REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 9 OF 2020

POLYMARRIES MBITHE MUTUA........................PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL..............1ST RESPONDENT

JOSEPH MWANIA MUTHAMA...................2ND RESPONDENT

PETER MWANZIA MWANIA......................3RD RESPONDENT

MUTUA WAWEU...4TH RESPONDENT

RULING

Introduction:

1. This Ruling is in relation to a Notice of Motion Application dated 29th May, 2020 in which the Applicant is seeking for the following orders:

> ***a) Spent.***
>
> ***b) Spent.***
>
> ***c) That this Honourable Court be pleased to issue preservatory and conservatory orders against the 2nd, 3rd, and 4th Respondents from disposing off and/0r in any way interfering with parcels of land known as Matungulu/Katine/2772, 2773 & 2774 and the prevailing status quo be maintained pending the hearing and determination of the Petition.***
>
> ***d) Costs of the Application be in the cause.***

2. The Application is supported by the Affidavit of Polymarries Mbithe Mutua, the Petitioner, who deponed that she is the registered owner of Land Parcel Number Matungulu/Katine/2772, 2773 and 2774 *(the suit property);* that the suit properties were as a result of an illegal sub-division of her parcel of land known as Matungulu/Katine/2548 and that she bought the suit property from one Maweu Kavuu *(deceased)* sometime in the year 1994.

3. According to the Petitioner, the deceased legally transferred the said parcel of land to her before his death; that after the lawful transfer, she took possession of the land and undertook developments thereon, including establishing her home and that she has been living on the said parcel of land with her family to date.

4. The Applicant deponed that sometimes in the year 1998, one Joseph Mwania Muthama, the 2nd Respondent herein, started claiming a portion of the suit land and that unknown to her and in collusion with the other Respondents and Christopher Katisya *(deceased),* the 2nd Respondent filed claims before the defunct Matungulu Land Dispute Tribunal in the year 1999 in respect of Land Parcel Number Matungulu/Katine/2548.

5. It was deponed that notwithstanding the fact that the Tribunal lacked jurisdiction to determine a dispute on ownership over a registered parcel of land, it proceeded to hear claim No. 14/99A and 14B/1999 in the Petitioner's absence and without giving her any notice whatsoever and that the awards of the Tribunal were read and confirmed as the Judgments of Court by the Resident Magistrate's Court at Machakos vide Misc. Application No. 71 of 2006 and 80 of 2006 on 23rd August, 2006 in her absence.

6. It was deponed that the Petitioner was never given an opportunity to be heard both by the Tribunal and the Magistrate's Court hence infringing on her right to be heard and that at the time all these was happening, there were injunctive orders which had been issued by the High Court, Machakos in HCCC No. 434 of 1998, which orders had not been set aside, reviewed and/or stayed.

7. It was also deponed by the Petitioner that the Resident Magistrate ordered the Executive Officer at Machakos Law Courts to execute the transfer forms in execution of the Tribunal's awards and that as a result, her parcel of land was unprocedurally sub-divided to create the suit properties herein.

8. The Petitioner deponed that she became aware of the illegal dealings over her subject parcel of land in the year 2007 after sub-division of the said land way after the time for filing Judicial Review proceedings and/or Appeal had lapsed and that her efforts to have the decision by the Tribunal quashed were thwarted by technicalities.

9. It was deponed by the Petitioner that the issue of ownership of the suit property has never been determined by a court of law with proper jurisdiction due to the aforesaid technicalities; that she is likely to lose out on her land due to the illegal and unconstitutional acts of the Respondents and that the 2nd-4th Respondents have started disposing off some portions of the subject parcels of land to third parties.

10. The 2nd and 3rd Respondents filed a Replying Affidavit sworn on 15th September, 2020 and deponed that the 2nd Respondent was wrongly enjoined in this Petition as he was in no way connected with the issues revolving around the suit property; that the 2 nd Respondent's name should be struck out from the Petition and that that 3rd Respondent bought 4 acres of the original suit parcel of land known as Matungulu/Katine/2548 from the late Maweu Kavuu sometime in 1997.

