



**Bandari Investments & Co. Ltd v Chiponda & 139 others (Environment & Land Case 16 of 2021) [2023] KEELC 17954 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17954 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 16 OF 2021**

**LL NAIKUNI, J**

**MAY 8, 2023**

**BETWEEN**

**BANDARI INVESTMENTS & CO. LTD ..... PLAINTIFF**

**AND**

**MARTIN CHIPONDA & 139 OTHERS ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants herein – “Martin M. Chiponda and Kazungu Katana’ herein moved this Honorable Court through filing a Notice of Motion application dated February 8, 2023 for its determination. The Applicants herein brought the said application under the provisions of Section 3A of the *Civil Procedure Act* cap21.
2. But prior to fully devolving into the details of this application, I feel it imperative to provide a little bit of the proceedings on the subject matter. Judicial notice will be taken to the fact that , there has existed multiple suits by the same parties and the subject matter being Land Reference No Plot Sub-Division No 817 (Original No 324/2) Section II MN. These suits are namely:-
  - (a) ELC Constitution Petitioner No 15 of 2017
  - (b) ELC No 16 of 2021
  - (c) ELC No 160 of 2021 Bandari Sacco Limited v Vincent Lusige & 15 others
  - (d) High Court JR Misc Appl No 7 of 2017
  - (e) CMCC (Mbsa) No 1686 of 2016 and Bandari Investment Co Limited v Hashim Loma & others
  - (f) Civil Appeal Application No 033 and 34 of 2021 Court of Appeal.



3. Indeed, while the ELC No 15 of 2017 was on January 28, 2021 determined through a Judgment of this Court ELC No 16 of 201 is part Heard before this Court where the Plaintiff testified and closed their case and the matter was on November 22, 2022 adjourned to 13<sup>th</sup> and March 14, 2023 for the Defence hearing. It's while at that point that several issues arose particularly regarding an intention of the 2<sup>nd</sup> and 18<sup>th</sup> Defendants to institute proceedings before the Court of Appeal as pertaining to the interpretation of the judgment rendered by this court in ELC Const Petition No 15 of 2021 and the alleged mistrial of the case of ELC No 160 of 2023 particularly taking that is that suit was suit to evict the Defendants from the suit land.
4. Indeed, the 2<sup>nd</sup> and 18<sup>th</sup> Defendants moved this honorable Court on February 18, 2022 on this having filed this notice of motion application and hence direction were taken for the said Notice of Motion to be disposed off by way of written submission. It's from this background that this court is now being called upon to provide directions taking that the case has for two (2) days 8<sup>th</sup> and May 9, 2023.

## II. The 2<sup>nd</sup> and 18<sup>th</sup> Defendants/Applicants Case

5. The 2<sup>nd</sup> and 18<sup>th</sup> Defendants/Applicants through the Notice of Motion sought for the following orders:-
  - a. That the Plaint is struck out or stayed sine dine with costs to the 2<sup>nd</sup> and 18<sup>th</sup> Defendants having been brought male fide to needlessly vex the Defendants and is otherwise an abuse of the process of court as the Plaintiffs alongside this suit in contemptuously prosecuting an appeal before the Court of Appeal from a Judgment of this Honorable Mr Justice Sila Munyao in Mbsa ELC Const Pet No 15 of 2017 between the same parties, which appeal if successful would render the taking of proceedings in this and any other suit relating to the same subject matter a nullity and an abuse of the court process.
  - b. In the alternative, this suit is stayed sine die of until the Plaintiff pays in full the agreed and certified costs against it in Mombasa High Court JR Miscellaneous Application No 7 of 2017 Republic v Hon Mutunga & Others I/P Bandari Investment Co Ltd *ex-parte* Dalu Chigamba & another.
  - c. The Cost of this application are provided.
6. The said application is premised on the ground testimonial facts and averments founded under the 13 Paragraphed Supporting Affidavit of Martin Mwabuni Chiponda sworn and dated 8<sup>th</sup> February, 2023 together with four (4) annexures marked as A, B, C and D annexed thereto. He averred as follows:-
  - a. He was the 1<sup>st</sup> Defendant named herein familiar with the matters of the case and hence competent to swear this affidavit on his behalf and that of the 18<sup>th</sup> Defendant/Applicant herein.
  - b. The cause of action in this suit was similar to an earlier suit in ELC Constitutional Petition (Mombasa) No 15 of 2017 between the same parties which was dismissed on January 28, 2021.
  - c. The unsuccessful parties in the dismissed Petition from the decree of January 28, 2021 before the Court of Appeal
  - d. There were two application pending before the Court of Appeal CA Civil Application E033 and 034 of 2021 touching on the validity of the Court of Appeal to amend the Notice of Appeal filed by the Plaintiff on ELC Constitution Petition No 15/2017 seeking for the



empowering and expanding bench of five (5) Judges to hear the two application as per the letter dated January 5, 2023 and marked as “B”.

