



**Upperview Properties Limited v Imperial Bank Limited (In Receivership)  
(Civil Suit 31 of 2017) [2024] KEELC 6679 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6679 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 31 OF 2017  
LL NAIKUNI, J  
OCTOBER 7, 2024**

**BETWEEN**

**UPPERVIEW PROPERTIES LIMITED ..... PLAINTIFF**

**AND**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP) ..... DEFENDANT**

**RULING**

**I. Introduction**

1. During the pendency of the instant suit and from the surrounding and emerging facts, this Honourable Court, “Suo Moto” felt the need to be intensely addressed on two fundamental legal issues which came to fore. Firstly, the jurisdiction of this Honourable Court was called to question. Essentially, the Court felt the need to make a determination on whether this matter was a commercial or one falling under the use and occupation of land as legally mandated under the *Environment and Land Court Act*, No. 19 and other related land statutes thereof. Secondly, whether the doctrine of “Sub Judice” has been breached. It is instructive to note that, indeed, the matter is part heard whereby the Plaintiff is at the verge of closing their case. It is based on this very reason that the Honourable Court was urged by the parties to provide direction over these two broad legal issues and which will have a glaring effect on whether the Honourable Court would continue entertaining the case or not.
2. With regard to the filed pleadings, the Plaintiff filed Plaintiff while the Defendant responded by filing the Statement of Defence and the Counter - Claim by the Defendant dated 20<sup>th</sup> July, 2018. Pursuant to this, and with the above stated concern triggered by the Court that the Plaintiff pragmatically moved court through an application dated 6<sup>th</sup> May, 2024 challenging the jurisdiction of the Court to hear and determine the Counter - Claim tabled by the Defendant. On the material date, the Honourable Court directed that the parties make skeletal submissions on the issue of the jurisdiction of the Court pursuant to the provisions of Article 162(2)(b) of the *Constitution* 2010, Sections 3 and 13 of the *ELC Act* No. 19 of 2021, Section 101 of the *Land Registration Act* No. 3 of 2012, Section 150 of the *Land*



Act No. 6 of 2012 and Section 6 of the Civil Procedure Act Cap 21 vis a viz other matters over the same subject matter and parties being - HCCC No. 392 of 2016 - "Imperial Bank of Kenya Limited (IL) & Another v Alnasbir Popat & 18 Others" and HCCC No. 523 of 2016 respectively.

## II. Directions for submissions

3. On 6<sup>th</sup> May, 2024 while all the Parties were present in Court, the Honourable Court directed them to canvass the issue of jurisdiction and sub judice in 5 paged submissions. Pursuant to that on a ruling date was reserved on 7<sup>th</sup> October, 2024 by Court accordingly.

### A. The Written Submissions by the Plaintiff

4. The Plaintiff through the Law firm of Messrs. Wandabwa Advocates filed their written submissions dated 25<sup>th</sup> July, 2024. Mr. Wandabwa Advocate commenced his submission by stating that arising from the above stated two – fold issues herein, the Honourable Court asked the parties to address it on whether the Court had the jurisdiction to hear the Counter - Claim dated 20<sup>th</sup> July 2018 and if it was "Sub – judice" to a pending civil suit – HCCC (Nbi) No. 392 of 2016. Hence, in that regard his comments were as follows.
5. The Learned Counsel provided the Court with a brief background of the suit that after the Defendant was put under Receivership, it declined to pay the rents in respect of the suit property, prompting the Plaintiff herein to file this suit for recovery of its rent due, which the Court Ordered that it should, and which order was affirmed by the Court of Appeal. Ideally the said suit was spent, because subsequently the Defendant was up-to date with the rent payments until the lapse of the said lease.
6. In response to the said suit, the Defendant filed its Defence denying that it owed any rents, based on its assertion that it was the beneficial owner of the suit property and had Counter - claimed for a refund of the rents thus far paid, and for an order to have the suit property transferred to it. This according to the Learned Counsel was the only pending issue to be determined and thus was before this Court.
7. According to the Learned Counsel it was notable that in the Plaintiff's Reply to the Defendant's Defence and Defence to the Counter - Claim, the Plaintiff had pleaded in under Paragraphs 36 and 37 as follows:

"The Plaintiff joins issues with the contents of paragraph 59 of the Defence and counterclaim and avers that the Defendant has failed to disclose to the Court that it has commenced Civil proceedings, being HCCC No. 392 of 2016 against the shareholders and directors of the Defendant in which the Defendant has alleged breach and statutory duty, fiduciary duty, negligence and fraud against the said shareholders/Directors and in which they have sought inter alia, the following reliefs;.....

Order the transfer of the shares held by the shareholders/Directors in various companies including the Plaintiff herein. The Plaintiff avers that the Defendant cannot sue for the damages arising out of inter alia the alienation of the suit property in HCCC No. 392 of 2016, and in the same breath purport to maintain a claim as owner, beneficial or otherwise in respect of the same property, being the suit property herein."

8. Therefore, it was the Learned Counsel's contention that this Court sitting as an Environmental and Land Court was barred from proceeding with this Counter - claim on the grounds following:-
  - a). On the issue of the basis of the Counter - Claim is the subject of an earlier suit being HCCC No. 392 of 2016 and HCCC No. 523 of 2016 was an abuse of process and that the same



should be struck out, the Learned Counsel submitted that in the current suit, the Defendant had pleaded in its Defence and Counter - Claim as follows:-

“The Defendant avers that whilst correspondences in its possession dated 12<sup>th</sup> January 2010, C) v show the shareholders of Plaintiff assigning the 2009 second interim dividend purportedly due 'to them from IBL to the Plaintiff, its Adjusted Retained Earnings were negative in all years, and the Companies Act dictates that no dividends should have been declared or paid in the years 2006 to 2014.

The Defendant further avers that investigations conducted reveal that the bank had insufficient retained earnings in 2009 to declare and pay / assign such dividends; the bank was not profitable, and therefore unable to declare such dividends. The shareholders were therefore incapable of assigning any dividends, or at all In the circumstances, therefore any funds used to purchase the property were actually Bank monies that had been irregularly allocated as declared dividends payable to the shareholders.

