Amarnath Enterprises Limited v Kenya National Chamber of Commerce and Industry (Civil Suit 65 of 2021) [2023] KEELC 20826 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20826 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 65 OF 2021

LL NAIKUNI, J

OCTOBER 9, 2023

BETWEEN

AMARNATH ENTERPRISES LIMITED ..... PLAINTIFF

AND

THE KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY ..... DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Amarnath Enterprises Limited the Plaintiff herein through a plaint dated 6th April, 2021 and filed on the same day against the Kenya National Chamber of Commerce and Industry Defendant herein. Upon service of the pleadings and summons to enter appearance the Defendant entered appearance on the 4th May, 2021 and filed its statements of Defence on 27th May, 2021.

2. By 27th February, 2023 only the Plaintiff had fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference. The Defendant sought for an extention oftime which was granted to 17th May, 2022. On this date again the Defendant had not filed their witness statement and sought for an extension of time once again. The Honourable Court of its patience granted it but on a raider that would be the last time. The Defendant was allowed a further 14 days leave to have fully complied and failure to which these orders, the Defendant would be automatically locked out from filing any documents as the same would tantamount to abuse of court process. Indeed, true to its word come the hearing on diverse dates of 19th October, 2022 and 15th March, 2023 respectively the Defendant had not yet complied and hence the matter proceeded on without the witnesses statement nor witnesses for the Defendants.

3. The matter proceeded for hearing by way of adducing of "viva voce' evidence with the Plaintiff's witness PW - 1 testifying in Court on 16th February, 2021. On 15th March, 2023, the Defendant called in a witness who testified as DW - 1. Thereafter, both the Plaintiff and the Defendant closed their cases.

II. The Plaintiff's case

4. The Plaintiff prayed for Judgment against the Defendant for:-

   a. A declaration that the Defendant is liable to satisfy the judgement and decree obtained against the Plaintiff herein in ELC No.164 of 2009;

   b. General and aggravated damages against the defendant

   c. Costs of and incidental to this suit

   d. Any other and or further relief that this Honourable Court may deem fit and just to grant.

5. The Plaintiff was described as a registered limited liability company incorporated in the Republic of Kenya under the provisions of the *Companies Act* (Cap 486 Laws of Kenya).

6. Based on the filed pleadings the Plaintiff claimed that by a lease dated the 16th December, 2008 the Defendant let to the Plaintiff premises known as Mombasa/BLOCK/XXIII/185 in the County of Mombasa for 5 years and 3 months at the monthly rent of a sum of Kenya Shillings Fourteen (Kshs.14,000/-) for the first year of occupation which rent would be increased by 5% for each completed year. The Plaintiff duly paid to the Defendant a sum of Kenya Shillings Fifty Six Thousand (Kshs.56, 000/-) as advance rent and was duly issued with a receipt No.0714 dated 25th March, 2009.It was an implied term and condition of the said lease and the Defendant thereby warranted that he had the right to lease the land to the Plaintiff and that the Plaintiff should had quiet enjoyment of the land, and further that the Defendant had a good title to the land, Mombasa/BLOCK/XXIII/185.

7. The Defendant provided the Plaintiff with a copy of the Certificate of Lease showing that the Defendant was the registered proprietor of the leasehold interest comprised in the leased parcel of land Mombasa/BLOCK /XXIII/185. Upon the execution of the lease agreement the Defendant handed over to the Plaintiff vacant possession of the parcel of land and the Plaintiff commenced thereon its scrap metal business. When in May 2009 a firm by the name Rahans Investments Limited accused the Plaintiff of trespass and encroachment on the parcel of land known as Mombasa/BLOCK/XXIII/185 the Defendant by a letter dated 21st May 2009 by and through its Chief Executive Officer, one T.G. Ruhiu reiterated and confirmed that the defendant was the registered owner of the land and that the plaintiff was its lawful tenant.

8. The said Rahans Investment Limited then filed against the Plaintiff Environment and Land Case No.164 of 2009 at the High Court in Mombasa. Although the Plaintiff joined the Defendant as a Third Party in that suit the Defendant, through its employees, servants and agents, including its lawyers, in blatant and immoral breach of the lease granted to the Plaintiff, disowned the Plaintiff. The Defendant belatedly employed other lawyers who admitted the serious acts of commission and omission on the part of its employees and lawyers but whose attempts at correcting and rectifying the situation proved futile as they came too late in the day. In the alternative, the Plaintiff averred and maintains that the Defendant had not at the time of the making of the said demise, good right or title so to let the said premises to the Plaintiff for the said term.