11. The 3rd Respondent deponed that the whole land measured 17 acres and that the late Maweu Kavuu sold the suit property to three people, that is, 7.08 acres to the Petitioner herein, 4 acres to the 2nd Respondent and 1 acre to Samuel Katisya *(deceased).*

12. The 3rd Respondent deponed that the Petitioner herein, without consent from the deceased or the other purchasers, fraudulently transferred the said land to her name; that the deceased together with Samuel Katisya went to the Land Control Board to sub-divide and transfer the land only to discover that the Petitioner had transferred the same to her name and that unfortunately, the deceased died within three (3) months of the said discovery without implementing the transfer and sub-division of the suit property.

13. The 3rd Respondent deponed that he is rightfully in possession of the suit parcel of land which he lawfully bought; that he is not in any way trespassing and or interfering with the Petitioner's land and that the Application should be dismissed with costs.

14. The 3rd and 4th Respondents filed a Notice of Preliminary Objection dated 20th June, 2020 together with a Replying Affidavit sworn on 27th July, 2020. In the Notice of Preliminary Objection, the Respondents averred that this court has no jurisdiction to entertain the Petition herein and that the Petitioner's claim is *res judicata* pursuant to provisions of Section 7 of the Civil Procedure Act. It was deponed that the Petitioner having raised similar issues and the same having been fully determined in Matungulu District Land Tribunal Claims No. 14A of 1999 and 14B of 1999, the Petition should be dismissed.

15. It was averred by the Respondents that the Petitioner's claim also raised similar issues which issues were determined with finality in Machakos HCCC No. 42 of 2009, which was consolidated with Machakos HCCC Case No. 434 of 1998 and that the Petitioner's cause of action, if any, is statutory time barred pursuant to Section 7 of the Limitations of Actions Act.

16. It was averred by the 3rd and 4th Respondents that the Petitioner's claim is an abuse of court process because the issues and facts herein were a subject of Nairobi High Court Judicial Miscellaneous Application Number 567 of 2007 which was withdrawn by the Petitioner and that it is trite law and principle that litigation must come to an end.

17. In his Replying Affidavit, the 4th and 3rd Respondents deponed that they were advised by their counsel that the Application herein lacks merit; that the Petitioner herein has not satisfied the grounds for the grant of conservatory orders and that the Petitioner had deliberately concealed crucial and material facts from this court with a view to misleading it into giving her undeserved orders.

18. The deponent averred that the dispute involving the land had been adjudicated upon in various courts namely: Matungulu District Land Tribunal Claims No. 14A and 14B of 1999; Chief Magistrate's Court at Machakos Misc. Application No. 71 and 80 of 2006; and Nairobi High Court Miscellaneous Application No. 567 of 2007. The deponent averred that even after learning about the Land Tribunal's decision, the Petitioner failed or ignored to file an Appeal or Judicial Review proceedings to set aside the said orders and that the Petitioner is seeking to deny him and the 3rd Respondent the right and chance to enjoy the use of the suit land contrary to the provisions of Article 40 of the Constitution.

19. On record also is a Notice of Motion Application filed by the 3rd and 4th Respondents dated 27th July, 2020 which is in response to the Notice of Motion Application filed by the Petitioner on 29th May, 2020. In his Affidavit in support of the Application, the 4th Respondent deponed that the Petitioner had deliberately concealed crucial and material facts from this court with a view to misleading it into giving her undeserved orders.

20. In response to the Application dated 27th July, 2020, the Petitioner deponed that although she filed Judicial Review proceedings to challenge the Tribunal's decision immediately she learnt about the proceedings and the decision of the Tribunal in the year 2007, the said Judicial Review Application was never determined on merit because she was forced to withdraw the same as it had been filed outside the statutory time.

21. The Petitioner further averred that the Respondents have never occupied the subject land; that she has been in occupation of the subject parcels of land since she purchased the same to date and that it is in the interest of justice that the Application dated 27th July, 2020 be dismissed. The two Applications and the Notice of Preliminary Objection were canvassed vide written submissions.