The Defendant avers that the said property having been acquired irregularly is therefore held in trust for IBL pending a completion of the investigation, and a final decision on the future of the institution.

b. At Paragraphs 46 and 47 of the Defence and Counter – claim it stated thus:

“The Defendant avers that an analysis of the IBL annual financial statements after making adjustments for the fraudulent and Unsecured loans to W. E. Tilley Group resulting from the breach of fiduciary duty by the Defendant's directors as shown hereinabove, the Adjusted Financial Position of IBL relating to W, E. Tilley Group loans and overdrafts only, as follows;

On the basis that Adjusted Retained Earnings were negative in all years, the Companies Act Cap 486 of the Laws of Kenya dictates that no dividends should have been declared or paid in the years from 2006 to 2014

c. Further, at Paragraph 53(a) of the Defence and Counter – Claim it pleaded:

“IBLIR repeats the contents of its Statement of Defence, as if the same were stated herein verbatim, and avers that by reason of the facts stated therein, the suit property, Mombasa / Block XXVI/25, having been acquired fraudulently, in breach of the Plaintiff and Defendant's directors and shareholders of their fidelity and fiduciary duty to IBLIR, the Companies Act, the Banking Act & CBK Prudential Guidelines, is therefore held in trust for IBLIR.”

d). In the Particulars of Breaches of the Companies Act, the Defendant in Paragraph 53 (a) averred as follows:-

“Approving the acquisition of interest in land by companies substantially owned by C)themselves, from the Plaintiff under transactions similar to sale and leaseback arrangements, in some instances, the interest was acquired by way of the shareholders foregoing or assigning dividends fraudulently declared on behalf of the Plaintiff.”



- e. At Paragraphs 55 of the Counterclaim under (a) titled Particulars of Fraudulent Declaration of Dividends it was averred as follows:-

“The Defendant’s, directors, being directors of the Plaintiff fraudulently recommended the payment of dividends, which were thereafter approved by their own companies being shareholders of IBLIR, in the full or expected knowledge that the Plaintiff was making losses, and thereafter assigning part of the said fraudulent dividends to companies substantially owned by themselves namely Sand View Properties Limited and Upper View Properties Limited, for the fraudulent acquisition of the property of the Plaintiff to wit LR 209/11623 ‘the Upper Hill property’ and Mombasa /Block XXVI/25j and thereafter leased the said properties back to the Plaintiff, cumulatively and unjustly enriching themselves for no consideration whatsoever.”

- f. At paragraph 56 of the Counter - Claim the Defendant averred that “Upperview Properties Limited”, through its Directors & Shareholders, being the Directors & Shareholder of Imperial Bank Limited;

- a. Being aware, and or reasonably expected to have been aware, that Imperial Bank Limited was not making profits proceeded to fraudulently declare, and thereafter fraudulently approved dividends, when none should have been declared or paid in the years from 2006 to 2014.
- b. Being aware, and or reasonably expected to have been aware, that Imperial Bank Limited was not making profits proceeded to fraudulently assign the fraudulently approved and declared dividends, for use for the purchase of the suit property.
- c. Fraudulently receiving, and assigning dividends towards the acquisition by Upperview Properties Ltd by approving the acquisition of interest in Mombasa/Block XXVI/25, being the property of IBLIR / Plaintiff, under transactions similar to sale and leaseback arrangements, in some instances, the interest, was acquired by way of the shareholders foregoing or assigning dividends fraudulently declared on behalf of the Plaintiff.”

- g. In its prayers the Plaintiff in the Counter – Claim had sought the cancellation of the Plaintiff’s title and for the property to be restituted to it. The Learned Counsel further submitted that in the civil case HCCC No.392 of 2016, in its Plaint (Vol 1 of the Plaintiff’s Bundle at pages. 104 to 151, but the same was annexed hereto and marked as Annexure ‘A’ for ease of reference) the Defendant herein averred;

At Pg.131 thereof at the Paragraph Numbered 83 (a) titled “Particulars of theft by the Directors (1<sup>st</sup> to 9<sup>th</sup> Defendants)”

“...Approving the acquisition of interest in land by companies from the 1<sup>st</sup> Plaintiff under transactions similar to sale and leaseback arrangements, in some instances, the interest was acquired by way of the shareholders foregoing or assigning dividends fraudulently declared on behalf of the 1<sup>st</sup> Plaintiff...”

At Pg. 139 thereof at the Paragraph Numbered (a) titled ‘Particulars of Fraudulent Declaration of Dividends.’

“...The 1<sup>st</sup> to 9<sup>th</sup> Defendants fraudulently recommended the payment of dividends, which were thereafter approved by their own companies the 11<sup>th</sup> to 18<sup>th</sup> Defendants,



in the full or expected knowledge that the 1<sup>st</sup> Plaintiff was making losses, and I thereafter assigning part of the said fraudulent dividends to companies substantially owned by themselves namely sand view properties limited and upper view properties limited, for the fraudulent acquisition of the property of the 1<sup>st</sup> plaintiff to wit LR No. 209/11623 ‘the Upper Hill property’ and Mombasa/Block XXXVI/25, and thereafter leased the said properties back to the 1st Plaintiff, cumulatively and unjustly enriching themselves for no consideration whatsoever...”

At Pg. 139 thereof at the Paragraph Numbered (a) titled ‘Particulars of fraudulent acquisition of 1<sup>st</sup> Plaintiff’s property’.

“...receiving, and assigning dividends towards the acquisition by Upperview properties Limited & Sandview Properties by approving the acquisition of interest in LR 209/11623 ‘the Upper Hill Property’ and Mombasa/Block XXXVI/25, being the property of the 1<sup>st</sup> Plaintiff, under transactions similar to sale and leaseback arrangements, in some instances, the interest was acquired by way of the shareholders foregoing or assigning dividends fraudulently declared on behalf of the 1<sup>st</sup> Plaintiff...”