- e. The President of the Court of Appeal on January 10, 2023 acceded to appoint a five (5) Judges bench to deal with the two applications.
- f. Since the Deponent cannot second guess the outcome of these two application or the Intended appeal, if it is ultimately lodged and allowed to go to trial. It was an abuse of this court’s process for the Plaintiff to file two (2) suits being ELC. No 16 of 201 and ELC. No 160 of 2021 seeking to recover the sale land while the appeal was pending before the Court of Appeal.
- g. It was an abuse of court process to bring an action or action to vex or evict a Defendant when the Plaintiff in such was also pursuing an appeal in a higher court to reverse a dismissal order relative to the same land.
- h. The Plaintiff was also named as Interested Party in Misc HC JR Misc Application No 7 of 2017 where costs were awarded against it when proceedings it had taken in “Mombasa CMCC No 1686 of 2016 – “Bandari Loma & others was called and quashed by Hon Justice Ogola, J.
- i. The Costs had been agreed upon and certified by the Deputy Registrar of the Court but the Plaintiff had moved the court on ground that the Advocate who defended it in the substantive JR Proceedings had no instructions to compromise on the costs after the Judge sitting on an objection fixed under section 11 of the Advocates (Remuneration) Order set aside on an earlier taxation and directed a re-taxation and directed a re-taxation using the value of the subject matter set out in the transfer.
- j. While no costs were awarded in ELC Constitution Pet No 15 of 2017, the Costs awarded in HCCC (Mbsa) JR Misc Appl No 7 of 2017 relate to previous proceedings to recover the same land which were quashed by the High Court and such costs ought to be paid before the Plaintiff could not regularly institute and prosecute the two suits based on the same cause of action and against the same Defendants now being heard before this Court. He enclosed a Certificate of Costs marked as “D”
- k. The Defendants/Applicants could not have brought this application earlier as the Plaintiff through its witness had consistently not known the existence of the previous suits, JR proceedings or that there was an appeal pending before the Court of Appeal from the decision of Hon. Justice Sila Munyao with threats that it would file an application to declare a mistrial yet the president had not given considered direction on the hearing of the two applications pending before the court. It had also challenged the Certificate of Costs on the spurious grounds on an affidavit of Mr. Sungu that the Advocate who secured the consent order on costs had no instructions yet he conducted the matter on behalf of the Plaintiff.

### **III. The Replying Affidavit by Plaintiff/Respondent**

- 7. On February 16, 2023, while on opposition of the Notice of Motion application dated February 8, 2023, the Plaintiff/Respondent filed a 9 Paragraphed Replying Affidavit sworn by Ken Tobias Odera Sungu and dated February 15, 2023. He averred as follows:-
  - a. He was a Director and Chairman of the Plaintiff/Respondent and hence competent to swear this Affidavit.
  - b. In relation to the prayer No 1 of the application the same had long been settled:-



- i. There was on record an earlier application by the same Applicants dated March 12, 2021 where they sought to strike out the suit on the same grounds.
  - ii. The Defendants/Applicants filed a Preliminary Objection on March 12, 2021.
  - iii. On June 7, 2022 the Honorable Court gave very clear instructions that:- the issues raised in the Preliminary Objection be canvassed in the full hearing and hearing commences on September 30, 2022.
- c. The Plaintiff had already testified and closed its case and hence it was the turn of the Defendant to adduce their evidence and therefore the matter should proceed on as ordered.
- d. The prayer No 1 as the Preliminary Objection raised issues of which were “*res judicata*”.
- e. That Prayer No 2, the Defendants/Applicants had deliberately withheld crucial facts from the court these were:-
- i. The Plaintiff had presented to court an application to set aside the Certificate of Costs in JR Misc. Application No 7 of 2017 Mbsa on the grounds that they were not parties and that the lawyer who acted on their behalf had not been appointed by the plaintiff, in short the entire suit was a product of fraud. The application was dated October 7, 2022.
  - ii. The Defendants/Applicants had raised a Preliminary Objection dated October 11, 2022.
  - iii. Both the application by the Plaintiff and the Notice of Objection by the Defendants/Applicant dated March 13, 2023 to confirm filing of submissions.
- f. In view of this the Certificate of Costs High Court JR Misc. Application No 7 of 2017 could not be used to stay these proceedings as it was not ready for execution. Hence this matter should be allowed to proceed to its logical conclusion.

