



Thoya & another (Suing as the administrators of the Estate of the Estate of Makwangara Kazungu Gunga) v Ainushamsi Multiple Agencies Limited & 2 others (Environment & Land Case E028 of 2024) [2024] KEELC 7332 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E028 OF 2024
LL NAIKUNI, J
OCTOBER 9, 2024**

BETWEEN

JAMES KAZUNGU THOYA 1ST PLAINTIFF

ONESMUS KAHINDI THOYA 2ND PLAINTIFF

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE ESTATE OF
MAKWANGARA KAZUNGU GUNGA**

AND

AINUSHAMSI MULTIPLE AGENCIES LIMITED 1ST DEFENDANT

**BENARD KARISA KATOTI T/A BENKA KATOI ENTERPRISES 2ND
DEFENDANT**

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

RULING

I. Introduction

1. What is before the Honourable Court for its determination is the Notice of Motion application dated 9th April 2024 filed under a Certificate of Urgency dated 9th April 2024 by the 1st & 2nd Plaintiffs/Applicants – James Kazungu Thoya and Onesmus Kahindi Thoya. The application was brought under the provision of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap. 21, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010.
2. Upon service of the application the 1st Defendant/Applicant filed a Grounds of Opposition and a Replying Affidavit in opposition. The Honourable Court shall be assessing these pleadings at a later stage of this Ruling on their merit.



II. The 1st and 2nd Plaintiffs/Applicants case

3. The 1st & 2nd Plaintiffs/Applicants sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the suit herein the 1st Defendant by itself, its servants and/or agents or anyone claiming under it be restrained by a temporary injunction from alienating, selling, or in any other way dealing with the land parcel known as Plot No. 28815/Mariakani CR. No. 60948.
 - d. That costs of this Application be provided for.
4. The application is premised on the grounds on the face of the application, testimonial facts and averments made out under the 13 Paragraphed supporting affidavit of James Kazungu Thoya and the eight (8) annexures marked as “JKT 1 to 8” annexed thereto. He deponed as follows:-
 - a. He was the 1st Plaintiff and duly authorized to swear this affidavit.
 - b. The 1st and 2nd Plaintiffs/Applicants were the duly appointed Legal Administrators of the Estate of the late Makwangara Kazungu Gunga (Hereinafter referred to as “The Deceased”).
 - c. Vide an agreement for sale dated 1st October 2010 the Deceased sold all that parcel of land known as Business Cum Residential Plot A Mariakani Letter of Allotment Ref. 42503/v dated 1st July, 1997 now Plot No. 28815/Mariakani CR. No. 60948 (hereafter referred to as “The Suit Property”) to the 1st Defendant at a consideration of a sum of Kenya Shillings Eighteen Million Nine Twenty Thousand (Kshs. 18,920,000/=).
 - d. As per Clause 5 of the said agreement for sale, the 2nd Defendant was responsible for the facilitation of the payments from the 1st Defendant to the Plaintiffs. The 2nd Defendant was required to receive the entire purchase price from the 1st Defendant and release the same to the Plaintiffs subject to the successful transfer of the suit property to the 1st Defendant.
 - e. The 1st Defendant paid a deposit of a sum of Kenya Shillings Two Million One Hundred and Thirty Thousand (Kshs. 2,130,000/=) to the Plaintiffs through the 2nd Defendant then proceeded to transfer the property to itself on 12th October, 2013 vide a transfer dated 6th November, 2012. However, the Plaintiffs are yet to be paid and/or receive the balance of a sum of Kenya Shillings Sixteen Million Seven Hundred and Ninety Thousand (Kshs. 16,790,000/=) from the Defendants.
 - f. It had been pleaded that the transfer of the suit property to the 1st Defendant was illegal, null, and void for the following reason that the 1st Defendant failed to pay the balance of the purchase price before transferring the suit property to itself, after forging the transfer documents which resulted into unlawful transfer. In the said transfer it was contended that the 1st Defendant indicated that the consideration for the purchase of the suit property was a sum of Kenya Shillings Nine Million (Kshs. 9,000,000/=) yet the consideration was a sum of Kenya Shillings Eighteen Million Nine Hundred and Twenty Thousand (Kshs. 18,920,000/=). Thus defrauding the Government of Kenya the sum of Nine Hundred and Twenty Thousand (Kshs. 920,000/=) by indicating that the value of the suit property was a sum of Kenya Shillings Nine Million (Kshs. 9,000,000/=) yet the consideration was a sum of Kenya Shillings Eighteen Million Nine Hundred and Twenty Thousand (Kshs. 18,920,000/=).



