Kenya Anti – Corruption Commission v Lobo & another (Sued as legal representative/ administrator of the Estate of Paul Lobo Benard Atati) & another (Environment & Land Case 175 of 2009) [2024] KEELC 5261 (KLR) (2 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5261 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 175 OF 2009

LL NAIKUNI, J

JULY 2, 2024

BETWEEN

KENYA ANTI – CORRUPTION COMMISSION ..... PLAINTIFF

AND

SARAH MARIA LOBO & MYRTLE DESA (SUED AS LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF PAUL LOBO BENARD ATATI) ..... 1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA ..... 2ND DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination of issues raised from the filed Notice of Motion application dated 20th May, 2024 by Bernard Atati, the 2nd Defendant herein. The application was premised under the provision of Article 40 & 159 the *Constitution* of Kenya 2010, Sections 1A, 1B, 3A, 7 and 8 of the *Civil Procedure Act*, Cap 21 Law of Kenya, Order 2 Rule 9 & 15, Order 51 Rule 1 of *Civil Procedure Rules* 2010 Laws of Kenya.

2. Despite of service of the application having been effected, neither the Plaintiff/Respondent nor the 1st Respondent filed any responses whatsoever. Thus, the Honourable Court will render its ruling on its merit accordingly.

II. The 2nd Defendant/Applicant's case

3. The 2nd Defendant/Applicant sought the following orders:-

a. That the suit herein instituted by the Plaintiff/Respondent vide a Plaint dated 9th June, 2009 be and is hereby strike out for being *res judicata*;

b. That the cost of this application and the main suit be borne by the Plaintiff/ Respondent.

4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 17 Paragraphed Supporting Affidavit of – Benard Atati, one of the directors of the 2nd Defendant/Applicant herein sworn and dated 20th May, 2024 with three (3) annextures marked as "BA 1 to BA 3" annexed thereto. The Applicant averred that:-

a). The events leading to the suit herein, on or about 9th June 2009, the Plaintiff/Respondent herein instituted the present suit seeking the following prayers:-

i. A declaration that the allocation to the 1st Defendant and the subsequent transfer to the 2nd Defendant by the 3rd Defendant and subsequent issuance of the lease to the 1st Defendant and transfer to the 2nd Defendant of the land comprised in MN/1/2408 was irregular, fraudulent, and illegal and consequently null and void.

ii. An order for rectification of the Register by cancellation of the title and all entries made in the land register in favour of the 1st and 2nd Defendants in reference of land reference number MN/1/2408.

iii. An order of preservation and permanent injunction against the 2nd Defendant, her agents, servants or assigns restraining her from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/1/2408 otherwise than by transfer, *Ethics and Anti-Corruption Commission – Versus - Sarah Mara Lo representative of the Estate of Paul Lobo) & 2 others* surrender to the Kenya Civil Aviation Authority and/or the Government of Kenya.

iv. General damages for fraud and breach of fiduciary duty as against the 3rd Defendant.

v. Costs of and incidental to the suit.

b). The above referenced prayers are encapsulated in the Plaint dated 9th June 2009 being the basis of the Plaintiff's suit. Annexed in the affidavit and marked as "BA- 1" was a copy of the Plaint and the accompanying documents filed by the Plaintiff in instituting the suit.

c). Soon thereafter, on or about 26th November 2010, vide gazette notice number 15570, the Registrar of Titles purported to issue a notice nullifying among others the Respondent's/ Appellant's title to Mainland North/1/2408 on account that the same had been reserved for public purposes under the relevant provisions of the *Constitution*, the *Governments Land Act* (Cap.280) and the *Trust Land Act* (Cap. 288) and therefore their allocation was illegal and unconstitutional and proceeded to revoke the said titles. Annexed in the affidavit and marked as "BA - 2" was a copy of the impugned Gazette Notice Number 15570 dated 26th November 2010.

c. Aggrieved by the decision made in the above impugned gazette notice dated 26th November 2010, he instructed his advocates to move to court for the quashing of the decision and more particularly sought the following prayers: -

i. An order of Certiorari to remove into this Honourable Court, and quash the order and/or decision made by the Registrar of Titles, Mombasa in the name of the Government purportedly under the provisions of the *Constitution* of Kenya, the

