



Ashbrook Limited v Chief Land Registrar & 7 others (Petition E004 of 2024) [2025] KEELC 5833 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
PETITION E004 OF 2024**

LL NAIKUNI, J

JULY 3, 2025

**IN THE MATTER OF ARTICLE 20 (2), 22 (1), 23, 40 (1), 60 (1)(B)
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION
OF KENYA, 2010 TO WIT, ARTICLES 10, 19, 20 (1 & 2), 23 (1 &
3), 24 (1 & 3), 27 (1 & 2), 40 (1), 60 (1) (B), 64 AND 232 (1) (E & F)**

AND

**IN THE MATTER OF SECTIONS 25, 80 AND 101 OF THE LANDS
REGISTRATION ACT, NO. 3 OF 2012 AND IN THE MATTER OF SECTION
13 OF THE ENVIRONMENT & LAND COURT ACT, NO.19 OF 2011**

AND

**IN THE MATTER OF THE PROPERTY TITLE
NUMBER KWALE/DIANI BEACH BLOCK/1352**

BETWEEN

ASHBROOK LIMITED PETITIONER

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

THE HON.ATTORNEY GENERAL 2ND RESPONDENT

RAMA OMARI CHIMWAGA 3RD RESPONDENT

ADAN KASSIM MKUNGU 4TH RESPONDENT

SULEIMAN SAID TEYA 5TH RESPONDENT

HATIBU MJAKA MTENGO 6TH RESPONDENT



HASSAN RASHID MZINGA 7TH RESPONDENT

NDORO MGOWA 8TH RESPONDENT

RULING

I. Introduction

1. Before the Honourable Court for its determination is a Notice of Motion application dated 8th October 2024 filed by the 3rd to 8th Respondents. The application was brought under the provision of Sections 5 and 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya.

II. The case of the Respondent/Applicant

2. The Notice of Motion application sought the following orders:-
 - a. Spent.
 - b. The Petitioner's Petition dated 11th June 2024 be struck out.
 - c. The Petitioners pay costs.
3. The application was premised on the grounds, testimonial facts and the a 23 Paragraphed Supporting Affidavit sworn by Mr. Hatibu Mjaka Mtengo the 5th Respondent and dated on 8th October 2025. He averred that:-
 - a. He was an 5th Respondent and the representative of other 3rd to 8th Respondents with authority in this matter with the knowledge of the facts attending to this case. Hence, he was competent to swear this affidavit on my own behalf and on behalf of the other Respondents.
 - b. They were the rightful owners of the suit property in whose names the suit property was re-allocated.
 - c. The property was leased to Decon Croft Wilcock for a period of 99 years since the year 1914.
 - d. The lease elapsed in year 2013 and was not renewed by the lessees. However, prior to the lapse of the 99-year period, the lease had been abandoned in the years 1980s or thereabout.
 - e. Due to the failure to renew the lease, the suit property reverted back to the Government. They then made an application to the National Land Commission for the property to be reallocated to us under a 99-year lease.
 - f. The National Land Commission considered the matter in year 2022 and wrote a letter to the County Government of Kwale on the same seeking their approval. The National Land Commission also wrote to the Land Administration Department to give their opinion on the allotment.
 - g. Both the County Government and the Land Administration Department did not object at that time. In fact, the county government forwarded a letter of no objection to the National Land Commission, thus signifying their approval.
 - h. The National Land Commission proceeded with the allotment and issued an allotment letter to them for their acceptance. Thereafter, they were issued with a lease for the suit property.



The lease was registered under their name after which they were conferred with the Certificate of Lease.

- i. The property had been in their custody and possession ever since and to allege the contrary would be an outright lie.
- j. The Petitioner had filed a Petition dated 9th October 2019 and filed on 11th October 2019 in the Environment and Law Courts in Malindi, being Petition Number 25 of 2021, in which we appeared as the Interested Parties.
- k. The subject matter of the said Petition was suit parcels Land Reference numbers Kwale/Diani Beach Block 1526, 1527 and 1352 where the Petitioners were claiming ownership.
- l. The matter was then transferred to Kwale Environment and Land Court and the issues canvassed were handled exhaustively by the Learned Judge A. E. Dena
- m. The Learned Judge then delivered her conclusive Judgment on the suit properties through her decision dated 3rd May 2023.
- n. The Learned Judge, while rendering her decision on the three properties, declined to issue any orders regarding the suit parcel Kwale/Diani Beach Block 1352 in her decision under paragraph 74.
- o. The Learned Judge stated that the Petitioners had not submitted any evidence to warrant a decision that would give the property legitimacy
- p. The other orders touching on Kwale/Diani Beach Block No. 1526 and 1527 were rendered against the Petitioners herein.
- q. Following the decision by the Learned Judge the Petitioners moved to the Court of Appeal at Mombasa through the civil suit “civil Appeal No. E083 OF 2024”, appealing the Learned Judge’s Judgment dated 9th October 2024, seeking the dismissal of the entire decision.
- r. The appeal was still ongoing and is yet to be conclusively determined.
- s. Subsequently, the Petitioners had rushed to this Honourable Court and instituted this petition, canvassing the same issues that were determined in Petition No. 25 of 2021, only in this case it just touched on LR No. Kwale/Diani Beach Block 1352.
- t. The parties and subject matter were the same, and issues and orders sought were also similar to those in Petition No. 25 of 2021.
- u. This matter had been heard by a court of competence jurisdiction and the matter dispensed with.
- v. As advised by his Advocate this matter before court, had been heard and determined, was deemed as concluded and the remedies available in law was Appeal and Review.
- w. Additionally, there was an ongoing appeal instituted by the Petitioners in the Court of Appeal at Mombasa. It was still pending determination, and that was directly connected to the suit property herein.
- x. As further advised by his Advocate the Petitioners had embarked on a quest to forum shop, looking for favorable order from this Honorable Court.



