



**Mburu (Suing as the Administrator of the Estate of Rosita Walter Mburu)
v National Social Security Fund & 4 others (Environment & Land Petition
76 of 2018) [2022] KEELC 13635 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13635 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 76 OF 2018
MD MWANGI, J
OCTOBER 11, 2022
IN THE MATTER OF ARTICLES 2,3,21(1),23,27(1)(2)(4) AND
(5),28, 35 (1)(B),
40(1),3, (4) & (6), 43(1)(C),47(1)& (2), 48, 50(1), 60(1)(B)
&(D), 64, 165(3) (B),258(1),
259 AND 260 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF A PETITION BY WALTER JOE MBURU
(AS THE
ADMINISTRATOR OF THE ESTATE OF ROSITA WALTER
MBURU)
AND
IN THE MATTER OF THE CONTRAVENTION AND
INFRINGEMENT OF FUNDAMENTAL RIGHTS

BETWEEN

WALTER JOE MBURU PETITIONER
SUING AS THE ADMINISTRATOR OF THE ESTATE OF ROSITA WALTER
MBURU

AND

NATIONAL SOCIAL SECURITY FUND 1ST RESPONDENT
COMMISSIONER OF LANDS AND REGISTRAR OF TITLES 2ND
RESPONDENT



CABINET SECRETARY MINISTRY OF DEFENCE 3RD RESPONDENT
DEPARTMENT OF DEFENCE 4TH RESPONDENT
HON. ATTORNEY GENERAL 5TH RESPONDENT

*(In respect of the Notice of Motion Application dated 3rd September,
2018 and a Notice of Preliminary Objection dated 10th January, 2022)*

RULING

Background

1. Coming up for determination is a notice of motion application dated September 3, 2018 by the 1st respondent and a notice of preliminary objection dated January 10, 2022 by the 3rd and 4th respondents who are represented by the office of the Attorney General.
2. The application by the 1st respondent seeks for orders that;
 - a. Spent
 - b. Spent
 - c. The petition herein as relates to the 1st respondent be struck out and/or dismissed with costs to the 1st respondent.
 - d. In the alternative, the 1st respondent's name be removed or expunged and the petition against it dismissed.
3. The application is premised on the grounds on the face of it and is supported by the affidavit of Carol Rakama Odera, the legal officer of the 1st respondent, sworn on the September 3, 2018. She deposes that the basis of the petitioner's petition herein is an alleged agreement of sale of land dated August 30, 1968 between the petitioner's deceased's wife, Rosita Walter Mburu and one Abdul Shakoore Sheikh.
4. The deponent further states that the petitioner herein had filed a suit way back in the year 1999 being High Court civil case No 1191 of 1999, over the same subject matter as in this petition, which suit was struck out by Ransley, Commissioner of Assize (as he then was) for being time barred *vide* the ruling delivered on the March 14, 2002. A decree was subsequently issued in the matter on the July 22, 2002. The petitioner being dissatisfied with the said ruling preferred an appeal in the Court of Appeal, being civil appeal No 195 of 2002. The Court of Appeal similarly dismissed the petitioner's appeal in its judgement delivered on the March 20, 2015.
5. The deponent states that petitioner herein had attempted to adduce additional evidence before the Court of Appeal but the court declined. The deponent asserts that it is the said evidence that the petitioner is now trying to covertly introduce now through this petition.
6. The deponent deposes that the petitioner has yet another suit before this court being Nairobi ELC No 811 of 2013. The suit is still pending determination in court. The petitioner has allegedly also filed a complaint with the National Land Commission in respect of the same subject matter.
7. The deponent therefore prays that the suit be dismissed on the basis that the filing of the petition amounts to an abuse of court process in view of the previous suit that was dismissed by the High Court and the dismissal upheld by the Court of Appeal, and the other pending suit being Nairobi ELC No



811 of 2013 which principally raises similar issues. The 1st respondent maintains that this is against the law and public policy. In essence, the petitioner seeks to circumvent the orders of the Court of Appeal and re-litigate again avoiding the issue of the suit being time barred.