Government Lands Act (Cap 280) and the *Trust Land Act* (Cap 288) communicated vide the Special Issue of the Kenya Gazette dated the 26th day of November 2010 in Gazette Notice No.15570 declaring the Titles issued to the Applicant for Land Reference Nos. Mainland North/l/2408 and Mainland North/l/2410 as having been revoked.

ii. An order of Prohibition - upon the grunt of prayer I above-prohibiting the Registrar of Titles Mombasa from revoking, recalling, cancelling and/or otherwise impeaching the Applicant's Title to Land Reference Nos. Mainland North/1/2408 and Mainland North/1/2410 and/or acting in any other way prejudicial to and/or inconsistent with the Applicant's registered ownership of the said land parcels.

d. The above Judicial Review application proceeded to its logical conclusion and on 12th March 2012, the Honourable Justice Edward M. Muriithi passed a ruling on the matter granting the orders as prayed by the Applicant as evinced in the resultant decree dated 21st March 2012. Annexed in the affidavit and marked as "BA - 3" was a copy of the decree dated 21st March 2012).

a. The resultant ruling and the decree issued has never been challenged in any court of law by appeal or otherwise and therefore remains in force and binding on the Applicant and the Registrar of Titles, Mombasa (or any successors in title).

b. In that regard, by virtue of the existence of the prohibition order which has never been challenged, it is not available for the Plaintiff/Respondent or any other party to move the Land Registrar, Mombasa (or successor in title) for the cancellation of my title over the Suit Property.

c. It was thus the deponent's prayer that the Plaintiffs case be and is hereby struck out with costs since the issues in contention were determined with finality and the court rendering a Ruling in Mombasa High Court Judicial Review No. 12 of 2011 - *Republic – Versus - Registrar of Titles, Mombasa & The Honourable Attorney General Ex Parte Benard Atati* and the resultant decree dated 21st March 2012.

d. The orders of the High Court encapsulated in the decree dated 21st March 2012 was an order in rem and thus had the effect of determining the status of a thing i.e. that the 2nd Defendant/Applicant's title to the property was determined and was not open to challenge by the Registrar of Title, Mombasa (or any successors in title) or any other party such as the Plaintiff/Respondent herein.

e. The matter herein was conclusively determined by the High Court in the Judicial Review application and that the fact that the Plaintiff/Respondent was not a party specifically is immaterial as the Attorney General was listed as a party and duly represented it as the adviser to Government and the Plaintiff was then a Statutory body under the executive.

f. In light of the above, if this Honourable Court proceeds to hear and determined the suit herein, it shall be sitting on appeal of a court of coordinate jurisdiction that heard and determined with finality.

g. This would have the effect of embarrassing the process of this Honourable Court as the risk of arriving at different and conflicting decisions is live and highly probable.

h. The deponent supported this application on grounds that it promotes the respect for the rule of law and acts to avoid further abuse of the process of thisHonourable Court and the hallowed judicial process and thus brought in the interest of justice.

i. No party would be prejudiced if the order sought in this application is granted as prayed.

III. Submissions

5. While all the parties were present in Court, they were directed to have the Notice of Motion application dated 20th May, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that, by the time of penning down this Ruling, the Honourable Court was only able to access the submissions by the 2nd Defendant/Applicant and not those of the Plaintiff/Respondent not the 1st Defendant herein. Thus, it reserved a date for the delivery of the ruling accordingly.

A. The Written Submissions by the Plaintiff/Respondent

6. The 2nd Defendant, through the Law firm of Messrs. T.K. Rutto & Company Advocates' filed their written submissions dated 20th May, 2024. Mr. T.K Ruto Advocate commenced his submission by stating that it was common ground that the suit herein was instituted by the Plaintiff/Respondent vide a Plaint dated 9th June 2009 seeking the afore - stated prayers.