- y. This unforsaken behavior amounted to an outright abuse of the court process and should not be tolerated.

III. Responses by the Appellant/Respondent

- 4. While opposing the Notice of Motion application dated 8th October 2024, the Appellant/Respondent responded to through filing a Replying Affidavit. It was sworn and dated on 27th November 2024 by Niraj Shah. He deposed that: -
 - a. He was a shareholder/director of the Petitioner and in his aforesaid capacity. Hence, he had the full information regarding this case and duly authorized to swear this Affidavit on behalf of the Petitioner.
 - b. He had read and had explained to him the Notice of Motion Application dated 8th October 2024 (the Application) and the supporting affidavit of Hatibu Mjaka Mtengo of even date.
 - c. He was advised that the application was frivolous and an utter abuse of the court process and which was solely intended to delay the hearing and determination of this matter.
 - d. The application was premised on falsehoods carefully crafted to mislead the court into issuing unmerited orders.
 - e. He had noted that the application by the Respondent's was premised on allegations that the current Petition was "Res judicata" and that the court had determined the question of ownership of the property title number Kwale/Diani Beach/ 1352 by a Judgment delivered in "the Petition No. 25 of 2021-Brookshill Limited & Another – Versus - The County Government of Kwale & others (Petition No. 25 of 2021)".
 - f. He was aware that this was a deliberate misrepresentation of facts and the correct position was as follows:-
 - i. On 3 May 2023, this court delivered a judgment in Petition No. 25 of 2021 and held as follows;

“Para 74- What about the title in respect of L.R. Kwale/Diani Beach/1352 dated 22d May 2018? I have keenly looked at the petition as well as the cross petition and there is nothing much that is pleaded about L.R. No Kwale/Diani Beach/1352. In fact, the contest is on L.R. No. Kwale/Diani Beach/1526 and 1527. It just appeared to him to have been brought in since it was adjacent to the former two parcels. I observe from the Certificate of Official search dated 22nd May 2018 produced by the Petitioners this parcel was initially registered to Colobus Development Company Limited and not Diccon Croft Willock...”
 - g. Based on the above analysis, the court proceeded to determine the issues raised in Petition no. 25 of 2021 and made final orders as follows at Paragraph 84 of the ruling.
 - i. The Petition was dismissed with costs to the respondent except the 2nd Respondent who did not participate in these proceedings.
 - ii. The Cross Petition succeeded.



- iii. The registration of the Petitioners as proprietors as Lessees of L.R. No. Kwale/Diani Beach/1526 and 1527 was illegal, null and void.
- iv. The properties L.R. No. Kwale/Diani Beach/1526 and 1527 shall revert and be held by the County Government of Kwale in Trust for the people resident in the county to be administered on their behalf by the National Land Commission.
- v. The Chief Land Registrar shall cause the register for L.R. No. Kwale/Diani Beach/1526 and 1527 to be rectified by expunging the entries in respect of the Petitioners and the 1st and 2nd Interested Parties.
- vi. The Petitioners shall also bear the costs of the Cross Petition in terms of 1 above.
- h. He was aware that the proprietorship of the suit property title number Kwale/Diani Beach/1352 had never been litigated and no orders or findings were made in Petition No. 25 of 2021 with regards to the ownership of the said property. In the said petition no. 25 of 2021, the court only analyzed and made findings and final orders with regards to L.R. No. Kwale/Diani Beach/1526 and 1527
- i. While he admitted that there was an appeal pending before the court of appeal against the Judgment of this court dated 3rd May 2024, the property L.R. No. Kwale/Diani Beach/1526 and 1527 was not subject of the appeal as could be evidenced by the Memorandum of Appeal filed in the said Appeal. A copy of the Memorandum of Appeal dated 2nd May 2024 was at pages 1 - 4 of the Exhibit Marked as “NS – 1”.
- j. He was advised by the Petitioners Advocates there had never been a final determination on the subject matter of the instant Petition, either before this court or any other court of competent jurisdiction.
- k. He was also aware that upon being served with the instant Petition, the Applicants disingenuously filed a Judicial review case being “Kwale Judicial Review Application No. E003 of 2024- Rama Omari Chimwanga & Others – Versus - Land Registrar, Kwale County & 4 Others” (Hereinafter referred to as “The Judicial Review Case”). In the said application, the Respondents herein sought the court to declare them as the registered owners of the property.
- l. He was the Land Registrar Kwale had since filed an affidavit in the said Judicial Review Case wherein he confirmed that the Respondent’s herein had no legitimate claim to the suit property. A copy of the replying affidavit by the Land Registrar was at pages 5-16 of the Exhibit.
- m. The Petitioners had also since filed an application seeking to be joined into the said judicial review proceeding. A copy of the Notice of Motion Application dated 26th November 2024 was at pages 17 - 25 of the Exhibit.
- n. Based on the foregoing, it followed that, even by their own action, the Respondents had always been aware that this Court never made any determination as to the ownership of the suit property.
- o. Therefore, he swore this affidavit in opposition to the application dated 8th October 2024 and prayed to this court to find that the instant suit is not “Res judicata” and to dismiss Application the with costs to the Petitioners.