8. The 1st respondent further argues that the petitioner has concealed material facts including the outcome of the Civil Appeal No 195 of 2002, which renders his petition a non-starter.
9. The 1st respondent's application was opposed by the petitioner who filed a replying affidavit deponed by himself on the March 31, 2022.

Replying Affidavit

10. In his affidavit, the petitioner indeed confirms that the petition arises out of the sale agreement dated August 30, 1968 between his late wife, Rosita Walter Mburu and Abdul Raof Sheikh. He however, alleges that sometime back in 1989, the 1st defendant/respondent fraudulently sold and transferred the suit property to the 2nd defendant at a consideration of Kshs 26,250,000/= and five days later, the 2nd defendant too fraudulently sold and transferred the suit property to the 3rd defendant at a consideration of Kshs 63,000,000/=.
11. The petitioner alleges that that was the reason why he filed the suit Nairobi ELC Case No 811 of 2013 (initially HCCC 1191 of 1999) for recovery of the suit land seeking a declaration that the sale and transfer of LR No 209/324/3 by the 1st defendant to the 2nd defendant and subsequently to the 3rd and finally to the 5th defendant was invalid, null and void hence should be nullified.
12. The petitioner deposed that he had instituted this constitutional petition in 2014 to enforce his constitutional rights which had been infringed and/or violated. He was seeking an order of injunction against the 4th defendant, Department of Defence to prohibit any dealings whatsoever, occupation and or developments within the suit property as well as a declaration that the suit property was unlawfully and illegally transferred and sold by the 1st respondent to the 4th respondent. He opined that the issues raised in the petition could not have been raised in the previous suit, Nairobi ELC Case No 811 of 2013.
13. The petitioner argued that the plea of *res-judicata* only applies where a suit has been heard and judgement delivered on merit. In the High Court case, HCCC 1191 of 1999, the court only dealt with the issue of limitation of time and did not hear the suit on its merits. He further asserted that there is no time limit for filing of a constitutional petition and that the legal provisions in the [Limitation of Acts Act](#) are not applicable and do not apply to violation of rights and freedoms guaranteed under the [Constitution](#). His petition further cannot be said to be an abuse of court process as there is a reasonable cause of action against the 1st respondent.
14. The petitioner further contended that judicial precedence dictates that no suit ought to be summarily dismissed unless it appears 'so hopeless that it plainly and obviously discloses no reasonable cause of action' and that it cannot be cured through an amendment. The application by the 1st respondent is therefore frivolous, vexatious and an abuse of the court process aimed at curtailing the petitioner's rights over the suit property.

Further Affidavit

15. The 1st respondent/applicant filed a further affidavit deponed by one Carol Rakama Odera sworn on the May 24, 2022. The deponent accused the petitioner of grossly misrepresenting the facts and the law in his replying affidavit while concealing material facts. She stated that the fact that the petitioner is suing as the administrator of the estate of Rosita Walter Mburu is proof that the petition is not about



the violation of any fundamental rights but is a continuation of the litigation over the suit property despite the fact that it has already been determined by the High Court and the Court of Appeal. That the reference to the sale agreement dated August 30, 1968 confirms that it is the substratum of the petition.

16. The legal officer of the 1st respondent opined that the petitioner had intentionally omitted to name the 1st and 2nd defendants in HCCC 1191 of 1999 being Abdul Shakour Sheikh (as Administrator of Estate of Sheikh Fazal Noorida Ilahi) and Opus Investment Limited, the initial registered owners of the suit property and from whom the 1st respondent had purchased the suit property for value without notice; in order to deny the court an opportunity to hear from them about their role in the transfer of the title to the suit property to the 1st respondent.
17. She further deposes that the prayers sought in the petition derive from matters the subject of the proceedings previously before the High Court and Court of Appeal and that were already determined upon the declaration that the initial suit was incompetent on a pure point of law which in itself legally and finally determined the dispute.
18. The deponent deposes that the petitioner in his petition seeks nothing more but recovery of the suit property and not remedies for alleged violations of constitutional rights. The petitioner is re-litigating against the 1st respondent in spite of the previous court decisions over the same subject matter.