- g. The 1st and 2nd Plaintiffs/Applicants also averred that through a demand letter dated 25th January 2021, they demanded the sum of Kenya Shillings Sixteen Million Seven Hundred and Ninety Thousand (Kshs. 16,790,000/=) from the 2nd Defendant.
- h. However, the 2nd Defendant informed the Plaintiffs that the 1st Defendant proceeded to have the property transferred to itself before paying the agreed balance of sum of Kenya Shillings Sixteen Million Seven Hundred and Ninety Thousand (Kshs. 16,790,000/=). The 2nd Defendant vide a letter dated 17th February 2021, copied to the Plaintiffs, demanded payment of the balance from the 1st Defendant but the same was never responded to.
- i. The 2nd Defendant then proceeded to register a restriction against the title of the suit property for the outstanding balance payable to the Plaintiffs.
- j. The Plaintiffs then issued a demand letter on 10th August 2021 to the 1st Defendant notifying them of their intention to rescind the contract if the purchase price is not paid. The Plaintiffs were apprehensive that the 1st Defendant would put the suit property for sale despite of the contention over the suit property.
- k. They urged the court to allow the application as prayed.

III. The Grounds of Opposition by & replies by the 1st Defendant

- 5. The 1st Defendant filed Grounds of Opposition dated 24th June 2024 and a Replying Affidavit dated 18th July 2024 oppose the application. In his grounds of opposition, the 1st defendant argued that:-
 - a. the application was frivolous, scandalous, vexatious, lacked merit, and abused the court process.
 - b. The application and the suit were said to be time-barred by dint of the provisions of section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - c. The Plaintiffs' claim had been overtaken by events due to developments in a related civil matter Mombasa ELC No. 241 OF 2020 which the Plaintiffs/Applicants were fully aware of. The court was urged to dismiss the application and the entire suit with costs.
- 6. Through the Replying affidavit dated 18th July 2024 which was affirmed by one Mohamed Rashid Muhumed, its director, the 1st Defendant deponed as follows:-
 - a. that the application was similar to one that was dismissed by Justice N. Matheka between the same parties in Mombasa ELC Appeal Number E043 of 2023 between the same parties, "James Kazungu Thoya & Anor -Versus - Ainushamsi Multiple Agencies Limited & Anor".
 - b. The Environment & Land Court number 2 through By the Learned Judge Matheka.delivered a ruling on 20th March, 2024 and dismissed the application for lack of merit.
 - c. That by revisiting the same application, the Plaintiffs/Applicants were forum shopping with duplicity and intended to bring disrepute to the court were it to arrive at a different conclusion.
 - d. Also in that similar application that was dismissed the applicant herein had sought to be made a party to the case number "Mombasa ELC Number 241 of 2020 between Jamal Abeid Khamis & Others – Versus - Ainushamsi Multiple Agencies Limited".
 - e. Therefore the allegation that they were not aware of the existence of that case could not be true.



- f. That by a Judgment dated 24th April, 2024 the said Court cancelled the title number 28815 CR No. 60948 which same title this court is being asked to re-adjudicate.
- g. The losing party being aggrieved by that decision had since preferred an appeal before the Court of Appeal in the “Mombasa Court of Appeal CACA Number 111 of 2024 between Ainushamsi Multiple Agencies Limited -Versus- Jamal Abeid Khamis & others”.
- h. The deponent argued that this court was being set up on a wild goose chase through multiple litigation fronts that did not help in resolving the issues between the parties and matters already overtaken by events.

IV. Submissions

7. On 24th June, 2024 while all parties were present in Court, directions were give to have the application disposed off by way of written submissions. Unfortunately, at the time of penning down this ruling, none of the parties had uploaded their submissions on www.cts.court.go.ke Thus, the Honourable Court proceeded to reserve a date for the delivery of the Ruling accordingly on its merit.