Submissions:

22. In his submissions, counsel for the Petitioner quoted Section 7 of the Civil Procedure Act, which stipulates as follows:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue had been directly an 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."*

23. Counsel cited the case of ***Abok James Odera vs. John Patrick Muchira Civil Application No. 49 of 2001***, as quoted with approval in the case of ***Loise Mumbi Gachinga & another vs. Stephen Kiiru Mugo & another (2014) eKLR***, in which Keiwua J., held that to rely on a defence of *res-judicata*, there must be:-

> *i) A previous suit in which the matter was in issue.*
>
> *ii) The parties were the same or litigating under the same title.*
>
> *iii) A competent Court heard the matter in issue*
>
> *iv) The issue had been raised in a fresh suit.*

24. Counsel submitted that in Machakos HCCC No. 42 of 2009, the Petitioner was seeking to have the Tribunal's decision declared null and void; that the same was struck out on preliminary points and that its merits were never argued. Counsel relied on the case of ***Peter Gicharu Ngige vs. Kiiru Chomba & 3 others [2004] eKLR*** in which Dulu J. held as follows:-

> *"…the decision was on Preliminary points. If it was on substantive points and the merits of the application, the Court would be persuaded that it cannot entertain the suit. However, as the application was dismissed on preliminary points, the two alternative reliefs still existed..."*

25. Counsel argued that both Nairobi Misc. Application No. 567 of 2007 and Machakos HCCC No. 42 of 2009 were decided on preliminary points without delving into the merits of the cases and that as such, the defence of *res judicata* as raised by the Respondents was unattainable.

26. On the issue of whether the Petition herein was time barred, the Petitioner's counsel submitted that the Petitioner filed the Constitutional Petition because her constitutional rights had been greatly violated by the Respondents and as such was not time barred.

27. It was submitted that the Petitioner's right to own property under Article 40 of the Constitution and her right to a fair hearing under Article 50 of the Constitution have been infringed and as such, the Limitation of Actions Act does not apply.

28. On the issue of whether the Petition was an abuse of the court process, the Petitioner's counsel submitted that the Petition was properly before court. Counsel relied on the case of ***Safepak Limited vs. Henry Wambega & 11 others [2019] eKLR*** where the Court of Appeal held as follows:

> *"The principles on which the court acts when dealing with a motion to strike out a suit are captured in **D.T Dobie & Company Limited v Joseph Mbaria Muchina & another [1980] eKLR** where Madan JA cautioned that a court seized of such application should act cautiously and carefully and that "a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal."*

29. Counsel submitted that the defunct Tribunal determined the issue of ownership of the suit property; that the Tribunal did not have jurisdiction to determine the said issue and that the court should dismiss both the Application dated 27th July, 2020 and the Notice of Preliminary Objection dated 20th July, 2020 and proceed to determine the Petition herein on merits.

30. The 2nd and 3rd Respondents filed their submissions dated 3rd November, 2020 in support of the Preliminary Objection dated 29th May, 2020. Learned counsel for the Respondents listed the issues for determination as follows:

> *i) Whether the Petition and Application herein is res judicata;*
>
> *ii) Whether the Petition an Application is statutory time barred.*

31. On the first issue, counsel submitted that the issues raised by the Petitioner were similar issues that had been fully determined in Matungulu District Land Tribunal Claims No. 14A and 14B of 1999 and the subsequent orders in Miscellaneous Application No. 71 and 80 of 2006 in the Chief Magistrate's Court at Machakos. It was submitted that the same issues were dispensed with in Machakos HCCC No. 434

of 1998 and Machakos HCCC No. 42 of 2009 by Angote J.

32. Learned counsel for the 2nd and 3rd Respondents further submitted that the doctrine of *res judicata* is a reinforcement of the public policy; that there must be an end to litigation and that a party should not be vexed twice in the same litigation. Counsel relied on the case of ***The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 others, ([2017] eKLR).***

33. It was submitted that this matter has been resolved by a court of competent jurisdiction and that the Applicant herein should not be allowed to bring up the same issue in the hope of getting his way.

34. On the second issue, learned counsel for the 2nd and 3rd Respondents relied on the case of ***Gathoni vs. Kenya Co-operative Creameries Ltd [1982] KLR 104*** in which the Court of Appeal, while dismissing an Appeal arising from an Application for extension of time to bring a suit after the period of limitation had expired, stated thus:-

> *"…The Law of Limitation of Actions is intended to protect defendants against unreasonable delay in the brining of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."*

35. Counsel also relied on the case of ***Mehta vs. Shah [1965] E.A 321***, in which Grabbie J.A in his Judgment stated as follows:-

> *"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."*

36. It was submitted that the Respondents' parcels of land were clearly identifiable on the ground and that the Respondents have been in possession of the same for over 20 years. Counsel finally stated that it was in the interest of justice that the Petition and Application dated 29th May, 2020 be struck out and dismissed with costs.