IV. Submissions

5. On 7th April 2025 while the Petitioner/Respondent, the 3rd to 8th Respondents/Applicants and for the 1st and 2nd Respondents were present, the Court directed that the parties to have the application be disposed off by way of written submissions. Some of the parties complied. The court reserved the 3rd July 2025 for delivery of the ruling.

A. The Written Submissions by the 3rd to 8th Respondents/Applicants

6. Learned Counsel for the 3rd to 8th Respondents/Applicants through the Law Firm of Messrs. OG Makowade Advocates filed their written submissions dated 15th March 2025. Mr. Makowade Advocate submitted three (3) key issues for its determination:-
- i. Whether the Petition dated 11th June 2024 was Res Judicata?
 - ii. Whether the Petition dated 11th June 2024 was sub - judice?
 - iii. Whether the Petition dated 11th June 2024 was forum shopping, an abuse of court, a waste of precious judicial time and if should be struck out with costs.
7. The Learned Counsel argued that the Petition dated 11th June 2024 was barred by doctrine “res judicata”, as the issues raised were previously determined in Petition No. 25 of 2021 by Lady Justice A.E. Dena on 3rd May 2023 in the Kwale Environment and Land Court. Both Petitions involve the same parties (Ashbrook Limited and the Respondents) and the same subject matter, including Kwale/Diani Beach Block/1352, with similar prayers for ownership and injunctions.
8. The prior Petition was heard and determined by a competent court, which found insufficient evidence to grant the Petitioner’s ownership claims over the suit property. Citing the case:- “Independent Electoral and Boundaries Commission – Versus - Maina Kiai (2017)” and the provision Section 7 of the Civil Procedure Act, Cap. 21, the Advocate asserted that all elements of res judicata are satisfied, precluding re - litigation.
9. The Learned Counsel contended that the Petition violates the sub - judice rule under the provision of Section 6 of the Civil Procedure Act, Cap. 21 as the same issues were pending before the Court of Appeal in Mombasa (Civil Appeal No. E083 of 2024). The appeal challenged the Judgment in Petition No. 25 of 2021 and sought to allow the Petitioner’s claims, including ownership of Kwale/Diani Beach Block/1352. Allowing the current Petition risks conflicting decisions, as the Court of Appeal’s ruling may affect the suit property’s status. The Counsel made reference to the case of:- “Kenya National Human Rights Commission – Versus - Attorney General (2020)” to argue that the sub judice principle prevented multiplicity of suits over the same subject matter.
10. The Learned Counsel submitted that the Petition constituted forum shopping and an abuse of court process, as the Petitioner sought to relitigate issues already decided and pending on appeal. The Petitioner’s failure to disclose the prior Petition and its determination, as required in the case of:- “Re Kensington Income Tax Commission (1971), was highlighted as a lack of candor.
11. Further citing the case of:- “Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Limited (2009)” and the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010, the Counsel argued that the Petition was frivolous, vexatious, and aimed at harassing the Respondents. He warned that allowing the Petition risked embarrassing the court through conflicting orders with the Court of Appeal, undermining judicial integrity.



12. In conclusion, the Learned Counsel urged the court to strike out the Petition dated 11th June 2024 as misconceived, incompetent, and an abuse of process. The Respondents sought costs, arguing that the Petitioner's actions waste judicial time and sought to frustrate the Respondents through repeated litigation.

B. The Written Submissions by the Plaintiff/Respondent

13. While in opposition to the Notice of Motion application dated 8th October 2024, the Law firm of Messrs. Hamilton Harrison & Mathews filed written submissions dated 23rd April 2025. The Petitioner/Respondent submit that the key issues for determination were:-

- i. Whether the Petition dated 11th June 2024 was “Res judicata?”
- ii. Whether the Petition dated 11th June 2024 was sub judice?
- iii. Whether the Petition dated 11th June 2024 was forum shopping, an abuse of court, a waste of precious judicial time and if should be struck out with costs

22. The Learned Counsel cited the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 and the case of:- “Independent Electoral & Boundaries Commission (Supra)” to outline the conjunctive elements required for res judicata: the issue must be directly and substantially the same, involve the same parties, litigate under the same title, and be finally determined by a competent court.