At Pg. 141 thereof at paragraph c, of the Prayers in the Plaint;

“...Order for the transfer to the first 1<sup>st</sup> Plaintiff, all the shares held by the 1<sup>st</sup> to the 7<sup>th</sup> Defendants as specified in paragraph 75 in the following companies.....Upperview Limited....”

- h. The Learned Counsel submitted that it was also noteworthy that the particulars set out in its Defence and Counterclaim, constituting the basis of their Counterclaim for the suit property contained in Paragraphs 53 to 69 were a verbatim regurgitation of the said claims in Paragraphs 81 to 94 of their Plaint in HCCC No.392 of 2016. From the said pleadings it was apparent beyond peradventure that:
  - a. Whereas in the this suit the Defendant has counterclaimed for the suit property, in HCCC No.392 of 2016, the Defendant, who is one of the Plaintiffs in the said suit has sued for inter alia the transfer of all the shares in the Upperview the Plaintiff herein, to the Defendant.
  - b. The transfer of the suit property to the Plaintiff is being faulted by the Defendant on the basis that the consideration for the said acquisition are dividends declared by the Bank to its shareholders, who then applied them to purchase the suit property in the name of the Plaintiff, in whom they hold shares, and which also is their plea in HHCCC No. 392 of 2016.
  - c. The predominant issue for determination in both suits is whether or not the Dividends declared from the Bank, and which were used to purchase the suit property were lawfully declared.
  - d. Both suits are heavily premised upon the allegations against the Banks’ shareholders and Directors, who happen to be the Defendant’s.
9. Further, and without prejudice to the foregoing it was the Learned Counsel’s submission that to the extent that the predominant issue for determination was the alleged fraudulent declaration of Dividends from the Bank which the respective shareholders invested in Upperview the Plaintiff herein



to acquire the suit property, it was their humble submission this was matter for determination by the High Court and not the Environment and Land Court (“ELC”).

10. According to the Learned Counsel, the jurisdiction of the ELC to deal with matters relating to inter alia the use, title and occupation of land is primarily set out by Article 162 (2) & (3) of the Constitution, the provision of Section 13 of the Environment and Land Court Act which established the ELC as well as the Land Act whose Section 150 stipulated that the ELC, the provisions of which the Honourable Court is well versed with. The jurisdiction of the High Court on the other hand has been broadly set out under Article 165(3) which stated that the High Court shall among others, have unlimited original jurisdiction in criminal and civil matters.
11. The Courts in grappling with the extent of the ELC's jurisdiction in land matters in which the issues that the court is called upon to determine are intertwined with other issues which are not related to the use, occupation and title to land have taken the view that the Court must first determine what the predominant issue for determination is, and if it finds that the predominant issue is one which is not related to the use, title and occupation of land then the ELC should decline jurisdiction and leave it to the High Court that has unlimited original jurisdiction in civil matters. In this regard, the Counsel made reference to the cases of: “Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR”, “Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another (2016) eKLR”, “Innocent Enoche Omboko v County Assembly of Busia & another [2021] eKLR” and in the case of “Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another (2018) eKLR” in which the Court summed up the issue as follows;

“I am aware of the decision of my brother, Ngugi J, in the case of Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another (2016) eKLR, where the Learned Judge, when faced with an objection to jurisdiction, was of the view that what is important in determining which court would have jurisdiction, is the ‘pre - dominant purpose test’, which the Judge elaborated as follows:

- “23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessarily be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you



will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation.”

12. The Learned Counsel asserted that further and without prejudice to the foregoing submissions, to the extent that the Defendant herein prayed for the transfer of the shares in the Plaintiff herein (Upperview) to itself in HCCC No.392 of 2016 filed prior to this suit on the basis that the shares were acquired from the proceeds of fraudulently acquired dividends, it could not in this suit filed subsequently, possibly seek the retransfer to it of the Plaintiff's suit property on the same basis. He relied on the case of “*Muchanga Investments Limited v Safaris Unlimited (AFRICA) Limited & 2 others* [2009] eKLR” the court stated that instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action and instituting different actions between the same parties simultaneously in different courts even though on different grounds was an abuse of process. This suit was an abuse of process and the same should be dismissed on that account alone. In support of this submission the Learned Counsel relied on the following;
- a. Section 6 of the *Civil Procedure Act* which enacts 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”
  - b. Further, Section 8 of the *Civil Procedure Act* stipulates as follows;

“Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”
  - c. Practice Directions Relating to the Filing of Suits, Applications and References in Proper Courts published in February 2009 vide Gazette Notice No. 1756, the Chief Justice exercising his powers under the provisions of Section 65 (3) of the repealed Constitution directed in Direction No. 2 as follows;

“Where suits have already been filed in the wrong Court, the Court should exercise its authority under Order VII rule 9 of the Civil Procedure Rules to return the plaint to be presented to the court in which the suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the process of the Court.”
  - d. It was therefore held in “*Barclays Bank of Kenya Limited v Elizabeth Agidza & 2 Others* [2012] eKLR” that:-

“.....if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the *Civil Procedure Act*, Section 6 will still apply. This is so because the overriding objective of the *Civil Procedure Act* is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the *Jadna Karsan- v - Harnam Singh Bhogal* was decided are completely different from the circumstances obtaining now.



The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources.”

- e. In “Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR”, the Court having found that a previously filed pending suit raised the same issues as those before it found the multiplicity of suits to be an abrogation of S. 6 of the Civil Procedure Act, and relying on Order 2 Rule 15 struck out the said suit for being an abuse of process, and stated as follows;

“30. The point to underscore is that a litigant has no right to pursue paripassu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.

32. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society...

38. Even though a court of law should try as much as possible to allow a suit to be determined on its merits, the court should not shy off taking action to rid the court process of proceedings that are clearly an abuse of the court process. In the premises the proper order that commends itself and which I will proceed to grant is to struck out the suit for being an abuse of the court process.”