Replying Affidavit and Notice of Preliminary Objection by the 3rd and 4th Defendants

19. The 3rd and 4th respondents on their part filed both a replying affidavit and a preliminary objection to the petition herein dated the January 10, 2022 and filed on the January 11, 2022 in response to the petition.
20. In their preliminary objection, the 3rd and 4th respondent pray that the petition be dismissed in its entirety, with costs on the grounds that;
 - a. The cause of action is time barred pursuant to section 3(1) of the [Public Authorities Limitations Act](#), cap 39 of the Laws of Kenya.
 - b. The cause of action is barred by the doctrine of *res judicata*.
 - c. The petition contravenes the trite law enunciated in the locus classicus case of [Anarita Karimi Njeru v Republic](#) (1979) eKLR.
 - d. The honourable court lacks the jurisdiction to entertain this suit.
21. The replying affidavit was sworn by one B.K Tororei on February 11, 2022. The deponent ‘adopts, associates with and reiterates’ the contents of the supporting affidavit of Carol Rakama Odera dated September 3, 2018.
22. The gist of the replying affidavit by B.K Tororei is that the petitioner’s case, now as in 1999 (HCCC 1191 of 1999) revolves around an agreement of sale dated August 30, 1968 between his deceased wife, Rosita Walter Mburu and Abdul Shakoor. That the petitioner moved to the ELC court sometimes in 2013 and on account of material non-disclosure managed to illegally, unlawfully and unprocedurally reinstate the suit HCCC 1191 of 1999 that had been struck out for being time barred. This is the suit that has now been allocated a new number ELC 811 of 2013.
23. The 3rd and 4th respondent’s argue that the petition herein is therefore a non-starter since it’s barred by the plea of *res judicata* and the [Limitation of Actions](#). Further that maintaining the petition alongside the suit ELC 811 of 2013 amount to an abuse of the process of court. The 3rd and 4th respondents



further maintain that this court lacks jurisdiction to entertain this petition as the issues in it are directly and substantially similar issues that were determined in HCCC 1191 of 1999 and affirmed by the Court of Appeal in civil appeal No 195 of 2002.

Court's Directions

24. The court directed that the 1st respondent's application and the preliminary objection by the 3rd and 4th defendants be heard together and be dispensed with by way of written submissions. The 1st respondent/applicant complied and filed its submissions dated June 24, 2022. Despite the petitioner being granted leave to file submissions and a supplementary affidavit, he did not comply. The 3rd and 4th respondents too did not file any submissions.

Issues For Determination

25. This court has considered the preliminary objection by the 3rd and 4th respondents, the application by the 1st respondent and the affidavits in support thereof and the replying affidavit in opposition, and the submissions by the 1st respondent/applicant. In this court's opinion the issues for determination are;
- a. Whether the filing of this petition amounts to an abuse of the process of court.
 - b. Whether this petition is *res judicata* to HCCC No 191 of 1999 and Civil Appeal 195 of 2002.
 - c. Whether this honourable court has jurisdiction to hear and determine the petition herein;

Analysis and determination

A. Whether the filing of this petition amounts to an abuse of the process of court.

26. In the case of *Kimunya v Mohammed & another* (2022) KEEL 2264 (KLR), the court cited with approval the Court of Appeal dictum in *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR where the court stated that,

“The term ‘abuse of court process’ has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive!”

27. The court in the above cited case went on to find that the applicant (in the case) was abusing the court process by opting to file a fresh application instead of filing an application to reinstate the earlier one that had been dismissed.

28. The *Black's Law Dictionary*, 6th Edition, on the other hand defines ‘abuse’ as,

“everything which is contrary to good order established by usage that is a complete departure from reasonable use.”

29. In the case of *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of Banking institutions of Kenya v Habil Olaka - Executive*



Director (Secretary of the Kenya Bankers Association being sued on behalf of Kenya Bankers Association) and another (2018) eKLR, the court held that;

“In the case of *Muchangi Industries Ltd v Safaris Unlimited (Africa) Ltd & 2 others*, the court of Appeal stated that the person who abuses process is interested only in accomplishing some improper purposes that is collateral to the proper object of the process and that offends justice.