37. Learned counsel for the 4th Respondent submitted that the Petitioner herein was still trying to prosecute the same cause of action that had been determined by the court; that currently, the Petitioner has changed the shape of the cause of action and expertly molded a constitutional Petition to avoid being caught by the doctrine of *res judicata* and that the Petitioner also added the Attorney General to these proceedings without raising any issue against him. Counsel submitted that in ***John Florence Maritime Services Ltd vs. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR,*** the Court of Appeal held that that *res judicata* is applicable in constitutional litigation. It was submitted that the Petition was an abuse of the court process and should be dismissed.

Analysis and findings:

38. I have considered the Application, the submissions by counsel and authorities cited. In my considered opinion, the issues that arise for determination are:

> *a) Whether this Petition is res judicata;*
>
> *b) Whether the Petition is time barred; and*
>
> *c) Whether the Petitioner is entitled to conservatory orders.*

a) Whether this Petition is *Res judicata*

39. This Petition was commenced by way of a Petition dated 12th March, 2020. In the Petition, the Petitioner has alleged that she is the registered owner of Land Parcel Number Matungulu/Katine/2772, 2773 and 2774 *(the suit property);* that the suit properties were as a result of an illegal sub-division of her parcel of land known as Matungulu/Katine/2548 and that she bought the said land from one Maweu Kavuu *(deceased)* sometime in the year 1994.

40. According to the Petitioner, the deceased legally transferred the said parcel of land to her before his death; that after the lawful transfer, she took possession of the land and undertook developments thereon, including establishing her home on the land and that she has been living on the said parcel of land with her family to date.

41. It is the Petitioner's case that sometimes in the year 1998, one Joseph Mwania Muthama, the 2nd Respondent herein, started claiming a portion of the suit land and that unknown to her and in collusion with the other Respondents and Christopher Katisya *(deceased),* the 2nd Respondent filed claims before the defunct Matungulu Land Dispute Tribunal in the year 1999 in respect of Land Parcel Number Matungulu/Katine/2548.

42. The Ultimate prayers that the Petitioner is seeking is for a declaration that the Tribunal's decision over parcel number Matungulu/Katine/2548 and the subsequent adoption of the Award by the Resident Magistrate was illegal, unfair, unconstitutional and against the provisions of Article 40 of the Constitution. The Respondents on the hand have argued that the Petition is *res judicata* and should be struck out with costs.

43. Section 7 of the Civil Procedure Act states as follows:

> *"...No court shall try any 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 issues has been subsequently raised and has been heard and finally decided by such Court."*

44. In the case of ***Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another, (2017) eKLR***, the Court of Appeal extensively considered the principle of *res judicata* and held as follows:

> *"...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal;* ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2007) eKLR:***
>
> *'The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and forces to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."*

45. In the case of ***Mburu Kinyua vs. Gachini Tutu (1978) KLR 69*** *Madan, J.* quoting with approval ***William Koross vs. Hezekiah Kiptoo Komen & 4 others (2015) eKLR,*** stated:

> *"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 person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, 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."*

46. The doctrine of *res judicata* is grounded on public interest and thus transcends the parties' interest in a suit. In the ***Maina Kiai*** case *(supra),* the court quoted with approval the Indian Supreme Court in the case of ***Lal Chand vs. Radha Kisham, AIR 1977 SC 789*** where it was stated:

> *"The principles of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.*
>
> *The practical effect of res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunct, from entertaining such suit."*

47. Again in ***Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (2014) eKLR***, the Court of Appeal in determining another application by *Benjoh* stated thus:

> *"The general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."*

48. In the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport & Infrastructure & Others, Civil Appeal No. 42 of 2014 (2015) eKLR***, the Court likewise extensively considered the principle of *res judicata* and cited with approval the cases of ***Handerson vs. Handerson (1843) 67 ER 313*** and the case of ***Kamunye & Others vs. Pioneer General Assurance Society Limited (1971) EA 263*** and stated thus:

> *"Res judicata is a subject which is not 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* ***Handerson vs. Handerson (1843) ER 313****:*
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> *"... where a given matter becomes the subject of litigation in and adjudication in 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 or 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..."

