



Jamhuri Commercial Centre Welfare Association v Njuguna & 5 others (Environment & Land Petition E008 of 2022) [2022] KEELC 15586 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E008 OF 2022**

**JO MBOYA, J
NOVEMBER 21, 2022**

BETWEEN

JAMHURI COMMERCIAL CENTRE WELFARE ASSOCIATION . PETITIONER

AND

**MORRIS MWIRIGI NJUGUNA 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
CHIEF LAND REGISTRAR NAIROBI 4TH RESPONDENT
NAIROBI METROPOLITAN SERVICES 5TH RESPONDENT
DIRECTOR PLANNING AND DEVELOPMENT NAIROBI
COUNTY 6TH RESPONDENT**

RULING

1. The Ruling herein relates to two Applications namely, the Application date 8th March 2022 and the Application dated 22nd June 2022. Besides, the Ruling also touches on and concerns the Preliminary objection dated the 4th of April 2022.
2. For coherence, it is appropriate to reproduce the reliefs sought at the foot of each of the named Applications.
3. In this regard, the Application dated the 8th of March 2022, seeks the following reliefs;
 - i. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue temporary injunctive Orders restraining the 1st Respondent from erecting structures, leasing, subletting, charging and disposing any interest in Nairobi/Block 63/787 Jamhuri Phase II.



- ii. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue a temporary injunction against the 3rd and 4th Respondents injuncting them from registering any Application for disposition of interest subject to Nairobi/Block 63/787 Jamhuri Phase II which is a gazetted car park along with a service road which has been fraudulently acquired by the 1st Respondent.
 - iii. That pending the hearing and determination of this Application, the Honourable Court issue a temporary injunction against the 5th and 6th Respondents from granting any development approvals over Nairobi/Block 63/787 Jamhuri Phase II which is a gazetted car park along with a service road.
 - iv. That costs of the Application be provided for.
4. Additionally, the Application dated the 22nd of June 2022 seeks the following reliefs;
- i. That this matter be certified as urgent and this Honourable Court be pleased to give the parties directions for an inter-partes hearing date before 20th July, 2022.
 - ii. That the Applicant's Petition filed on 8th March 2022 be struck out with costs to the 1st Respondent.
 - iii. That the costs of and occasioned by this Application be provided for.
5. Other than the reliefs sought at the foot of the two Applications, whose details have been alluded to in the preceding paragraphs, the 1st Respondent also filed and lodged a Notice of Preliminary Objection dated the 4th of April 2022.
6. For completeness, the Notice of Preliminary Objection has raised and amplified the following grounds:
- i. That the Notice of Motion Application dated 8th March 2022 and the entire Petition dated 8th March 2022 are sub-judice and constitute gross abuse of the court process as there is in existence High Court ELC Civil Case 354 of 2012 *City Council of Nairobi v Moris Njuguna Mwirigi and the Registrar of Lands* where the exact issues were raised in the subject Petition are the same issues sought in the said High Court ELC Civil Case 354 of 2012 *City Council of Nairobi v Moris Njuguna Mwirigi and The Registrar of Lands*.
 - ii. That the Petition therefore is expressly barred by virtue of Sections 6 and 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
 - iii. That the ownership of the suit property being contested in this Petition is the same issue raised in High Court ELC Civil Case 354 of 2012 *City Council of Nairobi v Moris Njuguna Mwirigi and The Registrar of Lands*.
 - iv. That John Mwenda Rutere who is a member of the Petitioner in this Petition is an Interested Party in High Court ELC Civil Case 354 of 2012 *City Council of Nairobi v Moris Njuguna Mwirigi and The Registrar of Lands*.
 - v. That the Petitioner has no Locus stand i to bring this Petition.
 - vi. That the instant Application and Petition are grossly incompetent, vexatious, bad in law, have no merit and constitute a gross abuse of the Court process.



7. Upon being served with the Application dated 8th March 2022, the 1st Respondent herein filed a response vide Replying Affidavit sworn on the 22nd of June 2022 and in respect of which, the 1st Respondent has contended that the Petitioner has neither established nor met the requisite conditions to warrant the grant of the orders of temporary injunction, either as sought or at all.
8. Similarly, the 3rd Respondent responded to the Application dated 8th March 2022 vide Grounds of Opposition dated the 19th of July 2022.
9. As pertains to the Application dated the 22nd of June 2022, the Petitioner/Respondent has filed a Replying Affidavit sworn on the 19th of July 2022. For clarity, the Petitioner has reiterated the contents of the Petition and the Supporting Affidavit thereof.
10. Other than the Petitioner, the Application dated the 22nd of June 2022, has also been opposed by the 6th Respondent who similarly filed and lodged Grounds of Opposition.
11. Be that as it may, when the matter came up for hearing on the 28th of July 2022, the parties agreed to canvass and dispose of the two Applications and the preliminary objection simultaneously.
12. In the premises, the court proceeded to and issued directions pertaining to and concerning the hearing and disposal of the named Applications and the Preliminary Objection.
13. Further, the court also ordered and directed that the named Applications and the Preliminary Objection be canvassed and disposed of by way of written submissions. For clarity, the timelines for the filing and exchange of written submissions was also circumscribed.
14. Pursuant to and in line with the directions of the court, the Petitioner filed her written submissions on the 18th of July 2022, whilst the 1st Respondent filed her written submissions on the 29th of September 2022.
15. Other than the Petitioner and the 1st Respondent, the other Party who filed written submissions is the 6th Respondent, whose written submissions are dated the 28th of October 2022.