V. Analysis and determination

8. I have carefully considered the application, the affidavit in support, and the responses thereto, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
9. To arrive at an informed, reasonable and fair decision, the Honourable Court developed the following four (4) issues for its consideration. These are:-
 - a. Whether the suit is time-barred by the provision of Section 7 of the *Limitation of Actions Act*, Cap, 22.
 - b. Whether the application and entire suit offends the Doctrine of Res Judicata to:-
 - i. Mombasa - ELC Appeal Number E043 of 2023 between the same parties, James Kazungu Thoya & Anor – Versus - Ainushamsi Multiple Agencies Limited & Anor.
 - ii. Mombasa ELC Number 241 of 2020 between Jamal Abeid Khamis & Others -Versus - Ainushamsi Multiple Agencies Limited.
 - c. Whether the application has met the threshold for grant of temporary injunction pending hearing and determination of the suit.
 - d. Who will bear the Costs of the application.



Issue No. a). Whether the suit is time - barred by the provision of Section 7 of the Limitation of Actions Act, Cap. 22.

10. Under this sub – heading, the Honourable Court will decipher on the substratum on whether the suit was statutory barred. The governing the issue of limitation of action on land is founded under the provision of Section 7 of the Limitation of Actions Act, Cap. 22 . It provides that:

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

The court in the case of:- “Sohanlaldurgadass Rajput & another – Versus - Divisional Integrated Development Programmes Co. Limited [2021] eKLR held:-

A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. It also refers to a legal theory upon which a Plaintiff brings suit.

Further, the court stated, the purpose of the Law of Limitation was stated in the case of Mehta – Versus - Shah [1965] E.A 321, as follows:-

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

11. To apply these legal principles to the instant case, the Honourable Court has been compelled to briefly examine the facts of the case. From the filed pleadings, the suit herein was instituted through a Plaint dated 9th April 2024 and filed in Court on 12th April 2024. The claim is based on the agreement of sale dated 1st October 2010 between the Deceased as the Vendor and Ainushamsi Multiple Agencies Limited as the purchaser. The vendor sold the parcel of land known as Business Cum Residential Plot A Mariakani Letter of Allotment Ref. 42503/v dated 1st July, 1997 now Plot No. 28815/Mariakani CR. No. 60948 to the purchaser at a consideration of sum of Kenya Shillings Eighteen Million Nine Hundred and Twenty Thousand (Kshs. 18,920,000/=). Which was effected with a transfer that was executed on 6th November 2012 which led to Ainushamsi Multiple Agencies Limited being registered as the proprietor of the suit property as seen from the Certificate of postal search dated 18th November 2020. The plaintiffs have sought, among other orders for the cancellation of the transfer dated 6th November 2012 and for the eviction of the 1st Defendant from the suit property and subsequent restrain from accessing it.
12. Ideally, when the cause of action arose is a question of facts that can be answered from the pleadings. Clearly, on quick computation of time, it has been about 13 years and 6 months which lapsed from the 1st October 2010 till the filing of this suit, from the time when the Deceased entered into an agreement of sale with the 1st defendant over the suit property. The Deceased died on 2nd February 2016. Thereafter, the Plaintiffs herein were granted Limited Grant Ad Litem on 17th August 2021 solely for the purposes of instituting this suit.



13. At this juncture, I seek refuge, soft land and comfort from the provision of Section 9 (2) of the *Limitation of Actions Act* states:-

Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

14. Indeed, it goes without saying that 13 years have lapsed since the 1st Defendant purchased the suit property from Deceased. However, as per the provision of Section 9 (2) the period of limitation starts to run when the right to action accrued from the date of death of the vendor which was 2nd February 2016. This means that the cause of action by the 1st and 2nd Plaintiffs/Applicants accrued to them upon the death of their father, the Deceased who died on 2nd February 2016. The court in the case of:- “Marindany – Versus - Kiplangat & another (Environmental and Land Originating Summons E014 of 2021) [2024] KEELC 3395 (KLR) (25 April 2024) (Ruling) held:-

“These provisions of the law are clear to the effect that where the deceased was on the date of his/her death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death. It is on record that the deceased Lucio Talai Arap Narok died on 6th October 2005 wherein her legal administrator has filed suit on behalf of her estate as an adverse possessor as this right of action accrued upon her death. As to whether or not the deceased had acquired the impugned suit land by way of adverse possession is a matter that shall be determined on trial and is therefore not within the ambit of this application.”

15. Therefore, I find that the suit herein is not time - barred by the provision Section 7 of the *Limitation of Actions Act*, Cap. 22.