And in *Governors Balloon Safaris Ltd v Attorney General & 2 others* (supra) the court stated that ‘It is an abuse of the court process to institute several proceedings in order to challenge the same action and the court has inherent jurisdiction to prevent such abuse. Bearing in mind the above jurisprudence, it is not in doubt, that the petitioner filed this petition after he failed in his quest in HCCC No 433 of 2003 and wanted to try his luck in this court. This is clearly an abuse of the court process that should not be tolerated.’

30. Mativo J (as he then was) in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* (2018) eKLR, was categorical that,

“it is trite law, that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.”

31. Mativo J, observed that, “the situations that may give rise to an abuse of court process are indeed in-exhaustive.....it involves situations where the process of court has not been or resorted to fairly, properly honestly to the detriment of the other party.”

32. The learned judge correctly observed that ‘abuse of court process’ in addition to the above (incidences) arises in the following situations:

- a. ‘Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- c. Where 2 similar processes are used in respect of the same right for example a cross appeal, and a respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by the court below.
- e. Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted a system of forum shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the court of appeal.
- h. Where 2 actions are commenced, the second asking for a relief which may have been obtained in the first. And abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the annoyance or irritation of an opponent.’



33. On the record of the court in this case is an affidavit sworn by the petitioner Walter Joe Mburu on February 19, 2020 in support of his application of the same date seeking the consolidation of this petition and Nairobi ELC Case 811 of 2013 (Walter Joe Mburu v Abdul Shakoor & others). In the said affidavit, the petitioner deposes that this suit (read petition 76 of 2018) arises out of the sale agreement for sale of land dated August 30, 1968 between his late wife and Abdul Raoof Sheikh. Further at paragraph 6 of the same affidavit, he deposes that the two suits arise from the same series of transactions!
34. It is not in doubt to my mind that the petitioner filed this petition after he failed in his quest in HCCC No 1191 of 1991 and wanted to try his luck in this court. In the year 2015, the Court of Appeal in CA No 195 of 2002 upheld the decision by the court in HCCC 1191 of 1999 striking out the said suit for being time barred. In the meantime, he continues to maintain in court the other case, Nairobi ELC No 811 of 2013.
35. This, I must categorically state, is a clear case of abuse of the court process. There must be an end to litigation.
36. I find it befitting at this juncture and as I conclude on this issue to associate myself and quote directly from the decision of the court in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* (supra), where the court clearly and forcefully stated that;

“It is settled law that a litigant has no right to pursue pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view to obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.”
37. As already noted earlier on, this court has an inherent jurisdiction to protect itself from abuse and/or ensure that its process is not abused. Rule 8 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, reserves the court’s inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.
38. This court will exercise that inherent power to prevent abuse of the process of court by striking out this petition with costs, which I hereby do.

B. Whether this petition is res judicata

39. The petitioner in the amended petition dated January 6, 2015, seeks the following orders: -
 - a. An order of injunction do issue restraining the Department of Defence, its servants, agents or employees from interfering with occupying or continuing to occupy, disposing of or developing the parcel of land known as LR No 209/324/3 Nairobi.
 - b. That there be a declaration that the parcel of land known as LR No 209/324/3 was unlawfully and illegally transferred or sold by the National Social and Security Fund (NSSF) to the Department of Defence (DoD) whilst there was in existence restraining orders of injunction and caveats lodged against the title, which orders still subsist and NSSF was fully aware of the same as it was a party to the proceedings in civil suit No 1191 of 1999, where the orders emanated.
 - c. The honourable court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the



enforcement of any of the provisions of articles 2, 3, 10 (2) (b), 21, 22,23, 27, 28, 35, 40, 43 (1) (b), 46 (1) (c), 47, 48, 50 (1), 60(1)(b) & (d), 165, 258, 259 and 260 of the Constitution of Kenya.