7. The Learned Counsel averred that during the pendency of the suit, i.e. on or about 26th November 2010, vide gazette notice number 15570, the Registrar of Titles purported to issue a notice nullifying among others the Respondent's/Applicant's title to Mainland North/1/2408 on account that the same had been reserved for public purposes under the relevant provisions of the *Constitution*, the *Governments Land Act* (Cap. 280) and the *Trust Land Act* (Cap. 288) and therefore their allocation was illegal and unconstitutional and proceeded to revoke the said titles. The effect of the above referenced decision was to pre-empt the orders sought by the Plaintiff as outlined above and therefore by doing so, the Plaintiff's suit had been overtaken by events.

8. Nonetheless, the 2nd Defendant/Applicant aggrieved by the decision of the Registrar of Titles, Mombasa moved swiftly to court and filed a judicial Review Application to wit "Mombasa High Court Judicial Review No. 12 of 2011 - *Republic – Versus - Registrar of Titles, Mombasa & The Honourable Attorney General Ex Parte Benard Atati*" challenging the impugned gazette notice. More specifically, the orders sought from the suit referenced above.

9. The Learned Counsel submitted that having been appropriately moved, the High Court proceeded to hear the suit and on 12th March 2012 passed a judgment in favour of the 2nd Defendant/Applicant and a decree dated 21st March 2012 subsequently issued granting the orders as prayed i.e. both the orders of prohibition and certiorari. Being the case, the 2nd Defendant/Applicant contends that the orders issued by the Honourable Trial Court on 12th March 2012 and evinced by the decree dated 21st March 2012 were orders in rem. Therefore any proceedings seeking to challenge its title is res judicata as the Registrar of Titles, Mombasa or any other successor in title was prohibited from altering or cancelling the 2nd Defendant/Applicant's title and since Courts did not act in vain, the suit herein has been overtaken by events and was *res judicata*.

10. Further, the 2nd Defendant/Applicant contended that by proceeding with the case herein, which was rendered *res judicata* on passing of judgment on 12th March 2012 is tantamount to asking this Honourable Court to sit on appeal of the Judgment of a court with the same status as thus Honourable Court by dint of the provision of Article 162 of the *Constitution* of Kenya, 2010. Essentially, the 2nd

Defendant/Appellant contended that the provisions of the law employed by the Registrar of Titles in Coming up with the decision in the impugned gazette notice 15570 which was eventually quashed by the High Court are the same provisions and the same circumstances in which the Plaintiff/Respondent herein was moving this Honourable Court. As such, two bodies both representing the state have sought the same orders and one already implemented the orders which was subsequently quashed by the High Court while the second one attempts to pick on the failures of the other to continue the vilification of the 2nd Defendant/Applicant contrary to the principles of natural justice

11. To push his argument, the Learned Counsel relied on two (2) issues for the determination by the Honourable Court. Firstly was whether the Plaintiff's/Respondent's suit instituted *vide* the Plaint dated 9th June 2009 was Res Judicata, the Learned Counsel submitted that from the onset, the suit herein commenced by the Plaintiff/Respondent became res judicata effective 12th March 2012 when the High Court passed its Judgment and issued an order of Certiorari quashing the impugned gazette notice and an order of Prohibition against the interference in the 2nd Defendant's/Applicant's parcels of land.

12. To begin with, the Counsel stated that the rationale behind the concept of "Res Judicata" resonated with the 2nd Defendant/Applicant cry herein as was espoused by the Court of Appeal in the case of "*John Florence Maritime Services Limited & Another – Versus - Cabinet Secretary Transport & Infrastructure & 3 Others* [2015] eKLR", where the Honourable judges stated that: -

> " The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably."