## VI. Submissions

8. On March 13, 2023 while all the parties were in court it was directed that the Notice of Motion application dated February 8, 2023 be disposed off by way of written submissions. Pursuant to that the Plaintiff/Respondent and the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants fully complied and court reserved a date to deliver its ruling accordingly.

### A. The Written Submissions by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants

9. On February 27, 2023 the Learned Counsel for the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants the Law firm of Messrs. Stephen (aka Suleiman) Macharia Kimani, filed their written submissions dated February 24, 2023. Mr. S. M. Kimani Advocate commenced the submissions by stating that the application before court sought to strike out the Plaint or stay the proceedings sine die having been brought mala fides to needlessly vex the Defendants and was otherwise an abuse of the Court Process as the Plaintiff was prosecuting a parallel appeal from an earlier suit. The *Constitution* Petition No 15 of 2017 based on the same cause of action and for recovery of the same subject matter which was dismissed on 28<sup>th</sup> January, 2021. Further, the Applicants sought the prayer for stay sine die of the suit for failure to pay agreed costs on the JR. proceedings on an earlier suit for recovery of the same land who decree of ejectment was called up by the High Court and quashed for want of jurisdiction in HC. JR. Mombasa Appl. No 7 of 2017.



The Learned Counsel averred as follows: -

- a. The application was opposed on the grounds that when this Honorable court gave directions on June 7, 2022 the issues relied on by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants became “Res Judicata”, and second the Plaintiff had sought to set aside the Certificate of Taxation recorded by consent of parties and therefore the prayer was pre-mature. He held that the Certificate of Taxed Costs was however not disputed as it remains unpaid.
- b. When this court gave directions on June 7, 2022, it never determined on merit the Plaintiff’s application then pending before court not dismiss on merit the 1<sup>st</sup> and 18<sup>th</sup> Defendants application and notice of Preliminary Objection. The court noted there were multiplicity of suits.
- c. The application before the Honorable Court seek to strike out the Plaint or stay the same “sine die’ having been brought mala fides to needlessly vex the defendants and was otherwise an abuse of the court process as the Plaintiff was prosecuting a parallel appeal from an earlier suit (Mombasa Const. Petition No 15 of 2017) based on the same cause of action and for recovery of the same subject matter, which was dismissed on January 28, 2021. The other prayer was for a stay sine die of the suit for failure to pay agreed costs in Judicial Review proceedings on an earlier suit. for recovery of the same land, whose decree of ejectment was called up by the High Court (Hon. Eric Ogola J.,) and quashed for want of jurisdiction, in Mombasa HC JR Application No 7 of 2017.
- d. The application was opposed on the grounds that when this court gave directions on June 7, 2022, the bifurcated issues relied upon by the 1<sup>st</sup> and 18<sup>th</sup> Defendant became “*res judicata*”. Secondly, it is averred that the plaintiff herein has sought to set aside the certificate of taxation recorded by consent of parties and therefore the prayer herein is premature. The certificate of taxed costs is however not disputed, and the fact that it remains unpaid is not disputed.
- e. When this court gave directions on June 7, 2022, it did not determine on merit the plaintiff’s applications then pending on bed of the court file, nor dismiss on merit the 1<sup>st</sup> and 18<sup>th</sup> Defendants’ application and notice of preliminary objection. The court was guided by the need to do justice expeditiously as it emerged there were multiple suits and evictions from the suit land and there was urgent need to deal with the matters to alleviate any grave mischief to the warring parties. Therefore, the plea of Res Judicata was of no avail. The Court of Appeal for East Africa in the case “*Salem Zaidi v Faud H. Humeidan* (1960) EA 92, 97-8, held that where a suit was dismissed after a party failed to attend the hearing and produce his evidence, and his advocate declined to participate at the hearing due to absence of client, a subsequent suit by the same party against the same defendant was on appeal from a decision of the High Court dismissed for being “*res judicata*”. It did not matter that the plaintiff was absent at the scheduled hearing. He never tendered any evidence in support of the claim and that is why the suit was dismissed in the first place. In the present suit, the plaintiff does not deny it was also the Plaintiff in ELC Constitutional Petition No15 of 2017, which according to it was dismissed on a technicality. The cause of action was alleged trespass and prayer for permanent injunction and ejectment. The subject matter was Plot 817/Section II/MN, which is the land the subject of the present Plaint. The Defendants were largely the same, save that in Constitutional Petition Number 15 of 2017, many of the Defendants were not named, and/or identified by name.