23. The Learned Counsel submitted that the question of ownership of Kwale/Diani Beach Block/1352, the subject of the instant Petition, was not determined in Petition No. 25 of 2021, decided by Lady Justice A.E. Dena on 3rd May 2023. In Petition No. 25 of 2021, the court noted at paragraph 74 that the contest focused on Kwale/Diani Beach Block/1526 and 1527, with no significant pleadings or final orders regarding BLOCK/1352, which was merely mentioned as adjacent to the other parcels.

24. The Learned Counsel made reference to the case of:- “John Florence Maritime Services Limited – Versus - Cabinet Secretary Transport & Infrastructure (2021)” and “Muriuki – Versus - Muriuki (2016)” to assert that res judicata applied only when a court reaches a final conclusion on the same facts and parties, which did not occur for Block/1352 in the prior case. Thus, the instant Petition was not barred by res judicata, as the ownership of BLOCK/1352 was neither heard nor determined.

25. The advocate acknowledged the pending Civil Appeal No. E083 of 2024 before the Court of Appeal, challenging the Judgment in Petition No. 25 of 2021, but argued it never rendered the instant Petition sub judice under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21. Citing the case of: “ASL Credit Limited – Versus - Abdi Basid Sheikh Ali (2019)”, the Counsel noted that sub judice applied when the same parties and subject matter were involved in multiple suits before different courts. However, the appeal concerns only Kwale/Diani Beach Block/1526 and 1527, not BLOCK/1352.

26. The Learned Counsel relied on the case of:- “Nguruman Limited – Versus - Nielsen (2023)”, which cited Indian Supreme Court cases “(The National Institute of Mental Health (2005) and Rajinder Aggarwal (2019))”, to argue that sub judice requires the prior suit's decision to operate as res judicata in the subsequent suit. Since the appeal never address BLOCK/1352, its outcome would not affect the instant Petition. The Memorandum of Appeal dated 2nd May 2024 sought relief only for BLOCK/1526 and 1527, reinforcing that BLOCK/1352 was not under consideration in the appeal.

27. The Learned Counsel invoked the provision of Articles 48 and 40 of *the Constitution* of Kenya, 2010, which guarantee access to justice and property rights, and the case of:- “Muruatetu – Versus - Republic (2017),” which emphasizes the right to ventilate disputes in court. The Learned Counsel argued that



the Petition was a legitimate effort to protect the Petitioner's rights to BLOCK/1352, not an attempt at forum shopping or abuse of process. Striking out the Petition would prejudice the Petitioner's right to a fair trial. The Learned Counsel urged the court to allow the case to proceed to a full hearing.

28. The Counsel requested that the court dismiss the Respondents' application dated 8th October 2024 with costs, allowing the Petitioner to ventilate its case regarding the ownership of Kwale/Diani Beach Block/1352.

V. Analysis and Determination

29. I have keenly assessed and considered the filed pleadings being mainly the said Notice of Motion application dated 8th October, 2024, the annexures thereof, the written Submissions in support of the Application, the myriad authorities cited, the provision of *the Constitution* of Kenya, 2010 and the statutes.
30. For the Honourable Court to arrive at an informed, reasonable and fair decision, the following three (3) issues fall for determination in the application: _
- a. Whether the Notice of Motion application dated 8th October 2024 has any merit to wit the Applicants had made a case to strike out the Petition.
 - b. Whether the parties herein are entitled to the reliefs sought; and
 - c. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 8th October 2024 has any merit to wit the Applicants have made a case to strike out the Petition.

31. Under this Sub – heading, there is only a single substratum for the consideration by this Honourable Court. Essentially, that is on striking the entire Petition as instituted by the Petitioners herein for offending certain provision of the law. The striking out of the suits are governed under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. It does allow a party to apply for the striking out of a suit. It provided:-

Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
32. From the myriads of authorities, it is settled law that the power and Jurisdiction of the Court to strike out pleadings is discretionary. It must be exercised judicially and be used sparingly and cautiously. That is the case as it is exercised without the court being fully informed on the merits of the case through



discovery and oral evidence. The leading and still very relevant case on this front was that of:- “D.T. Dobie & Company (Kenya) Limited – Versus - Muchina [1982] KLR 1”. Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

33. Further to that, in the case of: - “Co - operative Merchant Bank Limited – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

34. Additionally, in the case of: - “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the same court expressed itself thus: -

“A Plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial.....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

35. The main reason why the applicants have sought for this suit to be struck out is their claim that the suit is res judicata and sub judice. The Black’s law Dictionary 10th Edition defines “res judicata” as:-