- f. Further, if the Honourable Court too the view that predominant issue for determination is the purported fraudulent declaration of dividends, then this court would be lacking in jurisdiction by reason of which it would lack the discretion to even transfer the matter to the High Court. The court in “Kagenyi v Musiramo and another [1968] EA 43 (HCU)” elucidated itself on the issue as such. The Supreme Court was in congruence with this position in “Albert Chaurembo Mumba and 7 Others v Maurice Munyao & 148 Others [2019] eKLR” where it was stated as follows:

“[154] However, as it was well elucidated in the case of Kagenyi v Musiramo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”



In *John Adoyo & 6 others v De La Rue Currency and Security Print Limited* [2022] eKLR court endorsed the Kagenyi Case by stating that:

“20. The Court of Appeal as per Karanja, Gatembu and Sichale JJA, affirmed the plethora of cases including *Equity Bank case, Joseph Muthee Kamau and Another v David Mwangi Gichure and Another* (2013) eKLR and *Kegenyi v Masirambo* (1968) E.A. 43 in restating the Principle of law that “a Court should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

g. Further, and without prejudice to the foregoing, the Defendant having sued for the transfer of the shares in the Plaintiff on account of its allegation of fraudulently declared dividends, the Defendant was estopped from claiming the Plaintiffs land as well. This doctrine was enunciated by the Supreme Court of England and Wales in *Test Claimants in the Franked Investment Income Group Litigation and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant)* [2020] UKSC 47 at paragraph 61 as follows:-

“.....Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier Judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.... Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action.”

13. In Conclusion the Learned Counsel submitted that from all the foregoing, they prayed that the Honourable Court will find that the pending Counter Claim was an abuse of process and the same should be dismissed.

## **B. The Written submissions by the Defendant**

14. While opposing the application and negating on the above stated two fold issues, the Defendant through the Law firm of Messrs. Issa & Company Advocates filed their written submissions dated 26<sup>th</sup> August, 2024. Mr. Mansur Advocate submitted that the provision of Article 162 (2) of the [Constitution](#) establishes the Environment and Land Court as a superior court. The [Environment and Land Court Act](#), No. 19 of 2011 gives effect to Article 162(2) of the [Constitution](#) . Section 13(1) & (2) of the [Environment and Land Court Act](#) provides for the jurisdiction of this Honourable Court which inter alia include to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Further, Section 150 of the [Land Act](#) and Section 101 of the [Land Registration Act](#), 2012 reinforce the Constitutional underpinning of the jurisdiction of the Environment and Land Court.

15. Further the Learned Counsel submitted that the Plaintiff contended that this Honourable Court lacks the jurisdiction to hear and determine the Counter - Claim as it was premised on an earlier suit being HCCC No.392 of 2016 and HCCC 523 of 2016 and as a result therefore, should be dismissed. The Defendant was not aware of HCCC 523 of 2016.

16. The Learned Counsel opined that this Honourable Court had jurisdiction to hear and determine both the suit instituted by way of Plaintiff and the Counterclaim before it. The Plaintiff's claim against the



Defendant was that of a landlord against a tenant. The Plaintiff claims to be the registered proprietor of all that parcel of land situate in Mombasa County measuring 0.59 acres registered as Mombasa/Block XXIV/25 where a property known as Mombasa Building had been developed.

17. By a Lease Agreement dated 28<sup>th</sup> May 2010, the Plaintiff leased to the Defendant 31,162 Square Feet within Mombasa Building, which lease expired on 30<sup>th</sup> June 2015. The Plaintiff claimed that the Defendant continued to hold over and retain the property on the same terms as the expired lease. The Plaintiff was therefore claiming inter alia, vacant possession of the suit property, outstanding rent and mesne profits as itemized in the Plaintiff.
18. The Plaintiff had urged in its submissions that the Counter - Claim should be dismissed for being an abuse of the court process. Contrary to those submissions, the Learned Counsel argued that the Counter - Claim was properly before the court as what was pleaded in the Counter - claim was the manner in which the suit property was acquired and transferred to the Plaintiff. The Learned Counsel submitted that in its Counter - claim, it had pleaded that the Plaintiff illegally, unprocedurally, and through a corrupt scheme, fraud and/or misrepresentation acquired the suit property and as a result therefore, the suit property belonged to the Defendant and was only held in trust by the Plaintiff.
19. The powers to dispose of a company property must be exercised by the Directors for the purposes and in the interests of the company. Directors owe a fiduciary duty in respect of this power and breach of those duties is treated as a breach of trust. Therefore, a Director even where they were a shareholder should not take any corporate opportunities for personal benefits. The Defendant placed reliance on the case of “Pan Africa Insurance Holdings Limited & another v Dickson Ngatia Gachuche [2021] eKLR” to advance the duties of Directors. The Plaintiff’s shareholders having taken advantage of their positions as Directors of the Defendant Bank for their own benefit, a constructive trust automatically arose over the property known as Mombasa/Block XXIV/25. The Defendant shall prove that the Plaintiff was only holding the suit property in trust for the Defendant Bank. A constructive trust was imposed on property in the hands of a wrongdoer to prevent them from benefitting unjustly from the wrongful conduct. On this issue, the Defendant shall rely on the case of “Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [2018] eKLR”.
20. The Learned Counsel proceeded to submit that the Pre - dominant test as discussed in the case of:- “Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another” when applied to the present case would reveal that the predominant issue before this court was one that affects the acquisition of title to land which falls for determination by this Honourable Court. The Court held as follows:-

“That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the pre - dominant purpose of the transaction. If the litigant’s pre - dominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC”
21. According to the Learned Counsel, the suit property was transferred in the year 2009 before the Land Act and Land Registration Act had been enacted. Under the transitional provision of Section 162 (1) of the Land Act, No. 6 of 2012 as read together with Section 108 of the Land Registration Act, No. 3 of 2012 the rights, and obligations acquired and/or accrued before the enactment of these two laws continues to be governed by the Registered Land Act, Cap. 300 (Now repealed).



22. The provision of Section 143 (1) of the Registered Land Act (now repealed) provides that:

“Subject to sub - section (2),the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

The allegations of fraud pleaded against the Plaintiff company were pleaded at paragraph 56 of the Counter - claim. For the claim of fraud to succeed, the Defendant shall prove that the transfer of the suit property from the Defendant Bank to the Plaintiff company was fraudulent for lack of valuable consideration as stipulated in the Agreement for Sale.