The Court of Appeal in the case “Trade Bank Limited v LZ Engineering Limited [2000]1 EA 266,270 from letter had held that provided:-

“.....a matter was decided with certainty.....it matters not whether the first decision was right or wrong”.

At p 271, from letter the same Court held: -

“We observe that the doctrine of *res judicata* is a principle of general application in this court and it behoves us., therefore to refer to Halsbury's Laws of England (4<sup>th</sup> Ed.) in Vol. 16 para. 974 and 975 where it has been stated that the doctrine is a fundamental doctrine of all courts that there must be an end to litigation. The doctrine for convenience is treated as a branch of the law of estoppel”.

- f. In giving directions on June 7, 2022 this court did not deal with the issue of the dismissal of ELC Constitutional Petition No 15 of 2017, to render this suit *res judicata*. The plaintiff cannot now plead “*res judicata*”. Moreover, the directions of court were not a determination of an issue on merit. Since then, circumstances have also changed in that the plaintiff has relentlessly pursued its' pending appeal, and if the appeal entered from the decision of this Court of January 28, 2021 is ultimately allowed, this Court would have wasted time in hearing this suit, because the decision of the Court of Appeal on appeal would conclusively resolve the dispute. The plaintiff cannot, without abusing court process, play lottery with the Court by pursuing an appeal before the Court of Appeal and simultaneously prosecute this suit, based as it is, on the same cause of action.
- g. What was flabbergasting in these proceedings was that the second Defendant has by a separate application filed in Mombasa ELC No 160 of 2021 sought to set at nought the proceedings taken on bed of this file so far, so that he can participate in future proceedings. He had also applied for an order to first dismiss the 15<sup>th</sup> Defendant's Counterclaim, set aside the earlier directions of this court, and further that ELC No 160 of 2021 as originally filed may be consolidated for hearing “*de novo*” with this suit for the rule of “*sub judice*”, was endearing. However, it was for dismissal together with the suit going by the opinion of Hon. Mr. Justice JM Mativo (as he was then) in “Milimani HC JR Application No 45 of 2020 *Rep. v Paul Kihara, AG, & 2 Others Ex - Parte LSK* [2020] eKLR. Being a parallel suit filed during the pendency of the earlier suit, it would serve no useful purpose to hear the suit by original plaintiff as the resolution of the dispute herein would conclusively end the issues touching on Plot 817/ Section II/MN.
- h. If the Court was not persuaded by the forgoing arguments, it was submitted that this is the third, nay, the fourth suit based on the same facts and the same cause of action. The past cases are disclosed in the suit. Just to reiterate the pleadings, we have had the following files:
- i) Mombasa CMCC No1686 of 2016;
  - ii) Mombasa HC JR Application No 7 of 2017 which quashed the decree in CMCC No 1686/2016;
  - iii) Mombasa ELC Constitutional Petition No15 of 2017 and the Plaintiff in this file. Undeterred, the Plaintiff also filed Mombasa ELC No 160 of 2021 on the same cause of action and to recover the same subject matter.

There cannot be worse abuse of the court process. The Plaintiff must be controlled in its penchant for filing and denouncing suits and the advocates acting on its behalf. It must be