- d. That the costs of this suit be provided for.
40. The principle of *res judicata* is anchored on section 7 of the Civil Procedure Act which provides that:
- “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.”
41. The Supreme Court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR stated that:
- “The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively....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 case to 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.”
42. Again in the case of the Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, the Supreme Court while still considering the issue of *res judicata* held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
43. The 1st respondent contends that the prayers sought in the petition derive from matters the subject of the proceedings in Nairobi High Court civil case No 1191 of 1999 and in civil appeal No 195 of 2002, before the Court of Appeal. The 1st respondent affirms that the two courts conclusively determined



- the matter and made declarations that the initial suit was incompetent on a pure point of law which in itself legally, procedurally and conclusively determined the dispute. The 3rd and the 4th respondents support the application by the 1st respondent. In their preliminary objection, they also raise the issue of *res judicata*.
44. The petitioner on the other hand confirms that the suit arises out of the sale agreement dated August 30, 1968 between his late wife (Rosita Walter Mburu) and Abdul Raof Sheikh. He however alleges that sometime back in 1989, the 1st defendant fraudulently sold and transferred the suit premises to the 3rd defendant at a consideration of Kshs 63,000,000/=necessitating him to file Nairobi ELC Case No 811 of 2013 for recovery of the suit land seeking a declaration that the sale and transfer of LR No 209/324/3 by the 1st defendant thereafter to the 2nd, 3rd and 5th defendants was null and void.
 45. He deposes that the purpose of the constitutional petition instituted in 2014 was to enforce his constitutional rights which had been infringed and/or violated. He thus sought an injunction against the 4th defendant from any dealing whatsoever with the suit property. That the issues raised in the petition could not have been raised in the previous suit, Nairobi ELC 811 of 2013. He contends that *res judicata* only applies where a suit has been heard and judgement delivered on merit. In HCCC 1191 of 1991, the court only dealt with the issue of limitation of time and did not hear the suit on its merits.
 46. The petitioner further asserts that there is no time limit for filing of a constitutional petition and that the legal provisions in the limitation of acts Act are not applicable and do not apply to violation of rights and freedoms guaranteed under the Constitution.
 47. The petitioner further argues that *res judicata* does not arise in respect of the petition since the issues raised in the petition were not substantially dealt with in the previous decisions.
 48. This court has taken time to peruse and analyze in the aforementioned two suits.
 49. In Nairobi High Court civil case No 1191 of 1999, the petitioner herein sued Abdul Shakoor Sheikh (“the 1st respondent”), Opus Investment Ltd (“the 2nd respondent”) National Social Security Fund (“the 3rd respondent”) and the Commissioner of Lands together with the Registrar of Titles, (“the 4th respondents”) for three reliefs namely, a declaration that the sale and transfer of LR No 209/324/3 (hereinafter “the suit property”) by the 1st respondent to the 2nd respondent and subsequently to the 3rd respondent was null and void and the same be nullified; specific performance of the agreement dated August 30, 1968 between Abdul Raof Sheikh and Mrs Rosta W. Mburu and general damages for unlawful eviction.
 50. The National Social Security Fund moved the court seeking to strike out the suit on the basis that the suit against it was time barred. The court upheld the position by NSSF. Ransley, Commissioner of Assize, allowed the application and stated that the “suit is time barred as the agreement relied on was dated, the August 30, 1968 and the suit is filed for a declaration on June 15, 1999.”
 51. The petitioner herein was aggrieved by that decision and lodged an appeal to the Court of Appeal. The Court of Appeal in its judgement cited as Walter Joe Mburu v Abdul shakoor Sheikh & 3 others [2015] eKLR stated that;

“.....The learned Commissioner of Assize, from the pleadings, heard the parties’ respective positions on the principal issue of limitation before coming to the conclusion that the appellant’s claim as against the 3rd respondent was statute barred. Before him was the 3rd respondent’s averment in the amended defence and in the chamber summons that the appellant had brought his claim against it twenty (20) years late which averment the vendor had not rebutted by subsequent pleading. The foundation of the appellant’s claim is the



agreement of sale dated August 30, 1968. By the time the suit property was sold to the 2nd respondent and then to the 3rd respondent on June 28, 1989 and July 3, 1989 respectively, a period of over twenty (20) years had lapsed. We are at a loss to appreciate how the fact that the appellant had claimed a declaration would have advanced his case at all.