Submissions by the Parties

Petitioner's Submissions

16. Vide written submissions dated the 18th of July 2022, the Petitioner herein has raised and highlighted various issues, in respect of both the Application dated the 8th of March 2022, as well as the Notice of Preliminary Objection filed by the 1st Respondent.
17. First and foremost, counsel for the Petitioner has submitted that the issue of Sub-judice, has been inappropriately raised and canvassed vide the Preliminary Objection.
18. In particular, counsel for the Petitioner has submitted that where a Party seeks to canvass and raised the issue of sub-judice, then it behooves the Party to tender and supply the court with evidence relating to the existence of a previous suit between the said Parties. For clarity, counsel has added that such evidence would include, *inter-alia*, the pleadings, if any, filed in the alleged suit/proceedings alluded to.
19. As pertains to the subject matter, counsel for the Petitioner has submitted that the 1st Respondent has neither availed nor supplied this court with any pleadings and documents arising from the matter which is contended to be pending hearing and determination.



20. Further, counsel added that in the absence of any such pleadings and documents to show the existence of a previous and pending suit, this Honourable court cannot be invited to find and hold the subject Petition is sub-judice.
21. Secondly, counsel for the Petitioner has further submitted that the suit which is being alluded to by the 1st Respondent and which forms the basis of the sub-judice rule, was in any event filed by the Nairobi City Council and not by the Petitioner herein. For clarity, counsel for the Petitioner has added that the Petitioner herein was not equally a Party to the said suit.
22. Thirdly, counsel for the Petitioner has submitted that the said suit namely, Milimani ELC No 354 of 2012, was in any event dismissed for want of prosecution vide Ruling rendered on the 7th of July 2022.
23. Premised on the foregoing, counsel for the Petitioner has therefore contended that the doctrine/rule on Sub-judice, which has been invoked by the 1st Respondent is irrelevant and inapplicable to the subject matter.
24. Fourthly, counsel for the Petitioner has submitted that the doctrine of Res-judicata which has similarly been raised and ventilated by the 1st Respondent is also inapplicable to and in respect of the subject Petition.
25. For coherence, counsel has added that Milimani ELC 354 of 2012, which forms the basis of the contention that the doctrine of Res-judicata applies, does not involve the current Petitioner.
26. In this respect, counsel for the Petitioner has stated that the said suit was filed by the City Council of Nairobi against Morris Njuguna Mwirigi and the Registrar of Land s.
27. Consequently and to the extent that the said suit, namely Milimani ELC 354 of 2012 did not involve the current Petitioner, it has been submitted that the doctrine of Res-judicata does not apply.
28. Fifthly, counsel for the Petitioner has also submitted that the Petitioner herein is possessed and seized of the requisite locus stand i to commence, originate and maintain the subject proceedings.
29. To this end, the counsel for the Petitioner, has invited the Honourable court to take cognizance of the provisions of Articles 22, 258 and 260 of the Constitution 2010.
30. Besides, counsel for the Petitioner has also invited the court to invoke and apply the dictum of the Supreme Court of Kenya in the case of Mitubell Welfare Society v Kenya Airport Authority & 2 Others, ;Initiative for Strategic Litigation in Africa (Amicus Curie) Petition No 3 of 2018, (2021)eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013)eKLR.
31. The sixth issue that has been raised and canvassed by counsel for the Petitioner relates to the fact that the members of the Petitioner herein were duly allocated various plots in the neighborhood of the suit plot and thereafter the members of the Petitioner proceeded to and developed their properties, with the approval of the relevant authorities.
32. On the other hand , counsel for the Petitioner has similarly submitted that the suit property was indeed reserved as a car park. Consequently, the suit property was duly reserved and hence same was not available for alienation or allocation to any one, the 1st Respondent not excepted.
33. Nevertheless, counsel for the Petitioner has added that despite the suit property having been duly reserved as a car park, same was irregularly, fraudulently and illegally allocated to the 1st Respondent.