9. Further, after the making of the said demise and during the said term, the firm known as Rahans Investments Limited entered into the said parcel of land and evicted the Plaintiff therefrom. The

Plaintiff thereof claims damages against the Defendant for breach of covenant for quiet enjoyment and derogation from grant. As a direct result of the Defendant's said blatant and immoral breach of the lease granted to the Plaintiff, judgement was entered against the Plaintiff in ELC No.164 of 2009 and the Plaintiff was ordered to pay the said Rahans Investments Limited a total of a sum of Kenya Shillings Two Million Seven Hundred and Nineteen Thousand Five Fifty One and Eighteen Cents (Kshs. 2,719,551.18) as general and aggravated damages, which the Plaintiff averred and maintained it ought to be paid by the Defendant.

10. The Plaintiff further averred and maintained that if the Defendant had good tile to the land and the right to lease the land to the Plaintiff, the Defendant ought to have defended the claim against the Plaintiff and challenged the title held by Rahans Investments Limited, and its failure to do so amounted to culpable negligence for which the Plaintiff is entitled to damages and indemnity from the Defendant herein. By reason of the matters aforesaid the Plaintiff has suffered loss and damage.

11. The Plaintiff responded to the defense through a reply to defence dated 4th August, 2021 on 5th August, 2021 where the Plaintiff deponed that:-

    a. Save and except for what is herein expressly admitted the Plaintiff joins issue with all the averments in paragraphs 3 to 19 of the Statement of Defence to the extent that they contradict the averments in the Plaint and puts the Defendant to strict proof thereof.

    b. The Plaintiff reiterated the averments contained in the Plaint and averred and maintained that the Defendant deliberately omitted to take any action to defend its alleged title and the Defendant was put to strict proof of the averments contained in Paragraph 6 of the Statement of Defence.

    c. The Plaintiff denied the averments contained in Paragraph 9 of the Statement of Defence and specifically denied that this suit was “Res Judicata”.

    d. The Plaintiff stated and maintained that the issues between the Plaintiff and the Defendant herein were never considered or adjudicated upon in ELC No. 164 of 2009 and the Judgement in that case made it very clear that the issues between the parties herein could and ought to be decided separately.

    e. The Plaintiff said and maintained that the Statement of Defence was filed out of time without leave of the Honourable Court and does not comply with other mandatory provisions of the Law, and is therefore incompetent and irregular and ought to be struck out.

12. The Plaintiff prayed that Judgment be entered against the Defendant as prayed in the Plaint.

13. On 15th March, 2023, the hearing for the Plaintiff commenced whereby he summoned two witnesses – the PW - 1. He testified as follows:-

A. Examination is Chief of PW - 1 by Mr. Mwawasi Advocate

14. PW - 1 was sworn and he testified. He was called Gorave Amarnath born on 9th July, 1971 and the Director of the Plaintiff company. He lived in Mombasa. He was a building contractor by profession and a scrap metal dealer. He stated that he recorded his statement dated 6th April, 2021 which he adopted as his evidence in chief. He filed the list of documents dated 6th April, 2021 adopted as his exhibits 1 to 7. He stated that he had also filed further list of documents dated 4th August, 2021 – two documents which he produced as Plaintiff Exhibits 8 and 9.

15. He told the court that this matter was in court since year 2015. The Defendant had leased the property to them. But, Rahans Investment Limited came evicted them from the property. In the year 2009, Rahans Investment Limited claimed to be the owner of the land No. Mombasa/Block/III/185 in the County of Mombasa. In year 2008, they were given vacant possession through lease agreement by the Kenya National Chambers of Commerce and Industry (Hereinafter referred to as "KNCCI"). The Lease was dated 16th December, 2008 with lands and they further paid their rent in year 2009 – 2 months – February and March 2009. There were other letters by KNCCI. There was a hand-written letter by Mr. Laban Onditi. They occupied the land for 7 months; During this period they would be paying rates and rent. They were using the land but in the course of time they were served with a Court order - ELC No. 164 of 2009 to evict them by Rahan Investment Ltd. From the time of their eviction they never went back to the land. from the very beginning they were always informed KNCCI what was. They asked KNCCI to defend them but they were not able to do that.