13. The 2nd Defendant/Applicant herein had demonstrated that there had been previous litigation over the subject matter and over similar orders seeking the nullification of his title which were previously granted and nullified by a court of competent jurisdiction. As such, in this particular case, the Learned Counsel that its application to strike out the Plaintiffs suit and preliminary objection satisfied all the requirements for the doctrine of Res Judicata as outlined by the Court of Appeal in the leading authority of "*The Independent Electoral and Boundaries Commission – Versus - Maina Kiai & 5 others* [2017] eKLR" where the court laid down that a party seeking to rely on the concept of legitimate expectation has to satisfy the following:-

[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

14. On the first issue, from the prayers sought by the Plaintiff and outlined above compared to the impugned gazette notice and the High Court decision quashing them, it was clearly not in dispute that for both suits, what was in issue was similar i.e. the issue of the nullification or the cancellation of the 2nd Defendant/Applicant's title to the suit property on grounds that it was irregularly acquired. This was further evinced by the prayers sought in the pleadings as well as the resultant decree dated 21st March 2012 that now brought to fore the pending order of prohibition in rem against the Registrar of Titles, Mombasa irrespective of the mover of the motion to cancel the 2nd Defendant's/Applicant's title.

15. On the second issue the Learned Counsel submitted, it was beyond peradventure that at the time of the institution of the Plaintiff's suit, the Plaintiff was then a creature of the *Anti-Corruption and Economic Crimes Act*, 2003 and established as a statutory body under the control of the executive and even lacked prosecutorial powers. That being the case, the fact that the Plaintiff was not specifically listed as a party to the suit was immaterial since the complaints of irregular allocation had been canvassed and a decision to revoke and cancel the title to the suit property reached either the Plaintiff or any other competent body. As such, since the Attorney General was listed as a party then, it encompassed the Plaintiff since it was then a statutory body and party of the establishment of government or rather a department of government and not an independent constitutional commission as it was today.

16. Having shown that the Plaintiff was by extension represented by the Attorney General, it follows that the Plaintiff was being vilified by the second time with the Plaintiff sought to correct the wrongs previously committed to the prejudice of the Defendants. In essence, the question of the propriety of allocation of the Suit Property to the 2nd Defendant/Applicant had been heard and determined leading to the gazette notice that was thereafter quashed and an order of prohibition issued. Thus, the Plaintiff was seeking a second bite at the cherry and perpetrating an abuse of the court process through endless litigation.

17. On the third issue the Learned Counsel contended, the then Registrar and the Attorney General Defendant/Applicant. As such, the circumstances of the present suit fulfil prosecute the same complaints through different government departments merely to avoid being nabbed by this requirement. In summary therefore, the government having allotted the property allocation having been determined, there cannot be a turn around to sustain a decision that was already quashed.Such an approach would fuel the endless vicious of litigation that could be sustained through the use of various government departments, agencies, independent constitutional bodies and entities to prosecute a single issue multiple times and arm twist its opponents into submission by attrition.

18. On the fourth issue, the Learned Counsel submitted, the suit between the 2nd Defendant/Applicant and government was heard and determined with finality when Judgment was passed on 12th March 2012 by the High Court quashing the decision to revoke the title to the suit property and thereon issuing an order of prohibition. To elaborate this, the resultant decree and the similarity of the prayers sought by the Plaintiff and those that were evinced in gazette notice no. 15570 dated 26th November 2010 was similar. In essence therefore, by continuing the suit herein, the 2nd Defendant/Applicant was being vilified for the second time over the same subject matter that a decision has been made and that decision quashed by a court of law.

19. On the last ingredient i.e. competency of both courts the Learned Counsel stated that, it is not in dispute that the high court then and is the case now, has exclusive and original jurisdiction with regard to judicial review matters. On the other hand, by dint of the enactment of the *Constitution*

of Kenya,2010 and more specifically Article 162, this Honourable court has jurisdiction on matters relating to title to land but in this case, its jurisdiction is limited or hampered by the fact that the matter herein was "*Res Judicata*".