23. Further it was the Learned Counsel’s submission that as this Honourable Court would note that the Defendant was challenging the Plaintiff’s title to Mombasa/Block XXIV/25 which as pleaded, was transferred to the Plaintiff when the Plaintiff’s Shareholders fraudulently assigned themselves dividends from the year 2009 purportedly due to them from the Defendant while the Bank could not declare dividends during this period. The transfer and assignment of Mombasa/Block XXIV/25 was therefore stated to be fraudulent and the Counter - Claim was properly within the jurisdiction of this court. The Defendant cited the case of:- “Munyu Maina v Hiram Gathiha Maina” where the Environment and Land Court held as follows: -

“We state that when a registered proprietor's root of title is under challenge.it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

24. The Learned Counsel contended that the Plaint and the Counter - Claim were closely intertwined and the Plaintiff could not attempt to separate the two and submit that the Counter - Claim be dismissed and continue with the claim in the Plaint. The hearing of this case had proceeded substantially with the Plaintiff already calling three (3) witnesses to testify on its behalf. The witnesses had not only been asked questions in relation to the Plaint but also with respect to the issues raised in the Counter - Claim. This Honourable Court would therefore decline the invitation dangled by the Plaintiff to dismiss the Counter - claim and proceed with the Plaint.

25. On the doctrine of sub judice, the Learned Counsel submitted that it was further the Plaintiff’s contention that the issues raised in the Counter - claim were directly intertwined with issues raised in other suits before other courts specifically “HCCC No.392 of 2016: Imperial Bank of Kenya Ltd (IL) & Another v Alnashir Popat & 18 Others and HCCC No.523 of 2016 and as a result this Honourable Court should down its tools in light of the provisions of Section 6 of the Civil Procedure Act, Cap. 21.

26. According to the Learned Counsel, the basic and underlying object of sub judice is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two (2) parallel matters in respect of the same cause of action, same subject matter and the same relief. This was to avert the possibility of arriving at contradictory findings.

27. The Learned Counsel submitted that the present suit is not sub judice for the following reasons. First, the cause of action in HCCC No. 392 of 2016 related to fraudulent account keeping by the Defendants in that suit whilst the present suit related to fraudulent transfer of the Defendant’s property by the Plaintiff. Secondly, the parties in HCCC No.392 of 2016 were different from the parties in the present suit. In HCCC No.392 of 2016, the Plaintiffs were Imperial Bank Limited (IL), Kenya



Deposit Insurance Corporation and the Central Bank of Kenya against eighteen (18) Defendants, where Upperview Properties Limited was not a party to the suit.

28. Third, the reliefs being sought in HCCC No.392 of 2016 inter alia included the transfer of shares held by the 1<sup>st</sup> -7<sup>th</sup> Defendants in their conduit companies, judgment against the 1<sup>st</sup> - 10<sup>th</sup> Defendants for a sum of Kenya Shillings Fourty Two Billion Two Hundred Million (Kshs. 42, 200, 000,000.00/=) and a sum of Kenya Shillings Two Billion Seven Hundred Million (Kshs. 2, 000, 000, 000, 700, 000, 000.00) against all the Defendants being the amount fraudulently paid as dividends. With respect to the present suit, the reliefs sought in the Counter - Claim inter alia include a declaration that the title and transfer of interest in Mombasa/Block XXIV/25 to Upperview Properties Ltd was fraudulent, cancellation of the title and transfer of the interest in Mombasa/Block XXIV/25 to Upperview Properties Limited, order of restitution of Mombasa/Block XXIV/25 to Imperial Bank Limited (IL) and refund for rent paid by Imperial Bank Limited from January 2010 to March 2018 in the sum of Kenya Shillings Three Seventeen Million Six Fourty Seven Thousand Seven Fourty Seven Hundred (Kshs. 317, 647,747.00/=).
29. According to the Learned Counsel it was noteworthy, that the hearing in the High Court in HCCC No.392 of 2016 had not proceeded as there was a stay of proceedings issued by the Court of Appeal pending the hearing and determination of “Civil Appeal No. 395 of 2017 Imperial bank Limited & Another – v Alnashir Popat & 18 Others”. The appeal in the Court of Appeal related to an objection to representation of two (2) firms of Advocates and not the merits of the case.
30. According to the Learned Counsel, from the foregoing, it was evident that the Counter claim was not sub judice and the Defendant prayed that this Honourable Court makes that finding. The upshot of which the Learned Counsel held that this Honourable Court had jurisdiction to hear and determine both the Plaintiff and the Counterclaim. As the hearing had substantially continued, the Defendants prayed that the hearing of the suit be allowed to proceed as scheduled.

## V. Analysis and Determination

31. The Honourable Court has keenly considered the application by the Plaintiff in the main suit and Defendants in the Counter Claim, the responses by the Plaintiff in the Counter Claim and Defendants in the main suit, their comprehensive written submissions, the cited myriad of authorities, the relevant provision of the Constitution of Kenya, 2010 and statutes.
32. For the Honourable Court to arrive at an informed, fair, reasonable and Equitable decision, it has condensed the subject matter into the following three (3) salient issues for its determination, These are:-
  - a. Whether this Honourable Court has jurisdiction to entertain this matter by dint of the Provisions of Article 162 (2)(b) of the Constitution 2010, Sections 3 and 13 of the ELC Act No. 19 of 2011, Section 101 of the Land Registration Act No. 3 of 2012, Section 150 of the Land Act No. 6 of 2012 and Section 6 of the Civil Procedure Act Cap 21.
  - b. Whether this instant case is sub judice by virtue of HCCC No. 392 of 2016 and
  - c. Who bears the costs of the application.

**ISSUE No. a). Whether this Honourable Court has jurisdiction to entertain this matter by dint of the Provisions of Article 162 (2) (b) of the Constitution 2010, Sections 3 and 13 of the ELC**



**Act No. 19 of 2011, Section 101 of the Land Registration Act No. 3 of 2012, Section 150 of the Land Act No. 6 of 2012 and Section 6 of the Civil Procedure Act Cap 21**

33. Under this Sub heading, the main substratum is on the issue of the Court's Jurisdiction. Before this Honourable Court embarks on a detailed analysis on the issue of jurisdiction, it feels it imperative to first and foremost to extrapolate and expound on the brief facts of the case. From the filed pleadings, vide a Plaint filed in 2017, the Plaintiff claimed to be the registered proprietor of all that parcel of land situate in Mombasa County measuring 0.59 acres registered as Mombasa/Block/XXIV/25 where a property known as Mombasa Building had been developed.
34. By a Lease Agreement dated 28<sup>th</sup> May 2010, the Plaintiff leased to the Defendant 31,162 Square Feet within Mombasa Building, which lease expired on 30<sup>th</sup> June 2015. The Plaintiff claimed that the Defendant continued to hold over and retain the property on the same terms as the expired lease. The Plaintiff was therefore claiming inter alia, vacant possession of the suit property, outstanding rent and mesne profits as itemized in the Plaint.
35. The Defendant subsequently filed a Statement of Defence and Counter - Claim dated 20<sup>th</sup> July 2018 where it claimed that it owed any rents, based on its assertion that it was the beneficial owner of the suit property, and had Counterclaimed for a refund of the rents thus far paid, and for an order to have the suit property transferred to it. That is adequate on facts.
36. Now diving into the legal issue of jurisdiction. It is trite law that the moment a party in a suit challenges the jurisdiction of a Court, anything else the court does from then onwards became a nullity whatsoever. Once that happens, it was significant that that huddle is finally tackled first and foremost. This was because without jurisdiction the court had no mandate to make one more step. It ought to down its tools. This legal preposition was well established in the now "Classicus locus' and famous case of "Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (1989) eKLR" dealt with a court, Nyarangi JA held on jurisdiction thus: -

"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".

16. Additionally, still on the same point, in the case of "County Government of Migori v I N B Management IT Consultant Limited ( 2019) eKLR" whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

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The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-"Hon (Lady ) Justice Kalpana H Rawal v Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- "Ocheja Immanuel Dangama v Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-



“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”.

37. Jurisdiction means a courts power to decide case or issue a decree. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the case of:- “in the Matter of Interim Independent Electoral Commission [2011] eKLR” held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution , by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution .

38. In a nutshell, the issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. As elaborately submitted by both the Learned Counsels, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the Constitution of Kenya, 2010 and Section 13 (2) of the ELC Act No. 19 of 2011. The provision of Article 162(2) (b) which states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. Article 162 of the Constitution as read with Section 13 of the Environment and Land Court expounds on the jurisdiction of this Court as follows: -

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution , the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;



- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land

The Environmental Land Court Act grants jurisdiction to the ELC under Section 13 (7) to do the following, thus: -

“..... to make any order and grant any relief as the Court deems fit and just including: -

- (a) Prerogative orders
- (b) Award of damages
- (c) Compensations
- (d) Specific performance
- (e) Restriction
- (f) Declaration or
- (g) Costs.”

39. The broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Counsel went on to submit that Parliament indeed enacted the [Environment and Land Court Act](#), 2011.
40. It is the Plaintiff's case that this Court has no jurisdiction to entertain the Counterclaim being that the context of the same is commercial in nature. The Defendant on the other hand contended that this court has jurisdiction to entertain this matter by virtue of provisions of section 13 and of the [Environment and Land Court Act](#) as its claim was on the proprietorship of the land.
41. As indicated, it is common ground that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use occupation and title to land. However, what is in dispute is whether the cause of action in this suit was the suit property or the rent that the Defendant owed and had since paid and which matter had already been determined.
42. The above provision gives the ELC a very wide subject matter jurisdiction, and indeed, it does appear that so long as the dispute is one in which there is an issue over land or the environment, then the ELC would have jurisdiction. The ELC Act is not the only statute that gives the ELC jurisdiction. There are other statutes which provide that for purposes of the matters that they address, it is the ELC which will have jurisdiction. These statutes generally cover subject matter related to land and the environment. The [Land Registration Act](#) and the [Land Act](#), 2012 provided that the court with jurisdiction to hear matters falling within those two statutes is the Environment and Land Court. This was provided in Sections 101 of the [Land Registration Act](#) and Section 150 of the [Land Act](#) which were drawn as follows (before amendment in 2015 by the Statute Law Miscellaneous Amendment Act, 2015); -

Section 101, [Land Registration Act, Act No. 3 of 2012](#), Jurisdiction of court.



The Environment and Land Court established by the [Environment and Land Court Act](#), 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

Section 150, [Land Act, Act No. 6 of 2012](#), Jurisdiction of Environment and Land Court.

The Environment and Land Court established in the [Environment and Land Court Act](#) is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

43. Let me expound a little on the two statutes. They came into force on 2<sup>nd</sup> May 2012 and it is on that date that the Registered [Land Act](#), was repealed, by Section 109 of the [Land Registration Act](#), No. 3 of 2012. After the [Land Act](#), No. 6 of 2012 and [Land Registration Act](#) came into force, fresh matters relating to land ought to have been filed in the Environment and Land Court and not Magistrate's Court or indeed any other court, given the provisions of Section 101 of the [Land Registration Act](#), and Section 150 of the [Land Act](#) which I have already outlined above. I am alive to the fact that Sections 150 of the [Land Registration Act](#), and Section 101 of the [Land Act](#), and Section 30 of the Environment and [Land Act](#) were repealed and/or amended by the Statute Law Miscellaneous Amendment Act of 2015.
44. Having said that much then, the only question that remains is does this Honourable Court have the jurisdiction to hear and determine the Counter claim by the Defendant. I have deliberately and more keenly gone through the Counter - Claim the umpteenth times with a tooth comb and noted it addresses issue emanating from the use and occupation of title and land hereof with regard to the suit property. For instance, I have noted that apart from the aversions to lift the corporate veil in the present instance, it is important to note that at paragraph 53 of the statement of defence and Counter - Claim the Defendant alleges fraudulent acquisition of the suit property. Further, the Court feels it safer to re produce verbatim the prayers by the Defendant in the Counter - Claim which are but limited to:-
- a. A declaration that the title and transfer of the interest in Mombasa/ Block XXVI/25, from Imperial Bank Limited to Upperview Properties Limited was obtained illegally, unprocedurally and through a corrupt scheme, fraud and misrepresentation.
  - b. An order for cancellation of the title and transfer of the interest in Mombasa/ Block/ XXVI/25, from Imperial Bank Limited to Upperview Properties Limited,
  - c. Declaration that the sale/ purchase agreement for the transfer of the interest in Mombasa/ Block XXVI/25, from Imperial Bank Limited, to Upperview Properties Limited is void for failure of consideration.
  - d. An order for restitution of Mombasa/ Block XXVI/25 to Imperial Bank Limited,
  - e. Enters Judgment against the Defendant for the sum of Kshs. 317,647,747, being a refund to rent paid by Imperial Bank Limited to Upperview Properties Limited from January 2010 to March 2018 payable to Imperial Bank Limited.
45. The provision of Section 2 of the ELC Act defines “the Court” to mean ELC established by the Act and other Courts having jurisdiction on matters relating to land. This Honourable Court is the only one with jurisdiction apart from the Magistrate Court that are designated to conduct Environment and Land Matters that have the jurisdiction to cancel title and rectify a register in compliance with the provisions of Section 80 of the [Land Registration Act](#) is clearly spelt out. The issue of how the Plaintiff acquired the land has been challenged in the Counter - Claim and the same is provided for under Section 7 of the [Land Act](#) which provides several methods upon which acquisitions of title to land is attained. The efficacy and effects of registration of land are provided for under the provisions of Section



24(a) of the [Land Registration Act](#) read together with Sections 25 and 26 of the [Land Registration Act](#) which are amongst the back bone provisions governing the cases to be heard and determined by the Environment and Land Court.

46. The provision of Sections 79 and 80 of the [Land Registration Act](#), No. 3 of 2012 provides for the rectification of the register by the Land Registrar and cancellation of the title by an Order of Court. The Sections provides that subject Sub-section (2) the Court may order the rectification of the register by directing that any registrations be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake and that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission fraud or mistake in consequence of which the rectification is sought, or cause and such omission, fraud or mistake or subsequently contributed to it by any act, neglect or default.
47. It goes without saying that the further and deeper analysis of the said Counter - Claim in context the more and more it reveals that the same had issues to deal with land in contest and they touch on the title of the land which is a speciality of this Honourable Court and not the Commercial Court. The Defendant challenges the validity of the title which dispute can only be determined by an Environment and Land Court such as this Honourable Court being a specialized court only meant to deal with matters of land and the environment and the proprietary rights to land ownership and titles. So where a title is said to be fraudulent or there was some form of misrepresentation in the disposition of a land this Honourable Court cannot down its tools.
48. Needless to say, it is the finding of this Honourable Court that the Counter - claim by the Defendant dated 26<sup>th</sup> July, 2018 is not only properly, legally but rightfully in this Court. It will be premature to deprive this Honourable Court of the right to hear and determine it which determination will be limited to the disposition of the land, the means to which the same was disposed and the proprietorship of the land.
49. Having dealt with the issue of jurisdiction, the Plaintiff also raised the issue of the doctrine of sub judice which I shall discuss below.

**ISSUE No. b). Whether this instant case offends the Doctrine of “Sub – Judice” by virtue of HCCC No. 392 of 2016 and 523 of 2016.**

50. Under this sub – title, the Honourable Court shall examine the raised substratum being the Doctrine of “Res Sub judice” and if the instant filed Counter - Claim is barred by it. The existence of two suits is not disputed hence a useful starting point is the provision of Section 6 of the [Civil Procedure Act](#), Cap. 21 which provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are “expressly” or “impliedly barred.” In a situation where two suits arising out of the same issues between the same parties are brought before the Courts, there is bound to be wastage of resources and frivolous litigation. In order to correct this redundancy, there exists the doctrine of sub-judice which is captured in Section 6 of the [Civil Procedure Act](#), Cap 21 which both Counsel have heavily and extensively cited.
51. I wish to make reference to the provision of Section 6 of the [Civil Procedure Act](#) which provides that:  
‘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.’



52. On the meaning nature and scope of the a Counter – Claim as founded under Order 7 Rule 3 of the Civil Procedure Rules, 2010 In the case of “Kibona v Tanscan Timber Co. Limited Mbeya HCCC No. 8 of 1999 [1995-1998] 1 EA 121”, it was held that:-

“A Counter - claim is a case in its own right, completely different from the Plaintiff’s case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the Defendant becomes the Plaintiff and the Plaintiff the Defendant although they retain their titles as shown in the Plaintiff and since a Counter - Claim is a suit distinct from the Plaintiff’s suit, it must be headed by the term “Counter Claim” in bold capital letters which implies that although it is contained in a written statement of Defence it is also a suit to which a written statement of Defence is required.”

53. Similarly, it was held in the case of:- “Samaki Industries (Nairobi) Limited v Samaki Industries (K) Limited (2) [1995-98] 2 EA 369” that:-

“It is trite law that a Counter - Claim is substantially a cross suit and should be treated for all purposes for which justice requires it to be so treated, as an independent action.”

54. It follows that the doctrine of sub judice must apply to a Counter - Claim with equal force just as it applies to a claim. I will attempt to analyze some salient features of the rule 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 is 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 claim so long as the first suit is pending determination.

55. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage. The mere addition or subtraction of a party or parties does not alter the pith and substance of the suit. The Black’s Law Dictionary defines *lis pendens*, as a Latin expression which simply refers to a “pending suit or action.” In essence, there are three key conditions which need to be fulfilled to bring into operation the doctrine of “Res sub - judice”:

- (a). The matter in issue in the subsequent suit is directly and substantially in issue in the previous instituted suit.
- (b). The parties in the both suit are the same.
- (c). Both must be pending in Courts in Kenya established under the authority of the *Constitution* .
- (d). The Court in which the first suit is instituted is a Court with competent jurisdiction to grant the relief claim in the subsequent instituted suit.
- (e). The parties must be litigating under the same title in both suits

56. The Supreme Court of Kenya in the case “Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)” had occasion to pronounce itself on the subject of sub-judice. It aptly stated:

- (67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> 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.

- (68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the *Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the *Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the *Constitution* on leadership and integrity.
- (69) In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of the *Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.
- [70] In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of the *Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of the *Constitution*.
- (71) In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the *Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.
- (72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the *Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the *Constitution* and that Court has already been moved.
- (73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the *Constitution*. This Reference is sub-judice and this Court will not usurp the High Court’s jurisdiction under Article 165 (3).
57. Now applying these legal principles to the instant case. The Plaintiff contends that the Counter - Claim is sub - judice as it is the subject of an earlier suit being HCCC No. 392 of 2016 and HCCC No. 523



of 2016. The Plaintiff contends that the same prayers sought in the Counter claim for cancellation of the Plaintiff's title and for the restitution to it were similar in HCCC No.392 of 2016, in its Plaintiff (Vol 1 of the Plaintiff's Bundle at pgs. 104 to 151, but the same is annexed hereto and marked as Annexure 'A' for ease of reference) the Defendant herein averred. The particulars set out in its Defence and Counterclaim, constituting the basis of their Counterclaim for the suit property contained in paragraphs 53 to 69 are a verbatim regurgitation of the said claims in paragraphs 81 to 94 of their Plaintiff in HCCC No.392 of 2016.

58. According to the Plaintiff, from the said pleadings it was apparent beyond peradventure that;
- a. Whereas in the this suit the Defendant has counterclaimed for the suit property, in HCCC No.392 of 2016, the Defendant, who is one of the Plaintiffs in the said suit has sued for inter alia the transfer of all the shares in the Upperview the Plaintiff herein, to the Defendant.
  - b. The transfer of the suit property to the Plaintiff is being faulted by the Defendant on the basis that the consideration for the said acquisition are dividends declared by the Bank to its shareholders, who then applied them to purchase the suit property in the name of the Plaintiff, in whom they hold shares, and which also is their plea in HHCCC No. 392 of 2016.
  - c. The predominant issue for determination in both suits is whether or not the Dividends declared from the Bank, and which were used to purchase the suit property were lawfully declared.
  - d. Both suits are heavily premised upon the allegations against the Banks' shareholders and Directors, who happen to be the Defendant's.
59. On the other hand, the Defendant vehemently countered this assertion by stating that the basic and underlying object of sub judice is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two (2) parallel matters in respect of the same cause of action, same subject matter and the same relief. This was to avert the possibility of arriving at contradictory findings. It was the Defendant's contention that the present suit it not sub judice for the following reasons. First, the cause of action in HCCC No. 392 of 2016 related to fraudulent account keeping by the Defendants in that suit whilst the present suit relates to fraudulent transfer of the Defendant's property by the Plaintiff. Secondly, the parties in HCCC No.392 of 2016 were different from the parties in the present suit. In HCCC No.392 of 2016, the Plaintiffs were Imperial Bank Limited (IL), Kenya Deposit Insurance Corporation and the Central Bank of Kenya against eighteen (18) Defendants, where Upperview Properties Limited was not a party to the suit. Third, the reliefs being sought in HCCC No.392 of 2016 inter alia include the transfer of shares held by the 1<sup>st</sup> -7<sup>th</sup> Defendants in their conduit companies, judgment against the 1<sup>st</sup> - 10<sup>th</sup> Defendants for a sum of Kenya Shillings Fourty Two Billion Two Hundred Million (Kshs. 42, 200, 000,000.00/=) and a sum of Kenya Shillings Two Billion Seven Hundred Million (Kshs. 2, 000, 000, 000, 700, 000, 000.00) against all the Defendants being the amount fraudulently paid as dividends.
60. With respect to the present suit, the reliefs sought in the Counterclaim inter alia include a declaration that the title and transfer of interest in Mombasa/Block XXIV/25 to Upperview Properties Ltd was fraudulent, cancellation of the title and transfer of the interest in Mombasa/Block XXIV/25 to Upperview Properties Ltd, order of restitution of Mombasa/Block XXIV/25 to Imperial Bank Ltd (IL) and refund for rent paid by Imperial Bank Ltd from January 2010 to March 2018 in the sum of Kshs. 317, 647,747.00
61. From the above elaborate definition of the doctrine of sub judice, I note the matters in issue have to be similar. I have keenly gone through the Plaintiff in HCCC No.392 of 2016 and I take note that the



Plaintiff is not a party in that matter further the prayers sought in the HCCC No.392 of 2016 matter are commercial in nature while in this case the prayers are on the disposition of the land. The only prayer that touched on the Plaintiff was on shares and the same did not mention the suit property which is in contention herein.

62. Based on the facts as presented while relying on the school of thought that what the doctrine of sub-judice entails; same parties involved in same/similar subject-matter in various suits in different Courts, the suit are not found to be as between the same parties or those claiming under them over the same subject matter. For these reasons, this court finds the outcome of this suit will not affect or give raise to conflicting decisions over the same subject matter and thus the application must fail.

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

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
64. In the present case, the Honourable Court reserves the discretion not to award costs taking that the matter is still proceeding on and that it was the Court which “suo moto” triggered these issues to attaining further clarity from the parties and the issues before it.

#### **V. Conclusion and Disposition.**

65. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -
- a. That this Honourable Court has the jurisdiction to entertain the Counter - Claim dated 20<sup>th</sup> July, 2018 to its full hearing and determination.
  - b. That the doctrine of sub - judice fails as the subject matter in HCCC No.392 of 2016 is not similar to the subject matter in this instant suit.
  - c. That the suit shall proceed on from where it had reached with the Plaintiff's and subsequent Defence case on 7<sup>th</sup> and 8<sup>th</sup> October, 2024.
  - d. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....7<sup>TH</sup> .....DAY OF .....OCTOBER..... 2024.**

**HON. MR. 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. Gitau Advocate holding brief for Mr. Wandabwa Advocate for the Plaintiff.
- c. Mr. Mbatae Advocate holding brief for Mr. Isa Mansur Advocate for the Defendant.