And section 7 *Limitation of Actions Act*, chapter 22 Laws of Kenya provides:

“7 An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Given the pleadings which were before the learned Commissioner of Assize and the above provisions of the law, it is plain that the appellant’s claim was hopelessly out of time. No material was placed before the learned trial judge to indicate that the parties by their conduct had revived the appellant’s claim which had been extinguished long before he lodged his claim before the High Court ...”

52. It is evident that Court of Appeal dismissed the appeal and upheld the decision by the learned Commissioner of Assize in Nairobi High Court civil case No 1191 of 1999 on the basis of limitation of time.

53. The question I must answer is whether the suit HCCC 1191 of 1999 was determined on its merits. On this aspect, I would agree with the petitioner’s assertions that it was not. The court in the suit HCCC 1191 of 1999 merely struck out the suit on the basis that it was time barred. The Court of Appeal upheld that decision. In the case of *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* (2001) eKLR, Justice Ringera (as he then was) in finding that the suit before him was not *res judicata* held that;

“I have concluded that the present suit is not *res judicata* for the following reasons. First, As regards HCCC No 350 of 1998, the same having been withdrawn rather than determined on its merits there would be no basis of pegging the plea in bar thereon for it is a fundamental condition precedent to this plea in bar that the previous suit should have been heard and finally determined by a court of competent jurisdiction.”

54. Similarly, in this instance, I find that the plea of *res judicata* is not available to the respondents herein.

C. Whether this Honourable court has jurisdiction to hear and determine the petition herein

55. There is another issue that I need to address in this ruling. All the respondents, from their responses, seem to be in agreement that the reason why the petitioner opted for a constitutional petition rather than an ordinary civil suit was to circumvent the issue of limitation of time against his claim. I agree with the respondents. The petitioner’s claim is clearly time-barred. The Court of Appeal in no uncertain terms already made a determination to that effect in the civil appeal No 195 of 2002. That finding by a court superior to this court is binding on this court from whatever aspect one looks at it.

56. Secondly, the jurisprudence in this country is now well settled to the effect that a court should not entertain a constitutional matter though it may be properly before it where there exists some other basis upon which the case may be determined. This is the ‘principle of avoidance’ also known as ‘constitutional avoidance’.



57. The Court of Appeal in the case of *James Kanyi Nderitu v Attorney General and another* (2019) eKLR, held that a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation.
58. The supreme court of Kenya on the other hand while upholding the doctrine of constitutional avoidance in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (2014) eKLR made reference to the South African case of *S. v Mhlangu* 1995 (3) SA 867 (CC) where Kentridge AJ articulated the principle of avoidance in a minority judgement in the following words:-
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal without reaching constitutional issue, that is the course which should be followed.”
59. The supreme court further quoted with approval the holding by the US Supreme Court in the case of *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936) that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of.
60. The petitioner’s claim of ‘fraudulent transfer of title’ in this matter should and must be by way of an ordinary civil suit where the allegations of fraud would be specifically pleaded and particularized as required under the law. I see no justification why the petitioner would file a constitutional petition rather than an ordinary civil suit in such a case. The prayers sought in the petition can competently be granted by the court in an ordinary civil suit.
61. I further find that this petition is an abuse of the process of the court for violating the doctrine of constitutional avoidance. I would strike it out with costs for that reason as well.
62. In the end, the 1st respondent’s application dated September 3, 2018 is hereby allowed and the 3rd and 4th respondents’ preliminary objection dated January 11, 2022 is upheld in so far as the court finds that the filing of this petition amounts to an abuse of the process of court and that the petitioner’s claim based on the agreement for sale dated August 30, 1968 is time barred. Accordingly, the end result is that this petition is struck with costs to the respondents.
63. The 1st respondent and the 3rd and 4th defendants shall have the cost of the application and the preliminary objection respectively.
64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Gatugi holding brief for Njagi for the 1st Respondent/Applicant.

No appearance for the Petitioner

No appearance for the Attorney General.

Court Assistant- Hilda

M.D. MWANGI

JUDGE