ISSUE No. b). Whether the application and entire suit offends the Doctrine of “Res Judicata”

16. Under this sub - heading, the 1st Defendant has argued in their Replying Affidavit that this application is a ‘mirror application’ to two other suits filed before this court, that would be “Mombasa ELC Number 241 of 2020 between Jamal Abeid Khamis & Others – Versus - Ainushamsi Multiple Agencies Limited and Mombasa ELC Appeal Number E043 of 2023, James Kazungu Thoya & Anor – Versus - Ainushamsi Multiple Agencies Limited & Anor.

17. The law governing on the Doctrine of “Res Judicata” is provided for by the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 which states 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.”

18. The authority of the Doctrine of Res Judicata applies when the party pleading Res - Judicata establishes a similarity in the following issues between the former and present suits. The parties in the former suit must be the same as those in the current suit or have been represented by a party to the prior action,



the claim must be the same in the former and current suit, the parties must have been heard on merit and there must be a final Judgement.

19. In the civil cases of “Mombasa ELC Appeal no. 043 of 2023, James Kazungu Thoya and Onesmus Kahindi Thoya (suing as the administration of the estate of Makwangara Kazungu (deceased) against Ainushamsi Multiple Agencies Ltd, Benarad Karisa. Kato t/a Benka Kato Enterprises and Land Registrar”. Where the 1st and 2nd Plaintiffs herein, pending the determination of the appeal, sought injunctive orders against the 1st Defendant herein from interfering whatsoever with L.R No. 28815 Mariakani/Kilifi, C.R 60948 measuring 3.495 HA. The court while delivering its ruling on the application for stay pending appeal on 20th March 2024 declined to make any orders as there was another pending suit i.e. Mombasa ELC No. 241 of 2020 which was before it for Judgement, which was eventually delivered on 24th April 2024.
20. In the case of: “Mombasa ELC No. 241 of 2020 Jamal Abeid Khamis, Mohamed Abeid Khamis and Abdulhakim Abeid Khamis instituted the suit against Ainushamsi Multiple Agencies Limited. The Plaintiffs therein claimed that Title No. CR 60948 Plot No. 28815 measuring 3.495, held by the Ainushamsi Multiple Agencies Limited was obtained illegally. The 1st and 2nd Plaintiffs/Applicants therein contended that the suit property was part of the Kilifi Kawala ‘A’ Kadzonzo adjudication section. The Plaintiffs maintained that they were the registered owners of the suit property which was adjudicated as Kilifi/Kawala ‘A’ Kadzonzo/32. While Ainushamsi Multiple Agencies Ltd contended that the suit property was set apart by the then Mariakani County Council and a grant was issued to Makwangara Kazungu Gunga who later sold the suit property to him. There were two title documents before the court and the issue for determination was which of the two will be upheld by the court and which will be cancelled by the court within the meaning of the provision of Section 26 of the [Land Registration Act](#).
21. The court delivered its Judgement on 24th April 2024 and found that the title held by the 1st Defendant herein was first issued to Makwangara Kazungu Gunga on 6th September 2011 and the grant was registered at the Mombasa land registry on 4th January 2012 and later transferred to the Defendant on 10th October 2015, as seen from the certificate of search dated 20th January 2021, that was presented before the court as evidence. The court found that:-

“I am not satisfied that the setting part of the suit property was lawful. The court cannot connect the grant issued by the Commissioner of Lands and the setting apart by the County Council of Mariakani. It has not been established by the defendant whether the lease he holds is under government land or trust land, the Defendant has failed to prove the basis in which the Land Registrar Mombasa proceeded to process title in his name. It led the court to conclude that the defendant’s certificate of title CR 60948 LR No. 28815 was acquired illegally and ought to be cancelled.”
22. The court found in favour of the Plaintiffs and granted among other orders, an order compelling the Land Registrar, Mombasa to cancel the Certificate of Title No. CR 60948 LR 28815 issued in the name of Ainushamsi Multiple Agencies Limited and a permanent injunction against the 1st defendant herein from occupying LR. Title No. Kilifi/Kawala ‘A’ Kadzonzo/32 and in default eviction to issue. The legality of the title to the suit property was litigated before this court and a valid judgement delivered on 24th April 2024 by my sister Justice N. Matheka. The effect of the said judgement was the cancellation of the title held by the 1st Defendant herein. What is left for this court to determine? This court cannot relitigate on an issue that has been settled by the court.