made to pay awarded costs in previous suits before it could be permitted to prosecute this suit. Its two attempts to recover the suit land had gone a cropper. In the first case, the High Court awarded costs for the JR in which the eviction decree was called up and quashed. A certificate of taxation of costs has admittedly been issued. But it remains unpaid. For argument's sake, had the Plaintiff withdrawn discontinued or adjusted their two previous suits in Mombasa CMCC No1686 of 2016 and ELC Constitutional Petition No 15 of 2017, they could not be allowed a third bite at the cherry before paying costs (see Order 25 Rule of *CPR*). Applying this principle by parity of reasoning, the Court had inherent power to prevent abuse of Court process, and Section 3A and Order 25 Rule 4) reserve 'residual jurisdiction' designed to assist the court to control such litigants, and "...to put right that which would otherwise be a clear injustice"(see "*Wanjiku v Esso Kenya Ltd* [1995-8] 1 EA 332, 335 from letter a) and *Wanguku v Kani* (1982-8) KAR 780,785).As order 24 does not provide what should happen to awarded costs where a party whose suit is dismissed files successive suits in abuse of court process, this court is invited to exercise its discretion to order payment of costs in Mombasa HC JR No7 of 2017, in line with the Court of Appeal decision in the case of "*Bandali v Willis* [1990-94] EA 44 where suits dismissed without notice to the parties under the then Order XVI Rule 6 were restored under the Court's inherent powers and an application for leave to appeal to the Court of Appeal against the order setting aside the dismissal order was refused by Shields J., the Court of Appeal on a new application for leave to appeal to the Court of Appeal refused the application holding that the Judge in the court of first instance had properly invoked his inherent powers under Section 3A of the *Civil Procedure Act*, Cap. 21 as there was no remedy under the rules prescribing dismissal of the suits. The exercise of inherent power by Justice Shields was to correct an injustice which would otherwise have left the Plaintiffs whose suits were dismissed by court without a remedy. Unless the plaintiff in this case feels the pain of the litigation and vexing visited the Defendants in all these suits, they will not relent. Their actions have occasioned the defendants obvious injustice of eviction without due process in all these cases. The Court was thus invited to exercise its inherent powers dismiss or stay this suit sine die, until the costs in previous determined judicial review proceedings are paid. Another helpful decision cited with approval by Shields J in the case of:- "*Rawal v Mombasa Hardware* [1968] EA 392.

- i. It was immaterial that this file had been substantially heard. Two wrongs did not make a right. It would be improper employment of the Court's strained resources to continue hearing a case or cases in contravention of "the *sub judice*" rule. It was also imprudent for the Plaintiff to insist on pursuing its second claim in ELC No 160 of 2021, whatever its motivation considering the decision of Mr. Justice JM Mativo in the case of:- "*Rep v Paul Kibara, AG, and Others Ex- Parte LSK*. It cannot approbate and reprobate in the same proceedings. And remember, the Plaintiff has during the pendency of this action drawn a benefit from execution of an interlocutory injunction against most of the defendants in ELC No160 of 2021, and then turned around and denounced authority of counsel to sue on their behalf.
- j. The last point was that it was not disputed that that Mombasa Constitutional Petition No 15 of 2017 case was dismissed (and not struck out) on January 28, 2021. Res judicata, like issue estoppel bars a party from re-litigating matters already ruled on by of court of competent jurisdiction. After all the Court of Appeal is now fully seized of the appeal from the decision of Mr. Justice Sila Munya (ELC), and continued litigation of the same cause of action to recover the same land on a different file or files before this court, is legally untenable (see "*Mitchell v Chweya*).



- k. Notwithstanding the replying affidavit filed by the plaintiff's chairman, this is an opportune moment to strike out the two suits.
- l. The costs ought to go to the 1<sup>st</sup> and 18<sup>th</sup> Defendants in any event.

## **B. The Written Submissions by the Plaintiff/Respondent**

- 10. On 22<sup>nd</sup> February, 20123, the Learned Counsel for the Plaintiff, the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Advocates filed their written submissions dated February 21, 2023 Mr. Munyithya Advocate submitted that from the body of the application by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants there were two substantive prayers. In relation to the issues raised in prayer number 1 thereof the Plaintiff took the position that the issue was "Res Judicata". To justify this, the Learned Counsel urged the Honorable Court to consider the following:-
  - a) There was on record an earlier application by the same applicants dated March 12, 2021.They sought to strike the suit on the same grounds.
  - b) The applicants filed a notice of Preliminary Objection on March 12, 2021.
  - c) In the defence filed by the applicants dated March 12, 2021 the applicants raised the same issue and offered to canvass them during the hearing.
- 11. The Learned Counsel held that during the Pre - Trial conference held on June 7, 2022 and after hearing presentations from the Counsel for each of the parties and while bearing in mind the application dated March 12, 2021, Notice of preliminary objection dated March 12, 2021 and the defence by the applicants dated March 12, 2021 the Court issued an elaborate direction showing how the case was to proceed to conclusion. The Counsel submitted that the issue as to when the determination by the court of the question of Res Judicata was to be done by this suit was already settled. In other words the Court had already ordered that the suit do proceed to full hearing and after hearing all parties the court shall make a determination as to whether the suit was *res judicata* or not. There was no room to revisit that issue now until the suit is fully heard or unless an application for Review of the orders of 7<sup>th</sup> June, 2022 was filed and successfully prosecuted before this Court. To buttress on this point, the Counsel was guided by the decision and case of: "[Uhuru Highway Development Limited v Central Bank of Kenya & 2 others](#) [1996] eKLR.
- 12. Purely without prejudice to the foregoing and should the Court decide to consider whether this suit was *res judicata* at this stage, the Counsel submitted that the same did not pass the test set in the case of: "[Uhuru Highway Development Limited v Central Bank of Kenya & 2 others](#) [1996] eKLR. The Learned Counsel elaborated this point as follows:-
  - a) In the Civil Case - ELC CONST PET No 15 OF 2017- MOMBASA the Court was dealing with alleged breach of constitutional issues. The Petitioners had to meet the threshold set out in the case of "[Amarita Karim Njeru v Republic](#) [1976-80] 1KLR 1283 and emphasized in "[Trusted Alliance Society of Human Rights v Attorney General and others](#) [2015] eKLR on the manner of pleading in Constitutional Petitions. A party was required to plead with precision the rights alleged to have been violated the manner of the alleged infringement the constitutional provisions alleged to have been violated and the jurisdictional basis for it. The trial court found that the Petitioners in the Civil case of ELC CONST PET No15 of 2017- Mombasa did not meet the test and directed the parties to move the Court appropriately. He submitted that this was not what the Plaintiff ought to prove in this civil case.