49. The case of ***James Njuguna Chui vs. John Njogu Kimani, Court of Appeal Nairobi Civil Appeal No. 322 of 2014 (2017) eKLR,*** the Court in expounding a doctrine of *res judicata* cited with approval the decisions in ***William Koross vs. Hezekia Kiptoo Komen & Others, Civil Appeal No. 223 of 2013*** and also the case of ***Lal Chand vs. Radha Kishan Air 1997 SC 789*** and stated thus:

> *"The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the Courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, courtesy of the repeat litigation.*
>
> *The philosophy behind the principle of re judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too-human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."*

50. Indeed, the Court of Appeal has held that the doctrine of *res judicata* is applicable in constitutional Petitions. However, the principle should be used sparingly in constitutional Petitions because rights of individuals keep on mutating. In the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR***, the Court of Appeal held as follows:

> *"The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under **Rule 3(8)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions."*

51. The elements to be proved for one to succeed in a claim of adverse possession are clearly stipulated in the law *(Section 7 of the Civil Procedure Act).* In the case of ***Loise Mumbi Gachinga & Another vs. Stephen Kiiru Mugo & Another (2014) eKLR,*** the court held that to rely on a defence of *res judicata*, there must be: a previous suit in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue had been raised in a fresh suit.

52. The evidence before this court shows that the Petitioner was sued by one Christopher Katisya in Matungulu Land Dispute Tribunal Claim Number 14B of 1999. In its findings, the Tribunal found that the boundary between the Petitioner herein and the claimant were clearly marked. The Tribunal further held that parcel number Matungulu/Katine/2548 should be sub-divided so that the claimant *(Christopher Katisya*) gets his portion of land. From the proceedings, it will appear that the Petitioner herein was never heard.

53. The record shows that the decision of the Tribunal was adopted by the Resident Magistrate in Miscellaneous Application Number 71 of 2006 in which the Magistrate stated as follows:

> *"1. The Executive Officer Machakos Law Courts do sign and/or execute Land Control Board application form, land transfer forms and any other documents which may require to be sighed and facilitate the transfer of land parcel number Matungulu/Katine/2548 to the Claimant/Applicant."*

54. Being dissatisfied by the decision of the Tribunal, and the Magistrate, the Petitioner herein filed Nairobi Miscellaneous Application number 567 of 2007. However, the said suit was withdrawn by the Petitioner herein on 12th November, 2008.

55. It will appear that having withdrawn the Nairobi Miscellaneous Application in the year 2008, the Petitioner herein filed another suit being Machakos HCCC No. 42 of 2009. In the said suit, the only Defendant was Joseph Mwania Muthama, the 2nd Respondent herein. The Affidavit sworn by Anthony Muasya in the said suit shows that the Petitioner only bought a portion of the suit property and not the entire land that she is now claiming, while the Defendants purchased the remaining portions.

56. The Respondents in this matter filed an Application to have Machakos HCCC No. 42 of 2009 struck out. In its Ruling of 30th June, 2017, this court held as follows:

> *"24. The suit before this court is challenging the decision of the Tribunal, not by way of an Appeal or Judicial Review, but by way of an ordinary suit. In the case of **Florence Nyaboke Machavi vs Mogere Amosi Ombui & 2 others (2014) eKLR**, the Court of Appeal was confronted with an objection similar to the present one. The court, while determining the Application, agreed with the decision that had been rendered by the High Court. The court held as follows:*
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> *"It will therefore be seen that the said Act (Land Disputes Tribunal Act) provided an elaborate procedure for resolution of disputes*

relating to the division of, or determination of boundaries to land or trespass to land where jurisdiction was donated to a Tribunal... The Appellant in this Appeal did not challenge the decision of the Tribunal in accordance with the said procedure set out in the Act. Neither were Judicial Review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned judge found in the Judgment appealed from, the 1st Defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the Appeals Committee"

25. The Court of Appeal in the above matter agreed with the Respondent that the Appellant could not file a fresh suit to challenge the order of the Tribunal, other than appealing against the said decision or filing Judicial Review proceedings.

26. If the Plaintiff's claim is that he was never served with the pleadings by the Tribunal, the Plaintiff should have challenged the verdict of the Tribunal by way of an appeal or Judicial Review when he became aware of the decision.

27. Indeed, by the time this suit was filed, the Land Disputes Tribunal Act had not been repealed, neither had the Environment and Land Court been established. Consequently, it was incumbent upon the Plaintiff to follow the law as provided for under the Land Disputes Tribunal Act or the Law Reform Act to challenge the decision of the Tribunal.