34. At any rate, counsel for the Petitioner has added that borne out of the impugned allocation of the suit property, a complaint was made by the Nairobi city Council, which culminated into the arrest, charge and ultimate prosecution of the 1st Respondent.
35. Further, counsel for the Petitioner has also submitted that during and in the course of the criminal proceedings against the 1st Respondent, it was found and established that indeed the allocation of the suit property to the 1st Respondent was carried out on the basis of a fraudulent and fictitious Part Development Plan.
36. Owing to the foregoing, counsel for the Petitioner has therefore submitted that borne out of the illegal and fraudulent allocation and alienation of the suit property, the 1st Respondent herein ought not to benefit from the ownership rights attendant to and emanating from the suit property.
37. Finally, counsel for the Petitioner has submitted that unless the orders sought at the foot of the Application dated 8th March 2022 are granted, then there is a likelihood of the 1st Respondent, selling, disposing of, alienating, charging and or mortgaging the suit property, in a manner that may ultimately defeat the rights and interests of the Petitioner.
38. In view of the foregoing, counsel for the Petitioner has therefore contended that it is appropriate to decree and grant the reliefs at the foot of the subject Application.
39. In support of the various submissions alluded to, counsel for the Petitioner has quoted and relied on various decisions *inter-alia* *Mukisa Biscuit Manufacturing Company Ltd v Westend Distributors Ltd* (1969) EA, 699, *Kenya Bankers Association v Kenya Revenue Authority* (2019)eKLR, *Kinatwa Cooperatieve Savings and Credit Society Ltd v Kinatwa Prestige Ltd* (2021)eKLR, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, (2013)eKLR, *Mitubell Welfare Society v Kenya Airport Authority & 2 Others*, ;*Initiative for Strategic Litigation in Africa (Amicus Curie)* Petition No 3 of 2018, (2021)eKLR, *John Harun Mwao & Others v Attorney General & 2 Others* (2012)eKLR, *John Wekesa Khaoya v Attorney General* (2013)eKLR and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003)eKLR.

1st Respondent's Submissions

40. Vide submissions dated the 29th of September 2022, the 1st Respondent has raised and canvassed various issues, inter-alia the contention that the subject Petition is barred by the doctrine of Sub-judice and Res-judicata.
41. Firstly, counsel for the 1st Respondent has submitted that there is in existence a previous suit namely Milimani ELC Civil Case No 354 of 2012, between the City Council of Nairobi v Morris Njuguna Mwirigi and the Registrar of Land s, which suit touches on and concerns the suit property.
42. Further, counsel for the 1st Respondent has added that even though the Petitioner was knowledgeable and aware of the existence of the said previous suit, same failed and neglected to disclose its existence at the time of filing the current Petition.
43. Be that as it may, counsel has submitted that the existence of the said suit, constitutes a bar to the filing and prosecution of the current Petition.
44. In the premises, counsel for the 1st Respondent has submitted that the current Petition is therefore Bad in law and in contravention of the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.



45. In support of the submissions pertaining to and touching on the issue of Sub-judice, the counsel for the 1st Respondent has cited and relied on various decisions, *inter-alia* [David Ndii & Others v Attorney General & Others](#) (2021)eKLR, [Morris Muumba Ndeti & 6 Others \(suing on their own behalf and as officials of Kaseve Welfare Society\) v Harp Housing Ltd](#) (2021)eKLR and [Mokoosio & Another v Vadera & 3 Others](#) (2021)KEHC 56(KLR) (20th September 2021 (Judgment)).
46. Secondly, counsel for the 1st Respondent has also submitted that the current Petition is also Res-judicata and in contravention of the provisions of Section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
47. However, despite citing and quoting the provisions of Section 7 of the [Civil Procedure Act](#), counsel for the 1st Respondent has not ventilated any issue pertaining to the doctrine of Res-judicata.
48. Put differently, counsel has not made any extensive submissions as to why the subject Petition is said to be Res-judicata, either as claimed or at all.
49. Thirdly, counsel for the 1st Respondent has submitted that the Petitioner herein is not a legal entity and thus same cannot commence, originate and mount the subject Petition in her own name.
50. Further, counsel for the 1st Respondent has submitted that the Petitioner has neither supplied nor availed any evidence of her registration, either as a society or an association. Consequently, counsel for the 1st Respondent has added that in the absence of registration as a society or an association, the Petitioner herein cannot mount and or maintain the Petition as filed or at all.
51. In support of the foregoing submissions, counsel for the 1st Respondent has cited and relied on various decisions including the cases of *French Banqui International De-commerce De-Petro Grand v Goukassow* (1923)2KB, 682, [Goeffrey Ndirangu & 5 Others v Chairman Mariakani Jua Kali Association & 2 Others](#) (2005)eKLR, [Housing Company of Kenya Ltd v Embakasi Youth Development Project](#) (2004)eKLR.
52. Fourthly, the counsel for the 1st Respondent has also submitted that the current Petition was filed and mounted with unreasonable and inordinate delay and hence same has been caught up by the doctrine of Laches.
53. For coherence, counsel for the 1st Respondent has submitted that the supposed cause of action is stated to have arisen in the year 2001 and that the members of the Petition have been alive to and knowledgeable of the facts pertaining to the subject claim.
54. However, despite being privy to and aware of the cause of action, the Petitioner sat on her rights and only woke up to file the current Petition in the year 2022.
55. At any rate, counsel has also submitted that the Petitioner and her members have also engaged the 1st Respondent in various proceedings, including the filing of Milimani ELC Civil Case No 354 of 2012, with a view to harassing the 1st Respondent.
56. Be that as it may, the counsel for the 1st Respondent has contended that the filing of the current Petition has been made and mounted with unreasonable delay and that no explanation has been availed and supplied to explain the delay in the filing and mounting of the Petition.
57. In support of the foregoing submissions, counsel for the 1st Respondent has cited and relied on the case of [Edward Akomo Oyugi & 2 Others v The Attorney General](#) (2019)eKLR and [Wellington Nzioka Kioko v The Attorney General](#) (2018)eKLR.



