragraph 4 thereof, that it was not involved in the alienation of any land to and in favor of the 1st to the 62nd and 68th to 69th Defendants.

141. At any rate, the National Land Commission has further contended that though a dispute was raised before same touching and/or concerning the subject suit property same was however unable to entertain and or dispose of the dispute on the basis that her mandate vide Section 14(1) of the *National Land Commission Act*, No. 5 of 2012, lapsed and or expired before the Dispute could be determined.

142. From the foregoing, it is evident and/.or apparent that there are plausible and pertinent issues which required to be investigated before this court can effectively come to an informed conclusion, pertaining to the propriety of the Titles claimed by the Plaintiff herein.

143. Such interrogations and or investigations, can only be carried out and/or conducted during a plenary hearing and not vide summary process, like the one advocated for and applied by the 68th and 69th Defendants.

144. Finally, it is appropriate to note that where a court is confronted with an Application for striking out of pleadings, the Court is not enjoined to carryout a minute and microscopic analysis of the factual issues, either in the manner that the court was being invited to do herein or at all.

145. For clarity, it must be recalled that such examination and/or analysis belongs to the trial judge and not otherwise. In this regard, it would be pre-mature to venture into the arena of Disputed facts and try to resolve same vide the Summary process herein.

146. To buttress the foregoing statement of the law, it is appropriate to restate the holding of the Court of Appeal in the case of Industrial and Commercial Development Corporation v Daber Enterprises Limited [2000] eKLR, where the court observed as hereunder;

> Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to crossexamination - see the case of Wenlock v. Moloney and Others , [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.

147. The dictum in the foregoing decision, underscores exactly what the 68th and 69th Defendants herein were attempting to achieve. For clarity, same were seeking to enjoin the court to carryout and/or undertake a microscopic analysis of the huge and voluminous documentation, comprising of more than 4 volumes, with a view to striking out a suit that ipso facto raises very serious factual issues worthy of a plenary hearing.

Final Disposition:

148. Having reviewed the various issues for determination that were isolated and/or highlighted in the body of the Ruling herein, it is now appropriate to bring the subject Ruling to an end and essentially, to render the Final Orders.

149. Nevertheless, in the course of going through the ruling, it must have become apparent that the two applications and the two sets of Preliminary objections that were filed on behalf of the 68th and 69th Defendants, are premature, misconceived and legally untenable.

150. Consequently and in the premises, I am compelled to make the following orders;

i. The Application dated 18th March 2022 be and is hereby Dismissed.

ii. The Application dated the 11th March 2022 be and is hereby Dismissed.

iii. The Preliminary objection dated the 21st March 2022 be and is hereby Dismissed.

iv. The Preliminary Objection dated the 11th March 2022 be and is by Dismissed.

v. Costs in respect of two Applications and the two (2) sets Preliminary Objection be and are hereby awarded to the Plaintiff, 63rd, 64th , 65th and 70th Defendants and same shall be taxed and certified by the taxing officer of the court.

151. 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;

Joan Court Assistant

Mr. George Sichangi for the Plaintiff

Mr. George Gilbert for the 68th Defendant/Applicant

Ms. Herine Kabita for the 69th Defendant/Applicant

Mr. Allan Kamau for the 63rd, 64th, 65th and 66th Defendants

Mrz. Seth Ojienda for the 67th Defendant.

Mr. S Mbuthia for the 70th Defendant