20. Further, on the pre-requisites for a matter to constitute Res Judicata, the Learned Counsel relied on the case of "*Suleiman Said Shabhal – Versus - Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR" in which the Court of Appeal elaborated that:-

> " To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

21. Lastly, on account of the subsisting court decrees that was passed by the High Court in the nature of a prohibition against the alteration of the 2nd Defendant's/Applicant's title, since the same had never been challenged in a court of law or otherwise, the same was enforceable and bars the Plaintiff from further prosecuting the suit herein. To support the above assertion, the 2nd Defendant/Applicant relied on the authority of Romer, L. J. in "*Hadkinson – Versus - Hadkinson* [1952] ALL ER 567" which was quoted with approval in the case of "*Accredo AG & 3 others – Versus - Steffano Uccelli & another* [2019] eKLR" that: -

> " It is the plain and unqualified obligation of every person against,or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

22. In that regard, this Honourable Court was urged to decline jurisdiction and proceed to down its tools since the matter was heard and conclusively determined by the High Court. The Learned Counsel hereby urged the Court to be guided by the locus classicus in the case of "*Owners of the Motor Vessel "Lillian S" – Versus - Caltex Oil (Kenya) Ltd* [1989] eKLR" in which the immortal words of the Late Honourable Justice Nyarangi echoes on that; a court of law downs tools in respect of the matter before it the moment it held* the opinion that it was without jurisdiction. This Court was invited to do the same, down its tools on account of the suit herein having been rendered "*Res Judicata*" and end the Plaintiff's attempt to continue the circle of litigation perpetually without regard for the respect of the rule of law and the fact that litigation must come to an end and a litigant could not be subjected to litigation in perpetuity.

23. On the issue of who bears the costs of this preliminary objection. The Learned Counsel argued that that its preliminary objection and the application to dismiss the suit herein on account of it being "*Res Judicata*" was merited ladened and was for granting. He submitted that he had shown to Court in clear letter that its jurisdiction in the matter was extinguished when the court passed Judgment on 12th March, 2012 when Judgment in the civil case of: "Mombasa High Court Judicial Review No. 12 of 2011 - *Republic – Versus - Registrar of Titles, Mombasa & The Honourable Attorney General Ex - Parte Benard Atati* and the resultant decree dated 21st March 2012", was delivered.

24. It was further the Learned Counsel's submissions that he law that the Plaintiff's continuation of the present suit is prejudicial as it would amount to litigation on matters that have already been settled. Thus, in light of the discharge of the above obligation to Court, the Learned Counsel submitted that it should be awarded costs of the suit and the Preliminary Objection/Application to strike out the suit since it was generally accepted that costs follow the event.

25. In relation to this, the Learned Counsel relied on the persuasive authority in the case of "*Stanley Kaunga Nkarichia – Versus - Meru Teachers College & another* [2016] eKLR" in which the court (Hon. F. Gikonyo J.) held at paragraph *8* that:

> " As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the court has good reason to order otherwise."

26. The Learned Counsel submitted that the Honourable Court lacked both the requisite jurisdiction on account of the matter being both res judicata and an abuse of the process of Court. The prayers sought in application and preliminary objection ought to be allowed with costs to be borne by the Plaintiff/ Respondent.

27. In conclusion, the Learned Counsel prayed this Honourable court to find that it never had jurisdiction on account of the suit having been rendered res judicata and order that:-

    a. The Plaintiff's suit instituted vide Plaint dated 9th June, 2009 was rendered res judicata on 12th March 2012 when the High Court passed its judgment in Mombasa High Court Judicial Review No. 12 of 2011 - Republic – Versus - Registrar of Titles, Mombasa & The Honourable Attorney General Ex - Parte Benard Atati;

    b. That in effect, the 2nd Defendant's Notice Motion application was allowed and the Plaint herein dated 9th June 2009 be and was hereby struck out with costs; and

    c. That for avoidance of doubt, the Suit herein is struck out in its entirety with costs to be paid to the 2nd Defendant.

IV. Analysis & Determination.

28. I have carefully read and considered the Notice of Motion application dated 20th May, 2024 by the 2nd Defendant, the written submissions and the myriad of cases cited herein by parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statures.

29. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

    a. Whether the present suit instituted by the Plaintiff herein offended "the Doctrine of Res Judicata" to Mombasa High Court Misc. Judicial Review No. 24 of 2011 and if by virtue of the provision of Section 7 of the *Civil Procedure Act*, Cap 21.

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

    c. Who will bear the Costs of Notice of Motion application dated 20th May, 2024.