16. He told the court that its Rahan Investment Limited who are in possession of the suit property now. From the defence by KNCCI they hold that they were the registered proprietors to the suit property. But the Defendant had been unable to defend the title and also themselves on their lawful tenants. It would not be fair for them to be held liable in the ELC No. 164 of 2009 for the nuisance of the Defendant. He had not seen any evidence to show that Mr. Onditi or any representative for the KNCCI were acting without the authority of the KNCCI. He asked the Honourable Court to hold the Defendant liable for the Judgment entered against them in ELC No. 164 of 2009.

17. According to him they suffered for the damages to other places before time and frame they underwent from the case.

Cross examination of PW - 1 by Mr. Salim Advocate

18. He confirmed that they had not attached a CR – 12 Form of the shareholders. They were sued by Rahan Limited and they applied for the Defendant to be joined. He was aware that they had filed a defence. According to him the Defendant was negligent and could have acted in time which they did not.

19. He referred to a handwritten letter by Natacha Advocate and Mr. Laban Onditi. There was nothing to show that they had the authority from the "KNCC1". The letter neither had an official stamp nor on a letter head. They made him believe they were officials from KNCCI. On the title deed, he stated that the due diligence was not done as no official search was affixed onto the title deed.

Re - examination of PW - 1 by Mr. Mwawasi Advocate

20. He testified that the letter dated 11th February, 2011 was addressed to Amarnath Limited. He had no reason to doubt them. The letter was by Mr. Laban Onditi. On 21st May, 2009, they received another letter from the C.E.O one Mr. T.G. Ruhiu on the KNCCI letterhead. That marked the close of the Plaintiff's case.

III. The Defendant's case

21. The Defendant was described in the Plaint as a registered Limited liability company incorporated in the Republic of Kenya under the provisions of the *Companies Act* (Cap 486 Laws of Kenya). The Defendant filed its statement of defense dated 27th May, 2021 on the same day. It is its defence that the Defendant denied the contents of Paragraphs 3, 4, 5,6 and 7 of the of the Plaint. The Defendant was a stranger to the contents of Paragraphs 8 and 13 of the Plaint.Save that the Defendant was enjoined to Mombasa High Court Environment Land Case No.164 of 2009 as a Third Party and filed its Defence

to the case accordingly Paragraphs 9, 10, 11 were denied in toto. The Defendant is the registered proprietor of Mombasa/BLOCK XXIII/185 per Certificate of Lease dated 19th January 1989 and Paragraph 12 of the Plaint was denied.Demand and notice of intention to sue was not issued herein.

22. The Defendant averred that the Plaintiff's claim and the particulars of special damages all outlined at Paragraphs 14, 15, 16 and 17 were denied in toto and the Plaintiffs were put to strict proof. The Plaintiff was not entitled to the orders sought in the Plaint and/or the claim as laid. All the steps taken by the Defendant herein were taken within the provisions of all relevant statutes and legal provisions.The Plaintiffs were not entitled to the prayers sought and this Claim therefore ought to be dismissed with costs in favor of the Defendant.

23. The Defendant prayed for the following orders:-

    a. A declaration that this matter was Res Judicata having been heard and determined in Mombasa High Court Environment Land Case No.164 of 2009;

    b. That the Plaintiffs' suit be dismissed with costs to the Defendant; and

    c. Any other relief that the Honourable Court may deem fit.

24. On 15th March, 2023, the Defendant called their witness as DW - 1 who was not in court and therefore they closed their case.

IV. The Submissions

25. On 15th March, 2023 after both parties closed their case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that they all complied accordingly and on 15th June, 2023, the Honourable court reserved a date to deliver its Judgement on notice to all parties or earlier by mid of October, 2023 which ever one will be earlier.