58. The other issue that has been raised and canvassed by the 1st Respondent relates to whether the Petitioner has established and proved the existence of a prima facie case with overwhelming chances of success, to warrant the grant of an order for temporary injunction.
59. In this respect, counsel for the 1st Respondent has submitted that the Petitioner has neither established nor proven any legal or equitable rights to and in respect of the suit property.
60. Further, counsel for the 1st Respondent has added that in the absence of any legal or equitable rights and interests over the suit property, the Petitioner herein cannot purport to have any legitimate basis to seek for an order for temporary injunction.
61. In support of the foregoing submissions, counsel for the 1st Respondent has cited and relied on various decisions, inter-alia *Mrao Ltd v First American Bank Ltd & 2 Others* (2003)eKLR, *Maxvictor Enterprise Ltd v Gulf Africa Bank Ltd & Another* (2020)eKLR and *County Assembly of Machakos v Governor, Machakos County & 4 Others* (2018)eKLR.
62. On the other hand, counsel for the 1st Respondent has also submitted that the Petitioner has not established that same is disposed to suffer any irreparable loss, if the orders of temporary injunction are not granted in the manner sought or at all.
63. Contrarily, counsel for the 1st Respondent has submitted that without being the registered proprietors of the suit property, the Petitioner herein is not disposed to suffer any loss, let alone irreparable loss.
64. Finally, counsel for the 1st Respondent has submitted that even if the Application for injunction was to be addressed on the basis of balance of convenience, same would still not be resolved in favor of the Petitioner.
65. For clarity, counsel has added that the balance of convenience over and in respect of the subject matter tilts to and in favor of the 1st Respondent, who is currently the registered owner of the suit property.
66. In respect of the submissions premised on balance of convenience, counsel for the 1st Respondent has cited and quoted the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others* (2016)eKLR.
67. In a nutshell, counsel for the 1st Respondent has therefore implored the court to find and hold that the entire Petition is premature, misconceived and legally untenable. Consequently, same has sought to have the entire Petition struck out.
68. In the alternative, counsel for the 1st Respondent has submitted that the Petitioner has not placed before the court sufficient material or basis to warrant the grant of the orders of temporary injunction sought at the foot of the Application dated 8th March 2022.
69. To this end, counsel for the 1st Respondent has therefore invited the court to find and hold that the said Application for injunction is devoid and bereft of merits.

6th Respondent's Submissions

70. The 6th Respondent filed written submissions dated the 28th of October 2022, and same has highlighted and amplified three issues for consideration.
71. First and foremost, counsel for the 6th Respondent has submitted that the doctrine of Sub-judice, which has been alluded to by and on behalf of the 1st Respondent does not apply to and in respect of the subject Petition.