Issue No. a). Whether the present suit instituted by the Plaintiff herein offended "the Doctrine of Res Judicata" to Mombasa High Court Misc. Judicial Review No. 24 of 2011 and if by virtue of the provision of Section 7 of the *Civil Procedure Act*, Cap 21.

30. Under this Sub heading, the main substratum is whether this suit offends "the Doctrine of Res Judicata" and thus should be struck out altogether. The Honourable Court now wishes to apply the able legal principles, the provision of Section 7 of the *Civil Procedure Act* provides:-

> " 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"

31. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of "*Nicholas Njeru – Versus - the Attorney General and 8 Others* Civil Appeal No. 110 of 2011 [2013] eKLR".

32. 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..."

33. It is now old hat that the said doctrine applies to both suits and applications. This sound legal position has been held through a myriad of cases as I shall be spelling out herein. To begin with it was held in "*Abok James Odera – Versus - John Patrick Machira* Civil Application No. Nai. 49 of 2001". However, as was held in the said suit, to rely on the 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 once again in a fresh suit.

34. Further, in the case of "*Christopher Kenyariri – Versus - Salama Beach* (2017) eKLR", the court clearly stated the ingredients to be satisfied when determining "*Res Judicata*" thus:-

> " .....the following elements must be satisfied...in conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit
>
> b) Former suit between same parties or parties under whom they or any of them claim
>
> c) Those parties are litigating under the same title
>
> d) The issue was heard and finally determined.

e) The court was competent to try the subsequent suit in which the suit is raised."

35. Additionally, the rationale of this doctrine, reliance was placed on the decision of the Court of Appeal in the case of:- "*Maina Kiai case* (*Supra*)";-

> " 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 fora, 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."

36. In the case of: "*Maina Kiai case* (*Supra*)", the Court quoted with approval the Indian Supreme Court in the case of *"Lal Chand – Versus - Radha Kishan*, AIR 1977 SC 789" where it was stated;

> " The principle 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 the 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."

37. Further, in the case of:- "*Lotta – Versus - Tanaki* [2003] 2 EA 556" it was held as follows:

> " The doctrine of *res judicata* is provided for in Order 9 of the *Civil Procedure Code* of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are:
>
> (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
>
> (ii) the former suit must have been between the same parties or privies claiming under them;
>
> (iii) the parties must have litigated under the same title in the former suit;
>
> (iv) the court which decided the former suit must have been competent to try the subsequent suit; and
>
> (v) the matter in issue must have been heard and finally decided in the former suit."

38. Furthermore, in the case of "*Gurbachan Singh Kalsi – Versus - Yowani* Ekori Civil Appeal No. 62 of 1958" the former East African Court of Appeal stated as follows:

> " 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 under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

39. A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.

40. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

41. From the foregoing, it is clear that for "*Res Judicata*" to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

42. In the case of:- "*E.T – Versus - Attorney General & Another* (2012) eKLR" where it was held that:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Versus - National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of *Njangu – Versus - Wambugu and another* Nairobi HCCC

No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....."

43. The law with regard to "*Res Judicata*" is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before.

44. Therefore, it is clear that parties are not to evade the application of res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

45. In this case, the Plaintiff in this matter was not the one in the civil case of:- "Mombasa High Court Judicial Review Application No. 24 of 2011" where the matter was for the revocation of the 2nd Defendant's titles in respect to properties MN/1/2408 and MN/1/2410 vide Gazette Notice Number 15570 dated 26th November 2010 by the Registrar of Titles Mombasa, while the contested issues.

46. What is the common issue in both suits? The suit properties MN/1/2408 and MN/1/2410. Who are/were the litigants? The parties in Mombasa High Court Judicial Review Application No. 24 of 2011 and the Plaintiff was not a party to the said proceedings and the Registrar of Lands is not a party to this suit.