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

36. The doctrine of res judicata is codified at the provision of Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.



Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

37. For a suit to be declared res-judicata, the following must be proved;
- (i) The former suit must have been decided.
 - (ii) The competence of a court which decides the former suit must be determined irrespective of any provision as to right of appeal.
 - (iii) The former suit must have been alleged by one party and denied or admitted expressly or impliedly by the other party.
 - (iv) Any matter which might and ought to have made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in the former suit.
 - (v) The parties litigating must be the same.
38. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See the case of:- “John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR”. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See the case of:- “Maithene Malindi Enterprises Limited – Versus - Kaniki Karisa Kaniki & 2 others [2018] eKLR”.
39. Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In case of:- “John Florence Maritime Services Limited (Supra)” the Court of Appeal stated:-

“..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because



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

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”

40. The concept of sub - judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata. It is governed under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 which bars any court from engaging in matters sub judice before them. It provides as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

41. In the case of:- “Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR” Justice Mativo (as he then was) stated as follows: -

“.....there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a Court or Judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

42. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the case of:- “Supreme Court of Kenya in Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)”, stated therein as follows: -

“(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.”

43. Based on these legal reasoning that the Court holds that the application by the Applicants has merit and ought to be considered as prayed.

Issue No. b). Whether the parties are entitled to the reliefs sought

44. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles to the instant case and assess whether the Applicants are entitled to the reliefs sought. As a matter of relevant information, the suit before court was initiated through a Petition dated 11th June 2024 the Petitioner/ Respondent herein through the Law firm of Hamilton Harrison and Mathews as follows;

The Humble Petition Of Ashbrook Limited (the Petitioner) of P.O. Box 976-00606 Nairobi whose address for the purposes of this Petition shall be care of Hamilton, Harrison & Mathews, 2nd Floor, Sea View Plaza, 2nd Floor, Mama Ngina Drive, Mombasa, P.O. Box 84759-80100 Mombasa in the Republic of Kenya and petitions That:

A. The Parties

1. The Petitioner is a limited liability company duly incorporated under the provisions of the *Companies Act*, Cap 486 (now repealed) and is resident and operates its business in Kenya.
2. The 1st Respondent is a statutory office established under the provisions of Section 12 of the *Land Registration Act*, 2012 and is mandated by statute to perform various functions as described in the said act, including, maintaining records and register of lands and ensuring accuracy thereof, registration and issuance of title deeds and certificates of leases among other functions. (Service of summons shall be effected through the Petitioner's advocates office)
3. The 2nd Respondent is a Constitutional Office established under the provisions of Article 156(1) of *the Constitution* of Kenya, 2010 and is the principal legal advisor to the national government of Kenya. (Service of summons shall be effected through the Petitioner's advocates office)
4. The 3rd, 4th, 5th, 6th, 7th and 8th Respondents are adult males living and working for gain within Kwale in the Republic of Kenya. (Service of summons shall be effected through the Petitioner's advocates office)

B. Background Facts And Grounds Of Petition

5. The Petitioner has at all times been the registered proprietor of the land title number Kwale/ Diani Beach Block/1352 situated in Diani Beach and measuring 2.279 hectares for a term of 50 years from 1st June 2002 and which ownership is duly registered and confirmed by a certificate of lease dated 22nd May 2018. (the Property)
6. The Petitioner purchased the Property from Mr. Michael Alan Turner on or about the year 2017. Mr. Michael Alan Turner was the then registered proprietor pursuant to a certificate of lease dated 19th October 2017. A historical search on the property established that: a.



- a. The Commonwealth Development Corporation was the original lessee from the government of Kenya pursuant to a Lease registered on 13th June 2006.
 - b. Colubus Development Company Limited purchased the property from Commonwealth Development Corporation Plc in 2007.
 - c. Mr. Michael Alan Turner purchased from the Colubus Development Company Limited on or about the year 2017
7. The Property is a registered private land as defined under article 64 of *the Constitution* of Kenya and the same is subject to the protection of the provisions of Sections 38-54 of the *Land Act*, 2012.
 8. The Petitioner acquired the land after carrying out due diligence on the Property and complying with all the requirements under the *Land Registration Act*, 2012. In particular;
 - a. The Petitioner obtained a Certificate of Official Search dated 19th October 2017 and duly signed and certified by the officers of the 1st Respondent acknowledging Mr. Michael Alan Turner as the registered owner of the property;
 - b. The Petitioner obtained a rates clearance certificate from the County Government of Kwale dated 24th April 2018;
 - c. The Petitioner obtained a rent clearance certificate dated 31st January 2018 indicating Mr. Michael Alan Turner as the duly registered owner of the Property;
 - d. The Petitioner obtained a consent to transfer dated 19th February 2018 signed by the Commissioner for Lands;
 - e. The Petitioner applied for and obtained a valuation for stamp duty dated 26th February 2018 and signed by the Chief Valuer, Kwale.
 - f. The Petitioner paid the assessed stamp duty to the Kenya Revenue Authority on 12th March 2018;
 - g. The Petitioner executed and lodged for registration a transfer dated 12th February 2018 and the same was duly registered on 22nd May 2018.
 - h. A certificate of lease for the property was issued to the Petitioner on 22nd May 2018.
 - i. The Petitioner has thereafter continuously made payments for rates and rent and has obtained various rates and rent clearance certificates.
 9. The Petitioner acquired the Property legally and bona fides and by virtue of the Petitioner's registration as the proprietor of the Property, the Petitioner acquired indefeasible rights which are protected under Articles 40 of *the Constitution* of Kenya and Section 26 of the *Land Registration Act*, 2012. Accordingly, the Respondents or any other person for that matter are precluded, except through a lawful process, from interfering with or vacating the Petitioner's title and proprietorship to the Property.
 10. The Petitioner has maintained a sea-facing cottage with 3 and 4 bedrooms operated under the trade name, Diani Drifters and which bungalows the Petitioner rents out to guests and clients either on short term basis.



11. On or about January 2024, one of the Tenants of the Petitioner by the name Jennifer Johnson informed the Petitioner that she had made rent payments to the "new owners" of the Property and that she would not be liable for any further payments to the Petitioner.
12. The above information prompted the Petitioner to carry out a search on the Property and on 26th January 2024 and 1s March 2024, the Petitioner was issued with a Certificate of Official Search which indicated Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd.8h Respondents as the proprietors of the Property.
13. From the above stated Certificate of Search, the Petitioner established that the names of the 3rd - 8th Respondent's had been irregularly, fraudulently, and unlawfully entered into the register and the 1st Respondent issued a Certificate of Lease to the said parties on 26th January 2024. The Petitioner also established that the 1st Respondent irregularly changed the lease term from 50 years and instead granted the 3rd -8th Respondent a lease of 99 years from 1st December 2023.
14. The Petitioner states that at no point did it sell, transfer, or otherwise relinquish its proprietorship over the Property and that any transfer by the 1st Respondent to Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd-8th Respondents, or any other third parties is fraudulent, unlawful, irregular and void ab initio and the same is in flagrant breach of the Petitioner's rights as shall be particularized hereunder.
15. The Petitioner has also never entered into any sale agreement nor executed any instrument of transfer disposing the Petitioner's title and interest in the Property and that any documents or instrument of transfer registered by the 1s Respondent in favour of the 3d -8th Respondents or any other third parties is fraudulent, unlawful, irregular and void ab initio and the same is in flagrant breach of the Petitioner's rights as shall be particularized hereunder.
16. Surprisingly, despite several applications to the 1st Respondent, the Petitioner has not been supplied with a certified copy of the said Certificate of Lease issued to Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd.8th Respondents.
17. The Petitioner avers that its efforts to obtain copies of documents relied on by the 1st Respondent to effect the unlawful, irregular and fraudulent transfer of the proprietorship of the Property to the 3rd - 8th Respondents has been in vain and having no other recourse, the Petitioner has filed this petition seeking enforcement of its constitutionally guaranteed rights.
18. The petitioner has made reports to the Police through an OB Number 28/02/2024 and another OB Number 15/27/05/2024 but no report of any investigations has been shared with the petitioner.

C. Legal Foundation Of The Petition

19. Article 2 of *the Constitution* provides that the supreme law of the Republic and binds all persons and all State organs at both levels of government. The 1st-8th Respondents are therefore bound by *the Constitution*.
20. Article 10 of *the Constitution* provides that the national values and principles of governance in binds all State organs, State officers, public officers and all persons whenever any of them



applies or interprets this Constitution enacts, applies or interprets any law which under these circumstances is the *Land Act* and the *Land Registration Act*, 2012. The 1st Respondent being a state officer is bound to adhere to and to promote the national values and to act within the law in discharging its duties.

21. Article 19 of *the Constitution* provides that the rights and fundamental freedoms in the bill of rights belong to each individual and are not granted by the state and do not exclude other rights and fundamental freedoms not in the bill of rights, but recognized or conferred by the law.
22. Article 20 of *the Constitution* provides that The Bill of Rights applies to all law and binds all State organs and all persons. Further, every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
23. Article 22 of *the Constitution* provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
24. Article 23 of *the Constitution* provides that as read with Article 162(2)(a) confers this Honourable Court the jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
25. Article 24 of *the Constitution* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors.
26. Article 27 of *the Constitution* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law including the right to fully enjoy all the rights and fundamental freedoms.
27. Article 40(1) provides that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya.
28. Article 40(3) provides that the state shall not deprive a person of property of any description, or of any interest in, or right over property and any description save for the exceptions therein.
29. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the actions.
30. Article 60(1)(b) provides that land in Kenya shall be held, used and managed in a manner that inequitable, efficient, productive and sustainable and in accordance with the principles guaranteeing security of land rights.
31. Article 64 of *the constitution* defines a private land to include land held by any person under a leasehold tenure.
32. Article 232(1) (e) sets the values and principles of public service with includes accountability for administrative acts.
33. Article 258 of *the Constitution* provides that every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.



34. Article 259 of *the Constitution* provides that it shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights permits the development of the law; and contributes to good governance.

D. Violations Of The Petitioner's Rights

35. The Petitioner states that the actions and decisions of the Respondents have violated the Petitioner's rights under the aforesaid provisions of *the Constitution* and threaten to continue to prejudice and infringe on the Petitioner's rights hence warranting this Court's urgent protection.
36. The 1st - 8 Respondents have violated the Petitioner's rights to own, utilize and enjoy quiet possession of the Property which the Petitioner is the lawful and registered proprietor as guaranteed under Article 40 and 60 of *the Constitution*.
37. The 1st - 8th Respondents have violated the Petitioner's rights under Articles 24, 27, 40(3) and 60 of *the Constitution* to the extent that the 1st Respondent, in concert with the other respondents have unlawfully and without reason, cause Petitioner, deprived the Petitioner of its right to own and use the Property and caused the same to be transferred into the names of the 3rd -8th Respondents.
38. The 1st Respondent has violated the Petitioner's rights under Articles 27 and 232 of *the Constitution* of Kenya to the extent that the 1st Respondent has derogated and breached its constitutional duty to act within the law and specifically to carry out its functions in a transparent, accountable and to inform the Petitioner of the 1st Respondent's unilateral decision to transfer the Petitioner's Property to the 3rd -8th Respondents.
39. As the duly registered proprietors of the Property, the Petitioner has a guaranteed right and protection of the law against any illegal, irregular and unprocedural transfer of the Property and the 1st Respondent has a constitutional duty to uphold the Petitioner's rights. To the extent that the Property has been registered in the names of 3rd. 8th Respondent, the 1 Respondent has breached its constitutional duties under Articles 10, 27, 40 (3), 47, 232, and 259 and thereby infringing on the Petitioner's property rights under Article 40 of *the Constitution*.
40. The 1st Respondent has fundamentally failed to uphold the rule of law under 27, 47(2) and 259 of *the Constitution* by allowing the 3rd -8th Respondent to fraudulently deprive the Petitioner the title and use of the Property.
41. The Petitioner has since lodged a complaint at Diani Police station vide OB Number 73/28/02/2024 and 15/27/05/2024. However, the Petitioner is apprehensive that Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ngoro Ngowa, the 3d-8th Respondents are currently in the process of transferring the property to unsuspecting third parties and which action will further infringe on the Petitioner's rights to property.
42. Based on the foregoing, the Petitioner states that the violations and denial of the Petitioner's fundamental rights including the right to property, right to fair administrative action, equality before and protection of the law shall continue to be violated unless the Honourable court intervenes by issuing the orders sought to preserve the Property and to protect the Petitioner's rights to the Property.



43. Therefore, the Petitioner pray to this Honourable Court to issue the declarations, orders and directions as may be necessary to protect the Property and to prevent the violations of the Petitioner's fundamental rights and freedoms guaranteed under the law.

REASONS WHEREFORE, the Petitioner humbly pray that the Honourable Court be pleased to grant the following reliefs;

- i. A declaration be and is hereby issued that the Petitioner is the lawful and registered proprietor of the property Title Number Kwale/Diani Beach Block/1352.
- ii. A declaration be and is hereby issued that the transfer and subsequent certificate of lease issued to Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd-8th Respondents on 26th January 2024 is null and void ab initio.
- iii. An Order be and is hereby issued directing the 1st Respondent to revoke all the fraudulent transactions registered for title Number Kwale/Diani Beach Block/1352, indicating Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 31d-8th Respondents the owners of the property.
- iv. An order of permanent injunction be and is hereby issued restraining Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd.8th Respondents, their agents, servants or any person acting on their instruction from interfering with the Petitioners quiet enjoyment, use, ownership and interest over the property title number Kwale/Diani Beach Block/1352.
- v. An order of mandatory injunction directing Rama Omari Chimwanga, Adan Kassim Mkungu, Suleiman Said Teya, Hatibu Mjaka Mtengo, Hassan Rashid Mzinga, Rama Ndoro Ngowa, the 3rd.8th Respondents, their agents, servants and /or employees or any person to whom they have given right to occupy or own the land to vacate the property title Number Kwale/Diani Beach Block/1352 forthwith.
- vi. An order be and is hereby issued directing the Officer Commanding Police and Station Diani Police Station to assist the Petitioner in ensuring the enforcement of the orders granted by this Court and of observance and maintenance of peace.
- vii. General damages against the Respondent's jointly and severally.
- viii. Exemplary Damages against the 1st Respondent for the breach of the Petitioner's constitutional rights.
- ix. Costs
- x. Interest on (viii) and (ix) above.

45. There is no dispute that the Petitioners herein filed ELC Constitutional Petition Number 25 of 2021 against the Respondents herein and that case was heard and determined. The Respondents argue that the petition is res judicata because the issue of ownership of LR. No. Kwale/Diani Beach/1352 was determined in Petition No. 25 of 2021 by Hon. Lady Justice A.E. Dena on 3rd May 2023. The Petitioner counters that the court in Petition No. 25 of 2021 did not determine the ownership of LR. No. Kwale/Diani Beach/1352, as it was not substantially in issue.



46. Having reviewed the judgment in Petition No. 25 of 2021, this court notes that Hon. Justice Dena explicitly stated at paragraph 74 that "there is nothing much that is pleaded about LR. No. Kwale/Diani Beach/1352" and that the contest primarily concerned LR. No. Kwale/Diani Beach/1526 and 1527. The final orders issued in that Judgment (paragraph 84) only addressed the ownership and registration of LR. No. Kwale/Diani Beach/1526 and 1527, with no specific findings or orders regarding LR. No. Kwale/Diani Beach/1352.
47. I reiterate the case of the Supreme Court – "John Florence Maritime Services Limited & another (Supra) emphasized that for res judicata to apply, a court must examine the pleadings, record, and decision of the previous case to ascertain whether the same issues were determined. Since the ownership of LR. No. Kwale/Diani Beach/1352 was neither substantially pleaded nor determined in Petition No. 25 of 2021, the doctrine of res judicata does not apply to the instant petition.
48. The Respondents submit that the instant Petition is sub judice due to the pending Civil Appeal No. E083 of 2024 before the Court of Appeal in Mombasa, which challenges the Judgment in Petition No. 25 of 2021. The Petitioner argues that the subject matter of Civil Appeal No. E083 of 2024 relates to LR. No. Kwale/Diani Beach/1526 and 1527, not LR. No. Kwale/Diani Beach/1352, which is the focus of the instant petition. The court has examined the Memorandum of Appeal dated 2nd May 2024, which defines the "Suit Properties" as LR. No. Kwale/Diani Beach/1526 and 1527 and seeks orders specific to those parcels. No prayers or grounds in the appeal directly address the ownership of LR. No. Kwale/Diani Beach/1352. Since the Court of Appeal's decision in Civil Appeal No. E083 of 2024 will not determine the ownership of LR. No. Kwale/Diani Beach/1352, the instant petition is not sub judice.
49. The Respondents contend that the Petition constitutes forum shopping and an abuse of the court process, citing the case of: "Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Limited & 2 others [2009] eKLR 229, which defines abuse of process as the use of judicial processes to irritate or annoy an opponent or hinder the efficient administration of justice. They argue that the Petitioner is seeking favorable orders after failing in Petition No. 25 of 2021.
50. The Petitioner invokes Articles 40 and 48 of *the Constitution* of Kenya, 2010, which guarantee the right to property and access to justice, respectively. The Supreme Court in ".Muruatetu & another – Versus - Republic [2017] KESC 2 (KLR)" affirmed that access to justice includes the right to ventilate disputes through a fair trial. The instant petition seeks to address the ownership of LR. No. Kwale/Diani Beach/1352 and alleges fraudulent transactions registered on 26th January 2024, issues not canvassed in Petition No. 25 of 2021.
51. The provision of Order 2, Rule 15(1) of the Civil Procedure Rules, 2010, allows a court to strike out a pleading that discloses no reasonable cause of action, is scandalous, frivolous, vexatious, or an abuse of process. However, striking out a pleading is a drastic measure that should be exercised cautiously, as it denies a party the opportunity to be heard. Given that the ownership of LR. No. Kwale/Diani Beach/1352 was not determined in the prior suit and is not pending in the Court of Appeal, the petition raises a legitimate cause of action that warrants a full hearing.
52. Critically speaking, the court finds no evidence of forum shopping or abuse of process. The Petitioner's pursuit of its claim to LR. No. Kwale/Diani Beach/1352 is within its constitutional right to seek redress, and there is no indication that the Petition is frivolous, vexatious, or intended to harass the Respondents.



ISSUE No. c) Who will bear the Costs of the Objection?

53. It is now well established that the issue of Costs is the discretion of Courts. Costs is an award that a party is granted at the conclusion of any legal action and proceedings of litigation. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013) provides: -

- “(1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

54. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held: -

“..... the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

55. In the instant case, the Notice of Motion application dated 8th October 2024 by the 3rd – 8th Respondents has not succeeded on the fundamental threshold of resjudicata and sub judice and thus it is dismissed. It follows that the Petitioner/Respondent is entitled to the costs thereof.

VI. Conclusions & Disposition

56. Consequently, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -

- a. That the Petition dated 11th June 2024 is not res judicata, as the ownership of LR. No. Kwale/ Diani Beach/1352 was not determined in Petition No. 25 of 2021.
- b. That the Petition be and is hereby found not to be sub judice, as Civil Appeal No. E083 of 2024 as it does not concern LR. No. Kwale/Diani Beach/1352.
- c. That the Petition be and not found to constitute forum shopping or an abuse of the court process, and it raises a legitimate cause of action that merits a full trial.
- d. That the petition dated 11th June 2024 shall proceed to a full hearing on its merits
- e. THAT accordingly, the 3rd to 8th Respondents’ Notice of Motion application dated 8th October 2024 is dismissed with costs to the Petitioner/Respondent.

It is ordered accordingly.



**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT KWALE THIS 3rd DAY OF JULY2025**

.....

**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Andiwo for the Petitioner.
- c. Mr. Makowade for the 3rd to 8th Respondent.
- d. M/s Kagoi holding brief for M/s Langat for the 1st and 2nd Respondents.

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