28. The danger of allowing parties to challenge the decisions of the Tribunal in a manner that does not conform to the law is that matters which have been finalized will be litigated upon over and over, with the result that those people who had acted on those Judgments will suffer great injustice.

29. Having failed to file an Appeal or Judicial Review proceedings the moment he learnt about the decision of the Tribunal, I find that the filing of the present suit by the Plaintiff challenging the decision of the Tribunal five (5) years after the decision was made is an abuse of the Court process.

30. In the circumstances, I find merit in the Defendants' Application dated 23rd March, 2010.

31. Consequently, the Plaintiff's suit is struck out with costs."

57. The Petitioner herein challenged the decision of the Tribunal, not only vide a Judicial Review Application which was withdrawn, but also vide a suit which was struck out by this court. While striking out Machakos HCCC No. 42 of 2009, this court was clear in its mind that the Petitioner herein was abusing the process of the court by attempting to challenge the decision of the Tribunal by way of a suit, and five (5) years down the line.

58. The Petitioner herein did not Appeal against the decision of this court. Instead, she has waited for more than three (3) years after the delivery of the Ruling in HCCC No. 42 of 2009, and fifteen (15) years after the decision of the Tribunal, to once again challenge the decision of the Tribunal.

59. Indeed, although the current suit is couched as a constitutional Petition, the Petitioner has not raised any new issue that was not raised in the suit which was dismissed by this court and in the Judicial Review Application which he withdrew on her own volition.

60. The Petitioner has not convinced this court by way of the current Petition why this court should depart from its earlier Ruling in Machakos HCCC No. 42 of 2009 where it held as follows:

"The danger of allowing parties to challenge the decisions of the Tribunal in a manner that does not conform to the law is that matters which have been finalized will be litigated upon over and over, with the result that those people who had acted on those Judgments will suffer great injustice.

Having failed to file an Appeal or Judicial Review proceedings the moment he learnt about the decision of the Tribunal, I find that the filing of the present suit by the Plaintiff challenging the decision of the Tribunal five (5) years after the decision was made is an abuse of the Court process."

61. Indeed, other Machakos HCCC No. 42 of 2009 and Nairobi Miscellaneous Judicial Review No. 567 of 2007, the Petitioner has admitted that she also filed Machakos HCCC No. 434 of 1998 in which she obtained injunctive orders *"restraining the Defendant (the 2nd Respondent herein)"* from interfering with her lawful occupation and use of parcel of land number Matungulu/Katine/2548 until the suit is disposed of. The Petitioner has not told this court what happened to that suit.

62. Machakos HCCC No. 42 of 2009 and Nairobi Miscellaneous Judicial Review No. 567 of 2007 were not heard and determined on merit. The two suits were struck out and withdrawn respectively. That being the case, it cannot be said that the current Petition is *res judicata*. However, the current Petition is an abuse of the court process which was defined in the case of ***Satya Bhama Gandhi vs. Director of Public Prosecutions & 3 others [2018] eKLR*** as follows:

"The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. [Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415.]

The situation 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. However, abuse of court process in addition to the above 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 court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and 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 court below.

(e) Where there 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. [Jadesimi vs. Okotie Eboh (1986) 1NWLR (Pt 16) 264]

(f) Where a party has adopted the 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 two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[(2007) 16 NWLR (319) 335.]

In the words of ***Oputa J.SC*** *(as he then was). In the Nigerian case of Amaefule & other Vs The State.] abuse of judicial process is:-*

"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

63. The Petitioner filed Nairobi Judicial Review Application No. 567 of 2007 challenging the decision of the Tribunal which she withdrew on her own volition on 12th November, 2008. The Petitioner has not told the court why she did not file a Petition immediately thereafter. The Petitioner then filed Machakos HCCC No. 42 of 2009 raising the same issues she had raised in the Judicial Review Application.

64. Considering that the current Petition is challenging the decision of the Tribunal, and this court having found in Machakos HCCC No. 42 of 2009 that the Petitioner herein should have appealed against the said decision or filed a Judicial Review Application, I find the current Petition which has not raised any new issue, and which was filed three (3) years after the Ruling of this court, to be an abuse of the court process. That being so, I shall not address the issue of whether the Petition is time barred or whether the Petitioner is entitled to conservatory orders.

65. That being the case, I find merit in the Respondents' Notice of Preliminary Objection dated 20th July, 2020.

66. For those reasons, the entire Petition and the Application dated 29th May, 2020 are dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE