Lalji (Suing as the Power of Attorney of Sultan Hasham Lalji) v Chief Land Registrar & 4 others (Constitutional Petition E075 of 2024) [2024] KEELC 13478 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13478 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION E075 OF 2024

JO MBOYA, J

NOVEMBER 4, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27(1) AND (2), 40,47(1) AND (2) OF THE CONSTITUTION

BETWEEN

ASHIF LALJI [SUING AS THE POWER OF ATTORNEY OF SULTAN HASHAM LALJI] ..... PETITIONER

AND

CHIEF LAND REGISTRAR ..... 1ST RESPONDENT

SIMBA HILLS FARM LTD ..... 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 3RD RESPONDENT

DIRECTOR OF SURVEYS ..... 4TH RESPONDENT

UASIN GISHU COUNTY COMMISSIONER ..... 5TH RESPONDENT

RULING

Introduction and Background:

1. The Petitioner/Applicant has approached the honourable court vide Notice of Motion Application dated 17th September 2024, brought pursuant to the provisions of Articles 22, 23, 40, 47 of *the Constitution* of Kenya 2010, Section 63(e) of the *Civil Procedure Act*, Sections 7 & 11 of the *Fair Administrative Action Act*, and Sections 13(7) and 19 of the *Environment and Land Court Act* 2011, and in respect of which the Applicant has sought for the following reliefs;

i. This Application be certified as urgent and be heard on a priority basis, in the first instance Ex- parte.

ii. A temporary injunction be issued restraining the 2nd Respondent, Simba Hills Farm Limited, either by themselves, their agents, servants, employees, or anyone acting on their behalf from acting upon, dealing with, or in any manner relying on the Provisional Certificate of Title issued over LR No. 8304 IR 10556/1 until the hearing and determination of this Application and Petition.

iii. A conservatory order be issued staying any further administrative or legal actions by the 1st Respondent, Chief Land Registrar, with respect to LR No. 8304 IR 10556/1, including cancellation or alteration of the land's original title, pending the hearing and determination of the Petition.

iv. An order of temporary injunction be issued restraining the 2nd Respondent. Simba Hills Farm Limited. from entering, dealing, selling, transferring, alienating. or in any other way interfering with the Petitioner's possession and ownership of LR No. 8304 IR 10556/1 until the hearing and determination of this Petition.

v. That costs of this Application be provided for.

2. The subject Application is premised on the grounds which have been highlighted in the body thereof. Furthermore, the Application is supported by the affidavit of one Ashif Lalji sworn on 17th September 2024 and a further affidavit sworn on 8th October 2024. In addition, the deponent has attached/ exhibited various annexures [Documents] including a copy of the ruling by the Court of Appeal rendered on 4th December 2020.

3. Upon being served with the subject Application, the 2nd Respondent proceeded to and filed a Replying Affidavit sworn on 23rd September 2024; and in respect of which the deponent has stated inter alia that it is the 2nd Respondent who has been in occupation of the suit property. In addition, the deponent has averred that the 2nd Respondent herein was granted liberty by the Court of Appeal to proceed with execution of the judgment rendered by the ELC sitting at Eldoret.

4. Other than the foregoing, the deponent of the Replying Affidavit has averred that the issuance of the provisional certificate of title was undertaken after the Petitioner/Applicant declined to execute the transfer instruments in favour of the 2nd Respondent in accordance with the judgment rendered on 4th March 2020.

5. Suffice it to point out that the Application beforehand came up for directions on 3rd October 2024 whereupon the advocates for the parties covenanted to canvass and dispose of the Application by way of written submissions. In this regard, the court thereafter proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

6. Pursuant to the directions by the court, the Petitioner/applicant filed written submissions dated 8th October 2024; whereas the 2nd Respondent filed written submissions dated 16th October 2024. For coherence, the two [2] sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions:

7. The Applicant has filed written submissions dated 8th October 2024 and wherein the Applicant has adopted the grounds contained in the body of the Application as well as the averments in the Supporting Affidavit. In addition, the Applicant has also highlighted the averments contained in the Further/Supplementary Affidavit.

8. Furthermore, learned counsel for the Applicant has thereafter raised, highlighted and canvassed four [4] salient issues for consideration and determination by the court.

9. Firstly, learned counsel for the Applicant has submitted that the dispute between the Petitioner/ Applicant and the 2nd Respondent touches on and concerns ownership of LR No. 8304 IR 10556/1, [hereinafter referred to as the suit property]. It has been contended that the suit property was registered in the name of the Petitioner/Applicant.

10. However, learned counsel for the Applicant has added that the 2nd Respondent herein filed a suit vide Eldoret ELC No. 71 of 2017, which case was heard and disposed of vide judgment dated 4th March 2020.

11. In addition, learned counsel for the Petitioner has submitted that pursuant to the judgment rendered by the Environment and Land Court at Eldoret, it was directed that the suit property be transferred to the 2nd Respondent herein.

12. Nevertheless, learned counsel for the Applicant has submitted that upon the delivery of the impugned judgment, the Applicant herein was aggrieved and thereafter proceeded to and filed an appeal vide Court of Appeal Civil Appeal No. 70 of 2020. Besides, it has been contended that the Applicant also filed an Application for stay of execution of the judgment of the Environment and Land Court.

13. Additionally, learned counsel for the Applicant has submitted that the Application for stay before the Court of Appeal was heard and disposed of vide ruling rendered on 4th December 2020. For good measure, it has been posited that the Court of Appeal proceeded to and granted the stay of execution of the judgment of the Environment and Land Court.

14. In a nutshell, learned counsel for the Applicant has submitted that the implementation and enforcement of the judgment of the Environment and Land Court has since been stayed and/ or suspended pursuant to the Orders of the Court of Appeal.

15. Secondly, learned counsel for the Applicant has submitted that despite the existence of the orders of stay of execution issued by the honourable Court of Appeal, the 2nd Respondent herein has since proceeded to procure and obtain a provisional certificate of title over and in respect of the suit property. In this regard, it has been posited that the impugned provisional certificate of title was issued on 28th February 2024 albeit during the existence of the orders of stay of the Court of Appeal.

16. Further and in addition, learned counsel for the Applicant has submitted that the issuance of the provisional of certificate of title was undertaken on the basis of deceit, misrepresentation and fraud on the part of the 2nd Respondent. Instructively, it has been submitted that the 2nd Respondent misled the 1st Respondent [Chief Land Registrar] that the certificate of title in respect of the suit property had been lost and or misplaced.

17. Owing to the foregoing, learned counsel for the Applicant has submitted that the issuance of the provisional certificate of title is not only illegal and unlawful, but same [certificate of title] constitutes an endeavour to defeat the orders of stay of execution granted by the Court of Appeal. In this regard, the court has been implored to intervene and preserve the status of the suit property and to avert alienation of same.

18. Thirdly, learned counsel for the Applicant has submitted that the provisional certificate of title was issued without notice to and involvement of the Applicant who remains the registered owner of the suit property. In this regard, it has been contended that the issuance of the impugned provisional certificate of title therefore constitutes a violation or infringement of the Applicant's constitutional rights and fundamental freedoms in terms of Articles 40 and 47 of *the Constitution* 2010.

19. Based on the submissions that the certificate of title constitutes a gross violation and/or infringement of the Applicant's fundamental freedoms, learned counsel for the Applicant has therefore invited the court to find and hold that the Applicant has established and demonstrated the requite ingredients to warrant the issuance of the conservatory orders sought at the foot of the current application.

20. Furthermore, learned counsel for the Applicant has submitted that unless the conservatory order sought are granted, the Applicant's proprietary rights to and in respect of the suit property shall be violated, breached and/or infringed upon to the Applicant's prejudice and detriment.

21. Finally, learned counsel for the Applicant has submitted that the issues raised at the foot of the Petition and the Application for conservatory orders fall within the jurisdiction of the Environment and Land Court. In particular, learned counsel for the Applicant has cited and referenced the provisions of Section 13[2] and [7] of the *Environment and Land Court Act*, 2011 and Article 162 [2] [b] of *the Constitution* 2010.

22. Other than the foregoing, learned counsel for the Applicant has submitted that the issues raised at the foot of the current Petition have never been canvassed before any other court. In any event, it has been contended that the impugned provisional certificate of title constitutes a violation of the constitutional rights of the Applicant and thus the issue herein can only be ventilated before the Environment and Land Court and not before the Court of Appeal.

23. Finally, learned counsel for the Applicant has submitted that the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya does not apply to the dispute beforehand. In this regard, learned counsel for the Applicant has submitted that the matter before the Court of Appeal has neither been heard nor determined and hence no decree has accrued.

24. Additionally, learned counsel for the Applicant has submitted that the issues complained of at the foot of this Petition cannot be canvassed before the Court of Appeal until and unless a determination has been issued by this court. For good measure, learned counsel for the Applicant contended that the Court of Appeal is not seized of the original jurisdiction to quash the impugned provisional certificate of title and to issue orders of mandamus.

25. Arising from the foregoing, learned counsel for the Applicant has therefore invited the court to find and hold that the Environment and Land Court is seized of the requisite Jurisdiction; and that the Application beforehand is meritorious and hence same ought to be allowed.

b. 2nd Respondent's Submissions:

26. The 2nd Respondent herein filed written submissions dated 16th October 2024 and wherein same [2nd Respondent] has highlighted and canvassed six [6] salient issues for consideration and determination by the court.

27. First and foremost, learned counsel for the 2nd Respondent has submitted that the dispute pertaining to ownership of the suit property was the subject of ELC Case No. 71 of 2017 at Eldoret. In addition, it has been contended that the dispute beforehand was heard and determined vide judgment rendered on 4th March 2020. For coherence, learned counsel for the 2nd Respondent has posited that the judgment under reference directed that the suit property be transferred to and be registered in the name of the 2nd Respondent herein.

28. Based on the foregoing, learned counsel for the 2nd Respondent has therefore contended that the dispute beforehand is therefore barred by the doctrine of res judicata and by extension Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

29. Secondly, learned counsel for the 2nd Respondent has submitted that pursuant to the judgment delivered on 4th March 2020, the Petitioner/Applicant was directed to effect the transfer of the suit property in favour of the 2nd Respondent. However, it has been submitted that the Petitioner/Applicant failed to comply with and/ or adhere to the directives of the court.

30. Owing to the fact that the Petitioner/Applicant failed to effect the transfer of the suit property to the 2nd Respondent, it has been contended that the 2nd Respondent was therefore at liberty to proceed with the execution of the judgment taking into account that the Application for stay of execution had [sic] been dismissed.

31. At any rate, learned counsel for the 2nd Respondent has submitted that the commencement of the execution of the judgment was being undertaken because the 2nd Respondent had been given [sic] a nod by the Court of Appeal.

32. Thirdly, learned counsel for the 2nd Respondent has submitted that following the refusal and/or neglect by the Petitioner/Applicant to surrender the certificate of title in respect of the suit property, the 2nd Respondent had no alternative but to deem the said title as lost. Furthermore, it has been contended that the 2nd Respondent was therefore at liberty to apply for the issuance of a provisional certificate of title.

33. Premised on the foregoing, learned counsel for the 2nd Respondent has therefore submitted that the Application for and the ultimate issuance of the provisional certificate of title was undertaken in pursuance of the judgment of the Environment and Land court.

34. Fourthly, learned counsel for the 2nd Respondent has submitted that the Applicant herein has neither established nor demonstrated with clarity, which of her [Applicant's] fundamental freedoms have been infringed upon. In any event, learned counsel for the 2nd Respondent has posited that the issuance of provisional certificate which is complained of has been undertaken on the basis of a valid court order and not otherwise.

35. Fifthly, learned counsel for the 2nd Respondent has submitted that the question of status quo which the Applicant herein is seeking to revert to, is a matter that has already been dealt with and addressed by the Court of Appeal.

36. Further and in any event, it has been contended that the existing status quo relates to the fact that it is the 2nd Respondent who is in occupation and possession of the suit property. To this end, learned counsel for the 2nd Respondent has referenced paragraph 6 of page 13 of the judgment of the Environment and Land Court.

37. In view of the foregoing, it has been added that vide the instant application, the Applicant is keen to upset the orders which have since been issued and thereafter to create a different status quo. In this respect, learned counsel for the 2nd Respondent has invited the court to decline such an endeavour.

38. Finally, learned counsel for the 2nd Respondent has submitted that the issues being raised and canvassed before this court are now pending before the Court of Appeal. Furthermore, it has been contended that the Applicant having procured orders before the Court of Appeal, same cannot be heard to come back before this court for additional orders.

39. Be that as it may, it has been posited that this honourable court is devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the subject Petition and the Application. In particular, it has been contended that the Applicant should have recourse to the Court of Appeal and not otherwise.

40. To buttress the submissions touching on and concerning the question of jurisdiction, learned counsel for the 2nd Respondent has cited various decisions inter alia Owners Motor Vehicle Lilian S v Caltex Oil [K] Limited [1989] eKLR; Benson Makori Makuu v Nairobi Metropolitan Services & 2 Others [2022] eKLR and In the Matter of the Interim Independent Electoral Commission [2011] eKLR.

41. Arising from the foregoing submission, learned counsel for the 2nd Respondent has implored the court to find and hold that the Application beforehand is not only premature, but that same also constitutes an abuse of the due process of the court.

c. 1st, 3rd, 4th and 5th Respondents' Submissions:

42. The named Respondents were duly served with the Petition as well as the Application. However, the named Respondents have neither entered appearance nor filed any response to the Petition or the Application for conservatory orders.

43. Furthermore, it suffices to state that the said Respondents did not participate in the current Application. For good measure, no submissions were filed and/or lodged on behalf of the said Respondents.

Issues For Determination:

44. Having reviewed the Notice of Motion Application dated 17th September 2024; and the Response thereto and upon consideration of the written submissions filed by the respective parties, the following issues do emerge [crystalise] and are worthy of determination;

    i. Whether this Honourable court has the requisite jurisdiction to entertain and adjudicate upon the Petition and by extension the current Application.

    ii. Whether the instant Petition and the Application are barred by the doctrine of Res-Judicata or otherwise.

    iii. Whether the Applicant has established and demonstrated the requisite ingredients to warrant the grant of conservatory orders or otherwise.

Analysis and Determination:

Issue Number 1 Whether this honourable court has the requisite jurisdiction to entertain and adjudicate upon the Petition and by extension the current application.

45. Learned counsel for the 2nd Respondent has contended that this court is not seized of the requisite jurisdiction to entertain and adjudicate upon the Petition and by extension the Application for conservatory orders. In particular, learned counsel for the 2nd Respondent has submitted that the provisional certificate of title which is being complained of, is underpinned by a lawful court order flowing from the judgment rendered on 4th March 2020.

46. To the extent that the impugned provisional certificate of title is underpinned by a lawful court order, learned counsel for the 2nd Respondent has contended that this court cannot now purport to entertain the subject Petition and the Application, either in the manner propagated or otherwise.

47. What I hear learned counsel for the 2nd Respondent to be stating is that to the effect that if this court were to entertain the Petition and the Application, then the court would be superintending and/or supervising a court of concurrent jurisdiction. Such an endeavour, it is contended, would be an absurdity.

48. The second aspect/perspective that has also been canvassed by the 2nd Respondent touches on the fact that the Applicant herein has since gone to the Court of Appeal and procured orders therefrom. To the extent that the Applicant has gone to the Court of Appeal, it is contended that the Applicant cannot to be allowed to revert back to the superior court and seek to procure additional orders.

49. Based on the foregoing submissions, learned counsel for the 2nd Respondent has invited the court to decline the invitation to entertain and adjudicate upon the subject Petition. On the contrary, the court has been invited to strike out the Petition and the Application for want of jurisdiction.

50. On the other hand, learned counsel for the Applicant has submitted that the issues raised and canvassed at the foot of the instant Petition have neither been raised nor canvassed before any other court. For coherence, learned counsel for the Applicant has posited that what was canvassed before the Environment and Land Court at Eldoret touched on and concerned ownership of the suit property.

51. On the other hand, learned counsel for the Applicant has contended that what was before this court relates to the fraudulent and illegal provisional certificate of title which has since been procured despite the existence of the orders of stay of judgment by the Court of Appeal.

52. Additionally, it has been contended that the instant suit touches on and concerns the manner in which the provisional certificate of title was issued and the infringement of the Applicant's fundamental freedoms in terms of Article 40 and 47 of *the Constitution* 2010.

53. In view of the foregoing, learned counsel for the Applicant has submitted that the issues that colour the petition and the Application falls squarely within the jurisdiction of the Environment and Land Court. To this end, learned counsel has referenced Section 13[2] and [7] of the *Environment and Land Court Act*, 2011.

54. Having considered the rival submissions on behalf of the respective parties, I beg to take the following position. Firstly, the substratum of the suit vide ELC No. 71 of 2017 [Eldoret] related to ownership of the suit property. Furthermore, the court sitting at Eldoret proceeded to and rendered a judgment which declared that the suit property be transferred to the 2nd Respondent herein.

55. Additionally, it is worth pointing out that upon the rendition of the judgment vide Eldoret ELC No. 71 of 2017, the Applicant herein felt aggrieved and filed an appeal before the Court of Appeal, namely, Civil Appeal No. 70 of 2020. For good measure, the existence of the said appeal is not in contest.

56. Other than the foregoing, it is also imperative to underscore that the Applicant also filed an Application for stay of execution of the judgment and decree issued vide Eldoret ELC No. 71 of 2017. Instructively, the Court of Appeal proceeded to and granted orders of stay of execution.

57. From the foregoing, what becomes apparent is that the gravamen of what was before the court vide ELC No. 21 of 2017 was ownership of the land and title thereto. Nevertheless, the issue before this court relates to the issuance of a provisional certificate of title in favour of the 2nd Respondent during the existence of the orders of stay of execution before the Court of Appeal and in a manner that violated the provisions of Article 40 and 47 of *the Constitution*, 2010.

58. If I hear the Applicant correctly, same [Applicant] is contending that by virtue of the orders of stay of execution issued by the Court of Appeal, the suit property still belongs to and is legally registered in the name of the Applicant. Indeed, the issuance of an order of stay of execution operates to suspend and/or hold in abeyance the import of the judgment of the superior court.

59. To my mind, the Applicant herein is correct in contending that the suit property still belongs to and is registered in her name. For good measure, the judgment of the Environment and Land Court sitting at Eldoret has been held in abeyance.

60. Other than the foregoing, the Applicant is contending that despite being the lawful and legitimate owner, the 2nd Respondent has in collusion with the rest of the Respondents procured a provisional certificate of title. In any event, it has been contended that the issuance of the provisional certificate of title was informed by deceit, dishonesty and fraudulent misrepresentation of facts.

61. Arising from the foregoing, the substratum of the petition beforehand touches on and concerns whether or not the provisional certificate in favour of the 2nd Respondent could issue when the judgment of the superior court has been stayed; whether or not the issuance of the provisional certificate of title has violated and infringed upon the provisions of Articles 40 and 47 of *the Constitution* 2010, and whether or not the provisional certificate of title violates the Applicants constitutional rights and fundamental freedoms.

62. In my humble view, the pertinent issues that underpin the current Petition have neither been canvassed nor be determined by any other court of competent jurisdiction. Instructively, the issues at the foot of this Petition were not issues before the Environment and Land Court sitting at Eldoret.

63. Furthermore, it is worth pointing out that the issues sought at the foot of the petition herein are issues that can only be canvassed and ventilated before a court of first instance, which is seized of jurisdiction to grant the reliefs espoused by Article 23 of *the Constitution* 2010. For good measure, the issues raised at the foot of this Petition cannot be walked to the Court of Appeal not unless the superior court shall have rendered a decision capable of being appealed against.

64. To my mind, the contention that the Applicant has already approached the Court of Appeal vide an appeal against the judgment in Eldoret ELC No. 21 of 2017, does not constitute a bar to the filing of this Petition.

65. On the contrary, it is my humble view and finding that the Applicant herein was well within her Constitutional right to approach this court in accordance with the provisions of Articles 22, 23, 27, 40, 47, 50 and 258 of *the Constitution* 2010.

66. In a nutshell, it is my finding and holding that this court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the issues canvassed at the foot of the Petition and the Application for conservatory orders.

67. Be that as it may, I beg to highlight that where a court is confronted with a dispute, it behoves the court to interrogate whether same [court] is seized of the requisite jurisdiction. Where a court finds that same is divested of jurisdiction, then it behoves the court to decline and thereafter down its tools.

68. Notwithstanding the foregoing, it is also important to posit that whereas it is dangerous for a court to assume jurisdiction and entertain a matter where it is devoid of jurisdiction, it is equally dangerous and an abdication of duty for a court to decline jurisdiction, where the court indeed is granted jurisdiction by *the constitution* and the law.

69. In the circumstances, the determination of whether to assume jurisdiction or decline same, must be exhaustive and well grounded. Suffice it to point out that where a court declines jurisdiction, which in actual sense it has, a party, the Applicant herein not excepted, may feel that same has been driven away from the seat of justice. Such an endeavour would be inimical to the provisions of Articles 10[2] and 48 of *the Constitution* 2010.

70. Before departing from this issue, I beg to state that I am duly cognizant of the import and tenor of the dictum in the case of Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), where the Court considered the source of Jurisdiction of a Court and the manner to discern same.

71. For coherence, the court held as hereunder;

> (68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.
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> It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

72. Similarly, I do confess that I am also cognizant of the holding of the Supreme Court in the case of In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011) [2011] KESC 3 (KLR) (15 November 2011) (Order), where the court held thus;

> 29. 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 endeavours 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*.

73. Finally, I am also mindful of the words of the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010)* [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment), where the court held as hereunder;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

74. Despite the foregoing, I reiterate that I have reviewed the Petition and the Application for conservatory orders and I can state without fear of contradiction, that this court is seized of the requisite jurisdiction.

75. Flowing from the foregoing, my answer to issue number one [1] is to the effect that this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the instant Petition and by extension the Application for conservatory orders.

Issue Number 2 Whether the instant Petition and the Application are barred by the doctrine of Res-Judicata or otherwise.

76. The learned counsel for the 2nd Respondent has also contended that the issues at the foot of the Petition and by extension the current Application for conservatory orders have been heard and determined by a court of competent jurisdiction. In this regard, learned counsel for the 2nd Respondent has therefore invoked the doctrine of res-judicata.

77. According to learned counsel for the 2nd Respondent, the provisional certificate of title was applied for and issued on the basis of the judgment rendered vide Eldoret ELC No. 71 of 2017. To the extent that the provisional certificate flows from the said judgment, it has been contended that the issue cannot therefore be re-agitated before this court.

78. On the other hand, learned counsel for the Applicant has submitted that the issues being raised vide the Petition have neither been heard nor canvassed before any court of concurrent/ coordinate jurisdiction. In this regard, it has been posited that the doctrine of res judicata is therefore irrelevant and inapplicable.

79. On my part, I beg to state that the provisional certificate of title arose and was issued on 28th February 2024 long after the dispute before Eldoret ELC No. 71 of 2017, had been heard and disposed of. To this end, the question of the propriety and/or validity of the process leading to the issuance of the provisional certificate of title could not have been the subject of the named proceedings, in the manner contended by the Learned Counsel for the 2nd Respondent.

80. Secondly, there is no gainsaying that the provisional certificate of title was being issued long after the judgment of the Environment and Land Court sitting at Eldoret, had been stayed and thus suspended during the pendency of the appeal.

81. To the extent that the judgment of the superior court [Environment and Land Court] had been stayed, one cannot be heard to argue that the provisional certificate of title was procured on the basis of the impugned judgment. Such an argument, if any, is founded on deceit, dishonesty, mischief and contempt of lawful court orders;

82. Thirdly, there is the question as to whether the provisional certificate of title would be issued in favour of the 2nd Respondent, yet the original certificate of title is still being held by the Applicant. For good measure, for as long as the orders of stay of execution of the Judgment remains in existence, the suit property belongs to the Applicant and not otherwise.

83. Nevertheless, once the Court of Appeal shall have heard and determined the appeal and the orders of stay, discharged, the winner pursuant to the judgment of the Court of Appeal shall have the right to proclaim ownership. However, at this juncture and during the subsistence of the orders of stay, the 2nd Respondent cannot purport to be [sic] the owners of the suit property.

84. Arising from the foregoing, there is the question as to whether the Applicants rights and fundamental freedoms have been breached, violated and/or infringed upon.

85. To my mind, the issues, some of which, have been distilled in the preceding paragraphs are issues which have not been canvassed elsewhere. In this regard, the plea of res-judicata that has been raised and adverted to by the 2nd Respondent is irrelevant and inapplicable.

86. Suffice it to point out that where a plea of res-judicata has been raised and canvassed, it behoves the person generating the plea of res-judicata to place before the court the pleadings, proceedings and copies of the judgment to enable the court to undertake comparison and make a determination. Simply put, a court of law cannot casually return a verdict on the plea of res-judicata, without proper interrogation of the issues that were hitherto canvassed and determined in [sic] the previous suit/ proceeding[s].

87. Without belabouring the point, the manner in which a court of law, is supposed to behave when confronted with the plea of res-judicata was highlighted and elaborated by the Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).

88. For coherence, the court stated and held as hereunder;

> 56. The doctrine of "res judicata" is provided for under section 7 of the *Civil Procedure Act* in 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

57. The *Civil Procedure Act* has also provided explanations with respect to the Application of the res judicata rule. Explanation 1-6 are in the following terms:

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

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

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

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

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

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

58. This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:

> 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon Norbert Mao v Attorney-General, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.
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> 53. In Silas Make Otuke v Attorney-General & 3 others, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v The AG of Trinidad and Tobago (1991) LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the Application of the principle of res judicata".

54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:

> ... 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" [emphasis supplied].

58. . Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads:

    i. the matter in issue is identical in both suits;

    ii. the parties in the suit are the same;

iii. sameness of the title/claim;

iv. concurrence of jurisdiction; and

v. finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.'

In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a. There is a former Judgment or order which was final;

b. The Judgment or order was on merit;

c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)

89. Premised on the foregoing and taking into account the contents of paragraph *58* in the decision [supra], it is my finding and holding that both the Petition and the Application for conservatory orders are not barred by the doctrine of res judicata. To this end, the invocation of the doctrine of res judicata by the 2nd Respondent, was not only misconceived but misguided.

Issue Number 3 Whether the Applicant has established and demonstrated the requisite ingredients to warrant the grant of conservatory orders or otherwise.

90. The Applicant herein has approached the court seeking for various reliefs including a conservatory order to bar and/or prohibit the 2nd Respondent from alienating and/or disposing of the suit property. Furthermore, the conservatory order is also intended to avert legal actions and dealings with the suit property during the pendency of the civil appeal No. 70 of 2020.

91. Suffice it to point out that the prayer for issuance of the conservatory orders is underpinned by the fear that the 2nd Respondent is hellbent on alienating and/or disposing of the suit property.

92. On the other hand, the 2nd Respondent contends that same is a beneficiary of the judgment issued vide Eldoret ELC No. 71 of 2017. In any event, the 2nd Respondent has contended that pursuant to the said judgment, the Applicant was ordered to transfer the suit property to the 2nd Respondent.

93. Despite the foregoing, what the 2nd Respondent is not disclosing is that the judgment of the Environment and Land Court at Eldoret has since been stayed by the Court of Appeal. Furthermore, what the 2nd Respondent does not seem to appreciate/ comprehend is that an order of stay of execution suspends or places in abeyance, the execution of the impugned judgment.

94. Be that as it may, the totality of the evidence on record depicts the 2nd Respondent as being deceitful and dishonest. I say so advisedly. Firstly, though the 2nd Respondent is aware that the judgment vide Eldoret ELC No. 71 of 2017 has been stayed, same [2nd Respondent] is proceeding to execute the said judgment through the backdoor.

95. Secondly, the 2nd Respondent does appreciate and understand that upon the issuance of the order of stay, the legal implication is that the certificate of title remains in the person who held same [certificate of title] prior to the judgment. Suffice it to point out, that the registration status, and the status quo as pertains to occupation and possession may very well mean two separate things.

96. However, despite being privy to the import and tenor of the orders of stay of execution, the 2nd Respondent has procured and obtained a provisional certificate of title. In this regard, the 2nd Respondent has brought to the fore a situation that depicts same [2nd Respondent] as the lawful owner of the suit property.

97. Thirdly, the 2nd Respondent proceeded to and misrepresented facts to the Chief Land Registrar that the certificate of title in respect of the suit property was'/is lost. However, the 2nd Respondent is pretty aware that the certificate of title is held by the Applicant and indeed it is the said certificate of title that was ordered to be cancelled vide the judgment rendered on 4th March 2020.

98. Fourthly, the 2nd Respondent herein is aware that there is still Civil Appeal number 70 of 2020 which touches on and concerns the decision which decreed that the Applicant's title be cancelled. However, the 2nd Respondent has not only procured the provisional certificate by deceit and misrepresentation but same has since gone ahead and surrendered the said title to the Chief Land Registrar for purposes of sub-division and issuance of new titles.

99. To this end, it suffices to take cognizance of annexures DKK 4[b] and [c] attached to the Replying Affidavit sworn on behalf of the 2nd Respondent.

100. To my mind, the 2nd Respondent is hatching a plot and scheme to decimate, alienate and extinguish the suit property. Surely, something is a miss with both the 2nd Respondent and her Legal counsel.

101. As concerns the conduct of legal counsel for the 2nd Respondent in this matter, it is imperative to invoke and reference the provisions of Section 55 and 56 of the *Advocates Act*, Chapter 16 Laws of Kenya.

102. Furthermore, it is apposite to also remind counsel of the import and tenor of Section 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Quite clearly, learned counsel for the 2nd Respondent appears to be propagating a scheme intended to defeat not only the orders of stay issued by the Court of Appeal but also the appeal. To my mind, the impugned action constitutes a violation of the doctrine of lis-pendens. [See the decision of the Court of Appeal in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & City Council of Nairobi (Civil Appeal 44 of 2014)* [2015] KECA 911 (KLR) (Civ) (6 March 2015) (Judgment)].

103. Flowing from the perspectives that have been adverted to in the preceding paragraphs, there is no gainsaying that the Applicant has espoused and demonstrated a prima facie case with probability of success. Indeed, this court has highlighted various aspects that would merits interrogation and investigation during the plenary hearing of the Petition.

104. Other than the foregoing, it is also apparent that the conduct of the 2nd Respondent of procuring the provisional certificate of title during the pendency of the appeal at the Court of Appeal; and during the pendency of an order of stay and coupled with the subsequent surrender of the said provisional certificate of title, creates a likelihood that the Applicant would suffer grave prejudice and a miscarriage of justice if the conservatory orders are not granted.

105. In my humble view, the Applicant herein has placed before the court plausible and cogent material to warrant the intervention of the court. Quite clearly, the Applicant has met the threshold to warrant the intervention of the Court and for the grant of the conservatory orders.

106. In this regard, it suffices to cite and reference the holding of the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji, Independent Electoral and Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County (Petition 2 of 2014*) [2014] KESC 49 (KLR) (Civ) (2 April 2014) (Ruling), where the court stated and held thus;

> (85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.
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> (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

107. Similarly, the threshold to be met and satisfied before an Applicant can partake of conservatory orders were also underscored by the court [J.L Onguto, J, as he then was] in the case of *Board of Management of Uhuru Secondary School v City County Director of Education, Duncan Juma & Teachers Service Commission (Petition 359 of 2015*) [2015] KEHC 2174 (KLR) (Constitutional and Human Rights) (22 September 2015) (Ruling), where the court stated as hereunder;

> 1. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of Centre for Rights Education and Awareness and 7 Others –v- The Attorney General [HCCP No. 16 of 2011]:
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> "[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court

grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*".

1. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others CP No. 7 of 2011, who whilst agreeing with Musinga J's statement in Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General (Supra) stated as follows:-

   "I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success" (emphasis).

2. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in Jimaldin Adan Ahmed & 10 Others –v- Ali Ibrahim Roba and 2 Others [2015] eKLR and Micro Small Enterprises Association of Kenya (Mombasa Branch) –v- Mombasa County Government [2014] eKLR respectively.

3. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see *Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014* (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.

108. Arising from the foregoing analysis, my answer to issue number three [3] is threefold. Firstly, the Applicant herein has demonstrated the existence of a prima facie case with probability of success. Indeed, the Applicant has espoused grave concerns impacting on her rights to Articles 40 and 47 of *the Constitution* 2010.

109. Secondly, the Applicant has also demonstrated that unless the conservatory orders are issued the substratum/ gravamen of this petition and by extension, Court of Appeal civil appeal number 70 of 2020, would dissipate beyond redemption.

110. Thirdly, the Applicant has demonstrated that the loss that is likely to arise and/or accrue, unless the conservatory orders are granted, may not be compensable in monetary terms. Indeed, the Applicant has brought herself to the circumference that was adverted to and highlighted by the Supreme Court in the Gitarau Peter Munya case.

Final Disposition:

111. Flowing from the discussion [details highlighted in the body of the ruling], there is no gainsaying that the Applicant herein has satisfied the requisite threshold for the grant/issuance of the conservatory orders sought.

112. In the premises, the final orders that commend themselves to the court are as hereunder;

   a. The Application dated the 17th September 2024 be and is hereby allowed in the following manner:

i. There be and is hereby issued an order of temporary injunction restraining the 2nd Respondent, Simba Hills Farm Limited, either by themselves, their agents, servants, employees, or anyone acting on their behalf from acting upon, dealing with, or in any manner relying on the Provisional Certificate of Title issued over LR No. 8304 IR 10556/1 until the hearing and determination of the petition.

ii. There be and is hereby issued an order of conservatory order be issued staying any further administrative or legal actions by the 1st Respondent, Chief Land Registrar, with respect to LR No. 8304 IR 10556/1, including cancellation or alteration of the land's original title, pending the hearing and determination of the petition.

iii. Costs of the Application shall be borne by the 2nd Respondent

iv. Any order not expressly granted is declined.

113. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Mc'Court SC for the Petitioner/Applicant'.

Mr. Kipkemboi for the 2nd Respondent.

N/A for the 1st Respondent.

N/A for the 3rd, 4th & 5th Respondents