72. For clarity, counsel for the 6th Respondent has submitted that prior to and before the doctrine of Sub-judice can be invoked and applied, the claimant must prove the existence of a previous suit touching on the same subject matter and between the same parties.
73. However, in respect of the subject matter, counsel has pointed out that no evidence has been tendered or availed to show that the current Petitioners have hitherto filed and lodged any previous suit touching on the same matter between herself and the 1st Respondent.
74. In any event, counsel has added that the issue of Sub-judice can also not be canvassed and ventilated on the basis of a Preliminary Objection, to the extent that sub-judice entails provision of evidence pertaining to a previous and existing suit.
75. In support of the foregoing submissions, counsel has submitted and relied on the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 Others (Interested Parties)* (2020)eKLR.
76. Secondly, counsel for the 6th Respondent has submitted that the doctrine of Res-judicata, cited and relied upon by the 1st Respondent is also irrelevant and inapplicable.
77. Simply put, counsel for the 6th Respondent has also submitted that the 1st Respondent has neither availed nor supplied any evidence pertaining to the previous suit between the Petitioner and the 1st Respondent, which has been heard and determined by a court of competent jurisdiction.
78. In the absence of any evidence of a previous determined suit, touching on and concerning the same subject matter, counsel contended that the invocation and reliance on the doctrine of Res-judicata, is therefore misconceived.
79. In support of the foregoing submissions, counsel has quoted and relied on the holding in the case of *John Florence Maritime Services & Another Transport & Infrastructures & 3 Others* (2021)eKLR.
80. Finally, counsel for the 6th Respondent has submitted that the Petitioner herein is seized and possessed of the requisite locus stand i to commence, originate and maintain the subject Petition for and on behalf of her members.
81. To this end, counsel for the 6th Respondent has relied on the case of *Wilson Bursen Mukua v Central Kenya Conference of the Seventh Day Adventists & Another, Nairobi Cosmopolitan Conference Ltd (Interested Party)* (2021)eKLR.
82. In short, counsel for the 6th Respondent has submitted that the Notice of Preliminary Objection raised and canvassed by the 1st Respondent is misconceived and legally untenable.
83. To the contrary, counsel for the 6th Respondent has submitted that the Petition beforehand raises a reasonable cause of action and therefore ought to be allowed to proceed for hearing and determination on merits.

Issues for Determination

84. Having reviewed the Applications dated the 8th of March 2022, 22nd of June 2022 and the Notice of Preliminary Objection dated 4th April 2022, and having similarly considered the written submissions filed, the following issues do arise and are thus germane for determination:
 - i. Whether the subject Petition is barred by the doctrine of Sub-judice?
 - ii. Whether the doctrine of Res-judicata applies to and affect the subject Petition?



- iii. Whether the Petitioner is seized of the requisite Locus stand i, to commence, originate and mount the subject Petition?
- iv. Whether the Petitioner has established and proven the requisite conditions to warrant the grant of an order for temporary injunction, either as sought or at all?

Analysis and Determination

Whether the subject Petition is barred by the doctrine of Sub-judice.

85. The 1st Respondent has submitted that prior to and before the filing of the current Petition, there had been filed a Civil Suit, namely Milimani ELC Civil Case No 354 of 2012 between the City Council of Nairobi v Morris Njuguna Mwirigi & Registrar of titles.
86. Further, it was contended that even though the Petitioner was knowledgeable and aware of the existence of the said suit, same failed and neglected to disclose its existence in the body of the Petition or at all.
87. Nevertheless, counsel has added that the said previous suit, which was contended to be still pending hearing and determination, touched on and concerned the same subject property.
88. Premised on the fact that there was in existence the said suit, counsel for the 1st Respondent contended that the current Petition is therefore barred by the doctrine of Sub-judice.
89. Premised on the foregoing contention, the court has therefore been invited to find and hold that the doctrine of Sub-judice is applicable to the subject matter and thereafter to strike out the Petition.
90. Despite the submissions by the 1st Respondent, it is important to observe that the previous suit which has been alluded to, is stated to have been between the City Council of Nairobi v Morris Njuguna Mwirigi & the Registrar of Titles and not otherwise.
91. Clearly, the said suit was neither filed nor lodged by the current Petitioner. In any event, it has not been pointed out that the Petitioner herein was a party thereto, in any capacity whatsoever.
92. To the extent that the said previous suit was neither filed by the Petitioner nor was the Petitioner a party thereto, the Petitioner cannot now be said to be bound by the pleadings and proceedings for which same was neither privy nor party to.
93. On the other hand, it is also imperative to state and observe that any claimant who seeks to invoke and rely on the doctrine of Sub-judice is called upon to tender and place before the court evidence showing the existence of the previous suit and by extension the nature of the relief thereof.
94. To my mind, it behooved the counsel for the 1st Respondent to tender and or place before the court evidence of the pleadings that were filed vide Milimani ELC 354 of 2012. For clarity, it was not enough to mention the case file details at the foot of a notice of preliminary objection and thereafter imagine that such mention would suffice.
95. To this end, it is important to take cognizance of the holding of the Supreme Court in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others* (2020)eKLR, where the Supreme Court of Kenya observed as hereunder;

- (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.