A. The Defendant's written submissions

26. The Defendant through the Law firm of Messrs. Jacqueline Waihenya Advocates filed its written submissions dated 14th June, 2023. M/s. Maiga Advocate submitted that the Defendant would address the issues arising in this matter as briefly as possible and as more particularly outlined below:-

27. The Learned Counsel stated that the Plaintiff instituted the suit by way of a Plaint dated 6th April 2021 and filed on the even date. The Plaintiff sought the following orders;

    a. A declaration that the Defendant is liable to satisfy the judgement and decree obtained against the Plaintiff herein in ELC No.164 of 2009.

    b. General and aggravated damages against the Defendant

    c. Costs of and incidental to this suit

    d. Any other or further relief that this Honourable court may deem fit and just to grant.

28. The Defendant herein filed a statement of defence dated 27th May, 2021 and filed on the same day. The Defendant averred that this matter is currently subject of Mombasa High Court Environment Land Case NO. 164 OF 2009 and is accordingly res judicata and sought the following orders;

    a. A declaration that this matter is res judicata having been heard and determined in Mombasa High Court Environment Land Case No. 164 of 2009;

    b. That the Plaintiff's suit be dismissed with costs to the Defendant

c. Any other relief that the Honourable Court may deem fit.

29. The factual background of the suit as per the Learned Counsel are that the Defendant herein was a third party in Mombasa High Court ELC NO. 164 of 2009. It was enjoined in the suit vide a Third-Party Notice dated 19th February 2010 which was served upon the Third Party who later appointed an advocate Messrs. R.M. Mutiso & Co. Advocates who filed a Defence in response to the Plaint and Third-Party Notice dated 10th March 2010 and filed on 12th March 2010.

30. The Learned Counsel argued that the Defendant's then advocate never filed any other pleadings regarding this matter. The Third Party was left in the dark and not knowing the legal procedure of the law the matter continued without the Defendant's knowledge. The Defendant was then served with a mention notice through the Advocate on record on their behalf indicating that the Mention was for the purpose of confirming filing of written submissions in this suit. That was when the Defendant's retained the services of JWM LAW LLP to salvage the situation. Since time had passed, numerous applications to make amendments to the pleadings and additionally defend the suit were declined.

31. Judgement was entered against the Plaintiff in ELC NO. 164 OF 2019 and the plaintiff was ordered to pay the said Rahans Investments Limited a sum of Kenya Shillings Two Million Seven Hindred and Seventeen Thousand Five Fifty One Thousand Eighteen cents (Kshs. 2,719,551.18) as general and aggravated damages, which the applicant herein averred ought to be paid by the Defendant. The Plaintiff additionally filed an appeal in the Court of Appeal in Mombasa, namely the civil case "Civil Appeal E034/2022 Amarnath Enterprises Limited - Versus - Rahans Investment.

32. The Learned Counsel referred the Honourable Court to the legal issues for determination which were:-

a. Whether the instant suit was "Res Judicata".

b. Whether the Plaintiff was entitled to the prayers sought.

c. Who is entitled to the orders sought.

33. On whether the instant suit was "Res Judicata", the Learned Counsel submitted that the substantive law on Res Judicata is found in provision of Section 7 of the *Civil Procedure Act* Cap 21.

34. The Learned Counsel also referred Court to the Black's law Dictionary 10th Edition on the definition of doctrine of "Res Judicata". 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.For the doctrine "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.

35. The said doctrine applied to both suits and applications as was held in the case of:- "Abok James Odera – Versus - John Patrick Machira Civil Application No.Nai.49 of 2001". However, as was held in the said suit, to rely on the defence of Res Judicata there must be:-

i. a previous suit in which the matter was in issue;

ii. the parties were the same or litigating under the same title;

iii. a competent court heard the matter in issue;

iv. the issue had been raised once again in a fresh suit.

36. The Learned Counsel further argued that thewas the subject matter of Mombasa High Court Environmental Land Case No.164 of 2009 and was accordingly "Res Judicata" since the issues for determination are substantially and directly related to the issues raised in the instant suit. The Plaintiff additionally filed an appeal in the Court of appeal namely "Civil Appeal E034/2022 Amarnath Enterprises Limited - Versus - Rahans Investment which is pending determination. The net effect of this had been a multiplicity of suits and to determine this suit would render adverse effects to the Defendant herein since the matter was already being handled by a superior court and the outcome in the suit matter would directly affect this instant suit. It was the Defendants contention that the issues raised in the present suit were directly and substantially similar to those in the suit pending between the parties in the Court of appeal namely "Civil Appeal E034/2022 Amarnath Enterprises Limited - Versus - Rahans Investment. This amounts to forum shopping by the Plaintiff and numerous attempts to vex the Honourable Court.