- b) Secondly the parties in the Civil Case of ELC CONST PET No 15 OF 2017-Mombasa are different from those in this suit. The principle Respondents in that matter were Government agencies where the Petitioners were pushing for a public law remedy against the state. In the present suit the Plaintiff was pursuing a private remedy based on trespass to private property and other related remedies.
- c) Finally the issues raised in the civil case of ELC CONST Petition No 15 of 2017-Mombasa were never determined conclusively. He invited the Court to look at the decision of Munyao J. and note that other than the procedural aspect of moving the Court none of the issues could be said to have been conclusively determined to invite the application of Section 7 of the Civil Procedure Act, 21 together with the doctrine of Res Judicata. Thus, he submitted that Prayer 1 of the application was misplaced and should be dismissed with costs.
13. He stated that prayer No 2 dealt with the issue of discretion of Court on matters pertaining to costs. It was alleged that there existed a Certificate of Costs dated August 23, 2022. In the Replying Affidavit of Ken Tobias Odero Sungu filed in Court on February 15, 2023 it was disclosed that that Certificate of Costs was subject to pending litigation for setting aside or striking out the same. The application was dated October 7, 2022 filed in the civil case of:- HC JR MISC APPL No7 of 2017- Mombasa. In opposition of that application was a Notice of Preliminary Objection dated 11<sup>th</sup> October, 2022 which were set for mention before the Court on March 13, 2023. While aware of this the applicants did not disclose this to the Court. This was material non disclosure. This issue had not been denied by the applicants. The Plaintiff took the position that prayer 2 was premature and should wait until those pending applications were determined.
14. The Learned Counsel held that the overall objective of this court is to do substantive justice without regard to procedural technicalities pursuant to the provisions of Article 159 (2) of the Constitution of Kenya, 2010, Sections 1(A) and (B) of the Civil Procedure Act, 21 and Section 3 of the Environment and Land Court Act. Besides this, the jurisprudence developing in our country pursuant to the provision of Article 50 of the Constitution was that matters should be determined on merit. In this case, the pleadings had been closed and directions taken. Further the Plaintiff had closed its case and what was pending now was the defence case. It would be drastic for this court to stop the full hearing of the matter and venture into matters of procedural technicalities and strike out the suit. The matter should proceed to full hearing and a Judgement be delivered on merit. We rely on the words of the court in the case of “Bernard Maina Kamau v Sunripe (1976) Limited [2014] eKLR where the Court of Appeal adopted the holding in the case of:- “Geminia insurance co Limited v Kennedy Otieno Onyango[2000] eKLR where Justice Musinga as he was then held;
- “It is trite law that striking out of pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”(Blue Shield Insurance Co. Ltd v Joseph Mboya Ogutu [2009]eKLR).
15. The issues raised by the applicants for the striking of the suit had not demonstrated that this suit was beyond redemption in fact the provision of Order 25 of the Civil Procedure Rules 2010 did not contemplate the striking out of a suit rather staying such a suit pending the payment of costs in a previous suit.
16. Finally, the Learned Counsel held that the provision of Order 17 of the Civil Procedure Rules contemplated that once a suit had commenced hearing, the same should proceed to conclusion and issues determined on merit. He urged the Honorable Court to dismiss the application with costs.