96. On the other hand , I beg to state that the doctrine of Sub-judice by its very nature presupposes the existence of a previous suit, which remains pending hearing and determination before the same court or a court of competent jurisdiction.
97. Given its nature, a claimant who wishes to invoke and rely on the doctrine of Sub-judice is called upon to produce and adduce evidence, primarily relating to the pleadings, if any, filed in respect of the said existing suit.
98. Consequently, the question that arises is whether the plea of Sub-judice can be raised and canvassed by way of a preliminary objection, either in the manner ventilated by the 1st Respondent or at all.
99. To my mind, a preliminary objection is canvassed on the basis and assumption that the facts as pleaded by the adverse party are deemed to be correct and admitted.
100. Contrarily, a preliminary objection cannot be raised or canvassed, if certain facts are not agreed upon and therefore require to be investigated by the court.
101. Additionally, a preliminary objection can also not be ventilated, if the claimant shall seek to rely on, avail or supply evidence to the court, by whatsoever nature. For coherence, reliance on any foreign/ extraneous materials, other than the Pleadings filed by the Adverse Party and the Law, are forbidden while ventilating a Preliminary Objection.
102. Clearly, the foregoing observations were well delineated and underscored vide the holding in the case of *Mukisa Biscuit Company Ltd v Westend Distributors Ltd* (1969)EA, page 701, where the court stated and observed as hereunder;

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and , on occasion confuse issues. This improper practice should stop.”



103. Additionally, the circumstances under which a preliminary objection can be canvassed and ventilated were also adverted to by the court in the case of *Oraro v Mbaja* (2005)eKLR, where the court stated as hereunder;

“From my analysis of submissions and of case law herein, I have to state clearly that the Applicant’s “Notice of Preliminary Objection to Representation” dated 6th October and filed on 7th October, 2004 cannot pass muster as a procedurally-designed preliminary objection. As already noted, it is accompanied by affidavit evidence , which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy , as their factual foundations are the subject of dispute. As a preliminary objection, therefore, I find and determine that the “Notice of Preliminary Objection to Representation ” must be dismissed.”

104. Recently, the Supreme Court of Kenya revisited the circumstances where a preliminary objection can be raised in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, the Supreme Court expressed itself as follows;

“As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in *Mukbisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, in the case of *Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others*, Petition No 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’

- (15) The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Civil Application No 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others*, Application No 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

- (16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point



of law. (see *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Civil Application No 14 of 2014, [2014] eKLR).

(17) On that basis, two questions emerge for this Court's consideration: what pure point of law has the 1st respondent raised in her preliminary objection? Are the facts in issue, settled?

105. From the foregoing observations, it is apparent and evident that the 1st Respondent herein cannot agitate the plea of Sub-judice on the basis of the existence of a previous suit, without supplying or adducing copies of the pleadings in respect of the said suit.
106. Similarly, the issue of Sub-judice, which is backed by evidence, cannot be canvased and ventilated on the basis of a preliminary objection, which must be anchored on pure points of law.
107. Notwithstanding the foregoing, the Petitioner herein filed a Replying affidavit in opposition to the application dated the 22nd June 2022 and same stated that the previous suit, namely Milimani ELC Civil Case No 354 of 2012, was neither filed by same nor was a party thereto.
108. Additionally, the Petitioner also stated that contrary to the averments by the 1st Respondent, the said suit was indeed dismissed for want of prosecution vide ruling rendered on the 7th July 2022.
109. Either way, the limb of the preliminary objection touching on and concerning the doctrine of Sub-judice, is not only misconceived, but same is also, legally untenable.
110. Consequently and in this regard, I find and hold that the stated limb of the preliminary objection does not lie and same is hereby dismissed.

Whether the doctrine of Res-judicata applies to and affect the subject Petition.

111. The other issue that has been raised and ventilated by the 1st Respondent touches on and concerns the doctrine of Res-judicata.
112. However, I must point out that even though the 1st Respondent cited and quoted the provisions of Section 7 of the *Civil Procedure Act*, same has failed to ventilate clear and explicit submissions in this regard.
113. Be that as it may, it is imperative to recall that the Milimani ELC No 354 of 2012, upon which the plea of Res-judicata has been raised and canvased did not involve the current Petitioner and the 1st Respondent.
114. Similarly, evidence has been tendered by the Petitioner that upon her attention being drawn to the existence of the said proceedings, same instructed her counsel to peruse the court file and ascertain the obtaining status thereof.
115. Further, it was contended that upon perusal of the court file in respect of ELC No 354 of 2012, it was discovered that same was dismissed for want of prosecution on the 7th July 2022.
116. Essentially, the said suit, which did not involve the Petitioner herein was disposed of without a plenary hearing and hence the determination and eventual disposal thereof, was not premised on merits.
117. Again, it is important to note that the requisite ingredients that underpin the doctrine of Res-judicata, have neither been established nor proven by the 1st Respondent.
118. To this end, it is imperative to take cognizance of the holding of the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure*



§ 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the Supreme Court stated as hereunder;

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^{3/4}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.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)

119. Duly guided by the holding in the decision quoted in the preceding paragraph, it becomes evident and apparent that the plea of Res-judicata cannot be successfully invoked and be relied upon in respect of the subject matter.