23. The principle of finality is firmly entrenched in the doctrine of res judicata. The conditions of res judicata have been met herein, first, the issues in the first suit were decided by a competent court and judgement was delivered on 24th April 2024. Secondly, the matter in dispute in the former suit between the parties was substantially in dispute between the parties herein; the plaintiff herein seeks the cancellation of the transfer form dated 6th November 2012 that saw the 1st defendant execute for his registration as the proprietor of the suit property and for his eviction from the suit property. In my view, the issues determined in the former suit led to the cancellation of the title held by the 1st Defendant, this meant that the Plaintiffs herein have no title to claim or rather the court cannot determine the Plaintiffs' cause of action as prayed.
24. Thirdly the matter in the former suit, the 1st Defendant's claim was under the Plaintiffs', which meant that the court considered the root of the title held by the 1st Defendant, which is the plaintiffs' title and found it to be illegal and essentially cancelled the same. In the case of "Gurbachau – Versus - Yowani Ekori (1958) EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the Vice Chancellor in Henderson – v- Henderson (1) 67 ER 313 at page 319 wherein it was stated that:-

“In trying this question I believe I state the rule of the court correctly when I say that 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 the 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”

Issue No. c). Whether the application has met the threshold for grant of temporary injunction pending hearing and determination of the suit.

25. Under this Sub title, the Honourable Court has been urged examine the whether the Plaintiffs/ Applicants should be granted the orders of temporary injunctive orders. Legally, its trite law that the granting of temporary injunctive orders is set out under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows:-

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.



26. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella Versus Cassman Brown, where it was stated:-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

27. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited (Supra)”,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

28. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

29. Based on these authorities, its rather clear and as has already demonstrated herein, the Plaintiffs have no Prima Facie case on the matter. The Plaintiffs herein are seeking to introduce a new cause of action, which has already been resolved by a court of competent jurisdiction. The court will not allow parties to go on litigating forever on the same issues with, seemingly different or similar opponents before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court. In my view, the court having cancelled the title in ELC 241 OF 2020 there is nothing left for this court to consider in so far as the title of the suit property is concerned.

30. The court will not allow the litigation of the title to the suit property before it, simply because though there are different proceedings between superficially different parties, evidence on the sanctity of title will be similar. The evidence that was presented before the court in the former suit with the example of certificate of title held by the 1st Defendant, and certificate of the postal search will be presented before this court; yet another court of competent jurisdiction has already determined on their legitimacy and



has even ordered for their cancellation. The Plaintiffs are trying to re-litigate the issue and this amounts to abusing the court process. For these reasons, I discern that the Plaintiffs are not entitled to the orders sought and the application must fail.

ISSUE No. c). Who will bear the Costs of the application

31. It is well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted upon the conclusion of the legal action or proceeding in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the events, it means the results or outcome of the legal action.
32. In the instant case, taking that the case instituted and the application filed by the 1st and 2nd Plaintiffs/Applicant has been struck out, the 1st, 2nd and 3rd Defendants/Respondents are entitled to the costs to be borne by the Plaintiffs/Applicants herein.

VI. Conclusion & Disposition

33. Ultimately, upon causing intensive analysis of the framed issues herein, the Honourable Court based on the Preponderance of Probability and the balance of Convenience it has arrived at the following decision and renders these orders:-
 - a. That the suit herein offends the Doctrine of “Res Judicata” to the Civil case - ELC No. 241 of 2020 contrary to the to the provision of Section 7 of the *Civil Procedure Act*, Cap. 21.
 - b. That pursuant to that the filed Notice of Motion application dated 9th April 2024 be and is hereby found to be unmeritorious and thus it be dismissed with costs.
 - c. That further the suit through a Plaint dated 9th April 2024 and filed on 12th April 2024 be and is hereby struck with costs.
 - d. That costs of the application dated 9th April, 2024 and the suit by the 1st and 2nd Plaintiffs herein to be awarded to the 1st, 2nd & 3rd Defendants jointly and severally.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED,
DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2024.**

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HON. MR. JUSTICE LL. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Chege Advocate holding brief for Mr. Mwanzia Advocate the 1st & 2nd Plaintiffs/Applicants.
- c. Mr. Muchiri Advocate for the 1st Defendant/Respondent.
- d. No appearance for the 2nd Defendant/Respondent.

JUSTICE L.L. NAIKUNI