### III. Analysis and Determination.

17. I have had an opportunity to assess all the filed pleadings herein pertaining to the application dated February 8, 2023 by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants herein. Upon considering all the issues raised from the submissions and the authorities thereof, the relevant provisions of the [Constitution of Kenya, 2010](#) and the statutes, and in order to arrive at an informed decision, I have condensed the subject matter into the following three (3) issues:
- a. Whether the Notice of Motion application dated February 8, 2023 by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants has any merit.
  - b. Whether this Notice of Motion application dated February 8, 2023 offends the doctrine of “*res judicata*” to the direction of court made on June 7, 2022.
  - c. Who will bear the Costs of the Application.

#### **Issue No a). Whether the Notice of Motion application dated 8<sup>th</sup> February, 2023 by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/ Applicants has any merit.**

18. Under this sub heading, the Honorable Court wishes to critically assess and consider the issues raised from the application filed by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants. These are mainly three grounds. Firstly, that the suit through a Plaint by the Plaintiff be struck out with costs to the 2<sup>nd</sup> and 18<sup>th</sup> Defendants having been brought male fide to needlessly vex the Defendants and is otherwise an abuse of the process of court as the Plaintiffs alongside this suit in contemptuously prosecuting an appeal before the Court of Appeal from a Judgment of this Honorable Mr. Justice Sila Munyao in Mbsa ELC. Const. Pet. No 15 of 2017 between the same parties, which appeal if successful would render the taking of proceedings in this and any other suit relating to the same subject matter a nullity and an abuse of the court process.
19. Based on the numerous cases that Court have arrived at, its rather a drastic measure to cause suits to be dismissed. This is a decision that Court arrive at by exercising judicial powers and it is at the very last resort where the case is at a hopeless and unbearable stage. Thus, the Honorable Court have to exercise circumspect and precautionary measures before making this decision. This legal position has been supported in several Cases. I cannot avoid citing the famous case of “[DT Dobbie & Company \(Kenya\) Limited v Joseph Mbaria Muchina & Another](#) CA 37 of 1980” eKLR where Justice Madan held:-

“No suit ought to be summarily dismissed unless it appears so hapless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for the Court of Justice not to act in darkness without the full facts of case before it”.the cases of: “Co - Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No 54 of 1999) the Court of Appeal stated:

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



embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

In another case of:- *G.B.M Kariuki v Nation Media Group Limited & 3 Others*[2012]eKLR, H.C at Milimani, Civil Suit 555 of 2009, the Learned Judge Odunga J. delivered himself at length as follows:-

“As already indicated the application was primarily under Order 2 Rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”

Secondly, that the application was not “*res judicata* as the orders sought were distinct. The Honorable Court will be dealing with is issue with more details later on.

18. Thirdly, in the alternative, the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants sought to have this suit be stayed sine die until the Plaintiff paid in full the agreed and certified costs against it in “the Mombasa High Court J.R. Miscellaneous Application No 7 of 2017 *Republic v Hon. Mutunga & Others I/P Bandari Investment Co. Limited Ex-parte Dalu Chigamba & Another*.”
19. On the issue of stay of proceedings pending before this Court, I discern that the appropriate route would have been filing an application before Court of Appeal under the Rule 5 (2) (b) the Appellate Court jurisdiction. Nothing has been placed before me to warrant the stay of this proceedings. The fact that there are pending two applications an Appeal emanating from the decision of this court in Const. Pet. No 15 of 2017 delivered on 28<sup>th</sup> January, 2017 and the two application seeking for expansion of the bench to 5 Judges does not cause’ this court to halt its proceedings and if that would be the case there would be room for abuse of the due process.
20. From the records, this suit was part heard and whereby the Plaintiff had already close its case. What was remaining was the defence case. On February 8, 2023 the defence cases were fixed for hearing for two consecutive days 13<sup>th</sup> and May 14, 2023 due to the urgency of the case. While awaiting for the hearing dated, the 1<sup>st</sup> and 18<sup>th</sup> Defendants filed this application. The court delivered its ruling accordingly. The Honorable Court re fixed the matter for hearing on 8<sup>th</sup> and 9<sup>th</sup> May, 2023. Indeed, the dates were taken by the consensus of all the parties. I still wonder the reason the Applicants never raised these issues then nor moved Court immediately. To entertain this application would not only be prejudicing the



fundamental rights entitled onto all the parties on fair hearing vested under the provision of Articles 25 9 c ) and 50 ( 1 ) and ( 2 ) of the [Constitution of Kenya, 2010](#) but also causing unnecessary delay in disposing off this matter for no apparent good and/or justifiable reason or cause whatsoever.