120. Admittedly, the Petitioner herein was not a party to Milimani ELC Civil Case No 354 of 2012. Consequently, the proceedings and orders, if any, arising therefrom do not bind the Petitioner.



Whether the Petitioner is seized of the requisite Locus stand i, to commence, originate and mount the subject Petition.

121. Similarly, the 1st Respondent also sought to impeach the Petition on the basis that the Petitioner herein is not seized or possessed of the requisite Locus stand i to lodge and maintain the Petition.
122. According to the 1st Respondent, the Petitioner is not a body corporate or a registered association. In this regard, the 1st Respondent invited the Honourable court to find and hold that in the absence of a certificate of registration, the Petitioner cannot sustain the Petition beforehand .
123. To the contrary, counsel for the Petitioner submitted that the Petitioner is indeed an association of members and that by virtue of being such an association, same is vested with the requisite capacity to commence and maintain proceedings where the Constitutional rights of her members have been violated, breached and infringed upon.
124. Suffice it to point out that the counsel for the Petitioner has quoted and relied upon the provisions of Articles 22(2), 258 and 260 of the [Constitution](#) 2010.
125. As concerns the issues as to whether or not the Petitioner is seized and possessed of the requisite Locus Stand i, I beg to point out that what is before the court is a constitutional Petition and therefore the guiding parameters are supplied vide the provisions of Articles 22 and 258 of the [Constitution](#) 2010.
126. Additionally, it is imperative to state and observe that the [Constitution](#) 2010 has indeed expanded the perspective and latitude for various cadre of parties, to approach the court and ventilate their claims, irrespective of whether same are body corporate or otherwise.
127. Consequently, the legal strictures that apply to parties whilst filing suits under the private law, do not apply and obtain in constitutional Petitions.
128. Put differently, whereas in ordinary suits commenced under private law, an association, society or unincorporated body, cannot sue, but under a Constitutional Petition, such bodies including societies association or any cluster of un incorporated bodies, are at liberty to approach the court and commence Constitutional Petition.
129. For coherence, the legal parameters relating to the capacity of societies, associations and un incorporated bodies to approach the court and file Petition was aptly and succinctly addressed by the Court of Appeal in the case of [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others](#) (2013)eKLR. For clarity, the five (5) bench of the Court of Appeal stated and observed as hereunder;

We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the stand ard guide for locus stand i must remain the command in Article 258 of the [Constitution](#), which provides that:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a. a person acting on behalf of another person who cannot act in their own name;



- a. a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.”
- (28) It still remains to reiterate that the land scape of locus stand i has been fundamentally transformed by the enactment of the *Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus stand i requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the *Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of 28th June 2013 – the *Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the *Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22(2) and 258 of the *Constitution*.
- (29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the *Constitution*.
- (30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.

130. Additionally, the issue of Locus stand i and ability of a society to file and commence constitutional proceedings in her name, albeit for and on behalf of her members was also canvassed and deliberated upon by the Supreme Court of Kenya vide the case of *Mitu-Bell Welfare Society v Kenya Airports*



Authority & 2 others; initiative for Strategic litigation in Africa (Amicus Curiae) (Petition No 3 of 2018) [2021] eKLR where the Apex Court opined as follows:

“On the issue of locus stand i of the appellants to institute the petition before the trial Court, the Court found that the appellants through Mitu-bell Welfare Society, had locus before the trial Court. It reasoned that in light of the Certificate of Registration, the provisions of Article 22 (2) (d), Articles 22 & 258 of the *Constitution* and this Court's decision on the issue of locus in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR, every person has the right to institute proceedings claiming that the *Constitution* has been contravened; that a person in that regard, includes one acting in public interest and further, that pursuant to Article 260 it also includes a company, an association, or other body of persons whether incorporated or unincorporated.”(Emphasis is mine)

131. In view of the foregoing, I come to the conclusion that indeed the Petitioner herein is seized of the requisite capacity to commence, originate and maintain the subject proceedings, for and on behalf of her members.

Whether the Petitioner has established and proven the requisite conditions to warrant the grant of an order for temporary injunction, either as sought or at all.

132. The Petitioner herein has contended that the circumstances under which the suit property was allocated, alienated and ultimately registered in the name of the 1st Respondent is wrought and fraught with fraud and illegality.

133. In particular, the Petitioner has contended that the issue as pertains to the impropriety and illegality in the allocation of the suit property to the 1st Respondent was variously addressed vide the Judgment of the court in *Morris Njuguna Mwirigi v Attorney General* (2012)eKLR, being a Criminal Appeal wherein the court found and held inter-alia that the part development plan which had been used to alienate the suit property was fraudulent.

134. On the other hand , the Petitioner has also contended that the suit property had already been reserved as a car park for her members, who owned the neighboring properties. In this regard, it was contended by the Petitioner that the suit property was incapable of being re-allocated and re-alienated to and in favor of the 1st Respondent or any other third party.

135. Be that as it may, the Petitioner has averred that the 1st Respondent procured and acquired the allocation of the suit property unto him, albeit illegally and unlawfully.

136. Premised on the foregoing, the Petitioner has therefore implored the court to find and hold that if the 1st Respondent proceeds to deal with and dispose of the suit property, then the members of the Petitioner shall suffer irreparable loss.

137. On the other hand , the Petitioner has also sought that it is in the interests of justice to issue and grant temporary orders of injunction.

138. On the contrary, counsel for the 1st Respondent has submitted that the Petitioner herein and by extension her members do not have any legal or equitable rights or interests over the suit property.

139. Further, counsel for the 1st Respondent has added that in the absence of legal or equitable interests over the suit property, the Honourable court cannot grant or issue an order of temporary injunction in favor of the Petitioner or at all.



140. Despite the averment by and or on behalf of the Petitioner herein, I must point out that the manner in which the Application dated the 8th of March 2022 was crafted is curious and interesting.
141. Suffice it to point out that all the reliefs sought at the foot of the said Application are meant to subsist during the pendency of the Application. For clarity, there is no substantive prayer that the court has been invited to grant upon the hearing and determination of the impugned Application.
142. To my mind, the Petitioner herein does not appear to have correctly appreciated and considered the import and tenor of the reliefs sought.
143. I say this because if the Petitioner was well guided and advised, then appropriate reliefs would have been fashioned and crafted.
144. On the other hand , it is imperative to underscore that Parties are bound by their pleadings. Consequently, the Petitioner herein is duly bound by the reliefs sought at the foot of the Application dated the 8th of March 2022.
145. To this end, it is appropriate to recall and reiterate the dictum in the holding of the Court of Appeal in the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & Others* (2014) eKLR, where the Honourable Court of Appeal observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.

Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

146. Premised on the foregoing observation, it is imperative to state that this Honourable court cannot therefore proceed to grant an order of Temporary Injunction pending the hearing and determination of the Petition, insofar as none has been sought.
147. Nevertheless, as concerns the contention that the Petitioner or her members had not acquired any legal or equitable interests over the suit property, I must say that such is a substantive issue that would require suitable investigation and the interrogation of the process leading to the alienation of the suit property to the 1st Respondent.



148. Additionally, the determination of whether the Petitioner or her members have any legal or equitable rights over the suit property will also depend on the ascertainment and determination of whether the suit property was already reserved for a designated purpose and if so, whether same remained unalienated Government land , capable of alienation or otherwise.
149. Either way, the determination of such issues, must await the plenary hearing and hence, same cannot be addressed at this juncture.

Final Disposition:

150. Having calibrated upon and analyzed the various issues, which were isolated and highlighted in the body of the Ruling, it is now appropriate to render the final and Dispositive orders.
151. Be that as it may, it is appropriate to state and observe that in the course of addressing and dealing with the various issues, it must have become obvious that the Preliminary Objection canvassed and ventilated by the 1st Respondent was/is premature, misconceived and bad in law.
152. On the other hand , I have also pointed out elsewhere herein before that the prayers for Temporary Injunction were sought for pending the hearing and determination of the Application. For clarity, there was no substantive prayer pending the hearing and determination of the Petition.
153. Consequently and in the premises, the final orders of the court are as hereunder;
- i. The Notice of Preliminary Objection dated the 4th of April 2022, be and is hereby Dismissed.
 - ii. The Application dated the 22nd of June 2022, be and is hereby Dismissed.
 - iii. The Application dated the 8th of March 2022, be and is hereby Dismissed.
 - iv. Each Party shall bear its own Costs of the Preliminary Objection and the named Applications.
 - v. Nevertheless, the Court hereby grants an order for the Maintenance of the Status Quo currently obtaining over and in respect of LR No Nairobi/Block 63/787, (the Suit Property) pending the hearing and determination of the Petition.
 - vi. For the avoidance of doubt, the Suit Property shall not be alienated, transferred, disposed of and or otherwise charged by the 1st Respondent, pending the hearing and determination of the Petition. However, if the title is currently charged, then there shall be no Further Charge in respect thereof.
 - vii. The Parties herein are directed to take necessary and appropriate steps to have the Petition listed for Hearing and eventual disposal within the next six (6) Months from the date hereof.

154. It so Ordered.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE.

In the Presence of;



Benson - Court Assistant.

Mr. Omemo for the Petitioner/Applicant.

Mr. Victor Kimani Mungai for the 1st Respondent.

Mr. Allan Kamau for the 2nd and 4th Respondent.

Mr. Victor Swanya for the 6th Respondent.