47. Can the Plaintiff herein then hide behind the fact that he was not a party in the previous suit? The Court will refer back to the provision of Section 7 of the *Civil Procedure Act* Cap 21 provides that:

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

48. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been up held by our superior courts on numerous occasions. In the case of:- "*Republic – Versus - National Transport & Safety Authority & 10 others Ex - Parte James Maina Mugo* [2015] eKLR" where it was held:-

> "..... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with

a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits"

49. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction. In the judicial review, the ex parte is simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. An application for judicial review is normally commenced by a party seeking leave to filed a substantive motion to apply for the respective judicial review remedies that they are seeking. In respect of the same one cannot contend that a land dispute was resolved through judicial review proceedings because land claims are very sensitive matters that ought to be addressed heard through *viva voce* evidence and determined on merit.

50. Notably this Court has held recently in some of these cases:- "*Ware Transport Limited – Versus - Third Engineering Bureau of China City Construction Group Co Limited Tiba Freight Forwarders Limited (Third party)* (Environment & Land Case 252 of 2021) [2024] KEELC 1550 (KLR) (7 March 2024) (Ruling)", that land is sensitive and an emotive resource in Kenya. The complexity about the intertwining weavings and intersections between its ownership and the attachment many a person in Kenya give it so much so that it brings out the intensity of emotions attendant to it can only be discerned from the length of time some cases take and the energy and zeal they often take from both the litigant and Learned Counsel as well as judicial officers. Different scenarios present themselves to courts when they handle matters on land which draw long and protracted litigation.

51. According to the Plaintiff, the proceedings in Mombasa High Court Judicial Review Application No. 24 of 2011 were of Judicial Review process and the same were limited in nature and only restricted to the questioning of the decision making process of cancellation of title of the suit property vide Gazette Notice 15570 of 26th November 2010by the Registrar of title. The said proceedings cannot be deemed to be res-judicata.

52. Having said as much, the Honourable Court is in agreement with the Plaintiff/ Respondent that the relief or orders sought in respect to in Mombasa High Court Judicial Review Application No. 24 of 2011 was restricted to challenging the action by the Registrar of Title as ultra vires his authority to cancel the 2nd Defendant's Title, while the relief and orders sought by the Plaintiff/Respondent in this suit is a declaration that the allocation and subsequent transfer of the suit property to 1st and 2nd Defendant was irregular, fraudulent, illegal, null and void and that the Plaintiff/Respondent further sought orders for rectification of the register by cancellation of the title and all entries made on the land register in favour of the 1st and 2nd Defendants on the suit property. In this suit the Plaintiff has sought for an order of permanent injunction against the 2nd Defendant, his agents, servants, assigns restraining him from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with the MN/1/2408 otherwise that by transfer/surrender to the Kenya Civil Aviation Authority and or the Government of Kenya. Orders which may only be granted by the Environment and Land Court of Kenya and not the High Court. See the provision of Article 162 (2) (b) of the *Constitution* of Kenya, 2010 and Section 13 of the *Environment & Land Court Act*, No. 19 of 2011.

53. The gist of the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 defines the principle of Res – Judicata to apply where the issues in the previous suit ought to have been "heard and finally decided."

54. In the case of "*Tee Gee Electrics and Plastics Company Ltd – Versus - Kenya Industrial Estates Limited* [2005] KLR 97" the Court stated:

> " Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The *Tee Gee Electrics and Plastics Company Limited – Versus - Kenya Industrial Estates Limited* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".

55. In the circumstances of this case I am guided by the provision of Articles 25 (c) and 50 (1) & (2) of the *Constitution* which provide for fair hearing as well as Article 159 (2)(d) of the *Constitution* which directs this Court to tend to the substance of the case and its attendant justice.I strongly hold that this suit herein is not res-judicature to the civil case "Mombasa High Court Judicial Review Application No. 24 of 2011 and pertinent issues have been raised that require each party to be granted an opportunity to present their case for hearing and determination on merit.

56. The Court also finds it curious that the 2nd Defendant/Applicant waited for the time when the court is almost granting its final determination to raise the issue of res judicata taking that this Suit was filed in the year 2009; As we speak, it is currently the year 2024 which is almost 15 years after institution of the suit to object on it. Being a land matter, this Court is the proper place to handle it. Further, this Court has the requisite jurisdiction to hear and determine matters involving land and land ownership something that the High Court – Judicial Review Court does not have jurisdiction to do.

57. To my mind, the issues and the details of the properties which were being addressed and/or deliberated upon in the previous suit are separate and distinct from the issues that underpin the current suit by the Plaintiff/Respondent. Clearly, the Plaintiff herein, whose stakes a claim to ownership of the suit properties, which I have pointed out are different from the suit property in the previous suit, was not a Party to the said suit.

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

59. Contrarily, a suit is only dismissed after same has been heard on its merits and the Rights of the Parties thereto effectively and effectually determined by the court. Premised on the foregoing dichotomy, where a suit is struck out for whatever reason, the victim of the striking out order, is at liberty to revert to court, subject to the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

60. On the other hand, where a suit is dismissed on merit, the victim and or aggrieved party can only mount an Appeal or where applicable apply for Review. As I stated that the previous suit was heard by

the High Court Judicial Review Division which does not have the requisite jurisdiction to deal with matters land.

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

62. Premised on the foregoing observation, I am of the considered view that the invocation and ventilation of the Doctrine of Res-judicata by the 2nd Defendant herein was anchored on misapprehension of the underlying ingredients, which ought to have been proven. In a nutshell, my answer to issue number One, is that "the Doctrine of Res-judicata" was improperly invoked and is in any event, is inapplicable to and in respect of the suit

ISSUE No. b). Whether the suit instituted by the Plaintiff constitutes and/or amounts to an abuse of the due Process of the Court

63. The Plaintiff/Respondent herein has contended in the suit that despite being the lawful and registered proprietor of the suit properties, the 2nd Defendant, has purported to acquire illegal titles over and in respect of portions thereof. The Plaintiff further contended that the said properties belonged to the public. From the foregoing, it is evident and/.or apparent that there are plausible and pertinent issues which required to be investigated before this court can effectively come to an informed conclusion, pertaining to the propriety of the Titles claimed by the Plaintiff herein.

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

65. Finally, it is appropriate to note that where a court is confronted with an Application for striking out of pleadings, the Court is not enjoined to carry out a minute and microscopic analysis of the factual issues, either in the manner that the court was being invited to do herein or at all. For clarity, it must be recalled that such examination and/or analysis belongs to the trial judge and not otherwise. In this regard, it would be pre-mature to venture into the arena of Disputed facts and try to resolve same vide the Summary process herein.

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

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

67. The dictum in the foregoing decision, underscores exactly what the 2nd Defendant herein were attempting to achieve. For clarity, same were seeking to enjoin the court to carryout and/or undertake

a microscopic analysis of the huge and voluminous documentation, with a view to striking out a suit that ipso facto raises very serious factual issues worthy of a plenary hearing.

ISSUE No. c). Who will bear the Costs of the Notice of Motion application dated 20th May, 2024.

68. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

69. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

70. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court "*Jasbir Rai Singh – Versus - Tarchalan Singh*" eKLR (2014) and *Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*, eKLR (2014).

71. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by *Mulla* (*Supra*) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

72. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR" the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no "one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by

and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

73. In this case, as this Honourable Court has opined above, the 2nd Defendant/Applicant has not convinced this Honourable Court that the suit is *res judicata* under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 as per the Notice of Motion dated 20th May, 2024 therefore the Plaintiff shall have the costs having participated in the hearing and determination of the same to be paid by the 2nd Defendant.

V. Conclusion & Disposition

74. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes below order:-

    a. That the Notice of Motion application dated 20th May, 2024 be and is hereby found to lack merit and the same is hereby dismissed with costs.

    b. That the already scheduled two (2) hearing dates of this suit on 23rd and 24th July, 2024 to be maintained whatsoever.

    c. That the costs of the Notice of Motion application dated 20th May, 2024 are awarded to the Plaintiff/Respondent herein to be borne by the 2nd Defendant herein.

    It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....2ND .....DAY OF .....JULY.....2024.

.....

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. Abdulrahim Advocate for the Plaintiff/ Respondent

c. No appearance for the 1st Defendant.

d. Mr. T. K. Ruto Advocate for the 2nd Defendant/ Applicant