21. I fully appreciate and without prejudice the position of the multiplicity of suits filed by the Plaintiff though they seem to deny most of them on allegation that they were out of fraud and lack of instructions to Advocate, in particular ELC. No 160 of 2012 whereby Plaintiffs obtained orders that caused the eviction of most Defendants from the land. I am still not convinced that filing this application before this court was sufficiently executed.

**Issue No b). Whether this Notice of Motion application dated February 8, 2023 offends the doctrine of “Res Judicata” to the direction of court made on June 7, 2022.**

22. Under this sub heading, although the Plaintiff/Applicant has expended a large portion of its responses into the doctrine of *res judicata* having been breached by the 1<sup>st</sup> and 18<sup>th</sup> Defendant/Applicants, this Court would rather not deal with the said issues at all on two ( 2 ) grounds. Firstly, the Court fully appreciates that the substantive law on “*res judicata*” is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

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

23. The [Black’s law Dictionary](#) 10<sup>th</sup> Edition defines “*res judicata*” as:-

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

24. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

25. In order therefore to decide as to whether an issue in a subsequent Application is *res judicata*, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain:-

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

26. Kuloba J., in the case of “*Njangu v Wambugu and another* Nairobi HCCC No2340 of 1991 (unreported), held that:

“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.....”

24. In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that:-

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...

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

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

24. To this end, it is helpful to refer back to the reasons for the principle of finality including that decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle. In the plea of res judicata only the actual record, that the issue has been decided upon, is relevant. Not what material was before the Court.

29. From the above stated legal principles, It would call for the Court to call for these empirical evidence to be placed before it in order to prove the allegations. Certainly, the Honorable Court wishes not to indulge on that front at this stage.

Secondly, the Honorable Court has already made its pronouncement on the application and the objections raised herein by the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants. Thus, the Court need not be labour on these issues any further and in order to spare the ever precious Judicial time. For now the matter now rests.

#### **Issue No c). Who will bear the Costs of the Application.**

30. It is now well established that the issue of costs it is discretion of the Court. Costs means the award that is granted to a party at the conclusion of any legal action, proceedings and process. The proviso of the Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the event. By event it means the results of the said legal action, process and proceedings. This legal position was supported in the cases of:- “*Reid, Hewett & Co. v Joseph*, AIR 1918 CAL, *Myres v Defries* (1880) 5 Ex D 180



and *Morgan Air cargo Limited v Everest Enterprises Limited* (2014) eKLR,” and the Court of Appeal case of “Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Limited Judicial Review Application No 6 of 2014 and the Supreme Court case of “*Jasbir Rai Singh v Tarchalan Singh*” (2014) eKLR where the Court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

31. In the instant case, the application by the 1<sup>st</sup> and 18<sup>th</sup> Defendant/Applicants is unsuccessful. Essentially, the Plaintiff/Respondent herein is entitled to costs but taking that the matter is still proceeding on, I direct the costs to be in the cause.

#### **IV. Conclusion and Disposition**

31. In the long run, the Honorable Court having caused a critical analysis of the issues framed herein, on preponderance of the probability of the matter, it makes the following orders:-
- a. That the Notice of Motion application dated February 8, 2023 be and is hereby dismissed.
  - b. That the matter which is part heard to proceed on for Defence hearing on 8<sup>th</sup> and May 9, 2023 as scheduled to its logical conclusion as directed earlier on.
  - c. That the parties in the ELC. 160 of 2021 to fully participate in this proceedings as earlier on ordered.
  - d. That costs to be in the cause.
- 32 It is so ordered accordingly

**RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8<sup>TH</sup> MAY, 2023.**

**HON. JUSTICE MR. LL. NAIKUNI, JUDGE,  
ENVIRONMENT & LAND COURT AT MOMBASA**

**Ruling delivered in the presence of:-**

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Munyithya Advocate for the Plaintiff/Respondent.
- c. M/s. Kimani Advocate holding brief for Mr. S.M. Kimani Advocate for the 1<sup>st</sup> and 18<sup>th</sup> Defendants/Applicants.
- d. Mr. Mkan Advocate for the 2<sup>nd</sup>, 19<sup>th</sup> to 139<sup>th</sup> Defendants.
- e. M/s. Kagoi Advocate holding brief for M/s. Langat Advocate for the 140<sup>th</sup> Defendant.