37. In the case of "Nicholas Njeru – Versus - Attorney General & 8 others [2013]eKLR", the Court of Appeal held that:

> " The doctrine of Res Judicata is founded on public policy and is aimed at achie7ving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation...For the doctrine to apply:

The matter must be 'directly and substantially' in issue in the two suits,The parties must be the same or parties under whom any of them claim, litigating under the same title; andThe matter must have been finally decided in the previous suit..."

38. As regards the rationale of the doctrine of Res Judicata, the Learned Counsel relied on the decision of the Court of Appeal in "Independent Electoral & Boundaries Commission -Versus - Maina Kiai & 5 Others (2017)eKLR" where the Court held that:-

> " The rule or doctrine of Res Judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, 'there would be no end to litigation', and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice."

39. The Learned Counsel further made reference to Kuloba J.,in the case of "Njangu – Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)", where my brother 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....."

40. The doctrine of Res Judicata is provided for the *Civil Procedure Act*, 2010 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of provision of Section 7 therefore contemplates five conditions which, when co-existent, would bar a subsequent suit. The Conditions are:

    i. the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

    ii. the former suit must have been between the same parties or privies claiming under them;

    iii. the parties must have litigated under the same title in the former suit;

    iv. the court which decided the former suit must have been competent to try the subsequent suit; and

    v. the matter in issue must have been heard and finally decided in the former suit.

41. The rationale for this principle was restated in the case:- "Kampala High Court Civil Suit No.450 Of 1993 - Nyanza Garage – Versus - Attorney General" in which the Court held that:

> "In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

42. The Learned Counsel submitted that the issue estoppel prevented a party who previously litigated a claim (and lost),from taking a second bite at the cherry. This was a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice" all in the cause of fairness in the settlement of disputes. Based on the foregoing, it was the Learned Counsel's humble submission that this Honourable Court found and determined on the first issue for determination that the matter is res judicata, therefore 'directly and substantially' inissue in both this suit and of Mombasa High Court Environment Land Case NO.164 of 2009, has been decided with finality, and is between the same parties litigating under the same title.

43. On whether the Plaintiff was entitled to the orders sought, the Learned Counsel submitted that the Plaintiff alleged that the Defendant failed to defend and to protect the title of Mombasa Block XVIII/185 in ELC NO.164 OF 2009, and thereby also failed to defend its lawful tenant, the Plaintiff herein. The Defendant wished to respond to the said allegations as follows; the Defendant was the First Registered owner of the property title no. Mombasa BLOCK XXVI/185 in which the Certificate of Lease issued in 1988 held the name of the Defendant. The Plaintiff herein in ELC NO.164 of 2009 sought and was granted leave to issue a third-party notice to the Kenya National Chamber of Commerce and Industry seeking indemnity for loss of business and breach of contract and the chamber was subsequently enjoined as a third party. The third party filed its defence in March 2010 in which it denied leasing the suit premises to the Plaintiff herein. The third party further stated that it was the registered owner of the suit property and that the purported purchase by the Plaintiff of the suit property was fraudulent and was the subject of Mombasa CMCC No. 1902 of 2006.

44. The Learned Counsel submitted that the Defendant herein was a third party in Mombasa High Court ELC NO. 164 of 2009. It was enjoined in the suit vide a Third-Party Notice dated 19th February 2010 which was served upon the Third Party who later appointed an advocate Messrs. R.M. Mutiso & Co. Advocates who filed a Defence in response to the Plaint and Third-Party Notice dated 10th March 2010 and filed on 12th March 2010. The Defendant's then advocate never filed any other pleadings regarding this matter. The Third Party was left in the dark and not knowing the legal procedure of the law the matter continued without the Defendants' knowledge. The Defendant was then served with a mention notice through the Advocate on record on their behalf indicating that the Mention was for the purpose of confirming filing of written submissions in this suit. That was when the Defendant's retained the services of JWM LAW LLP to salvage the situation. Since time had passed, numerous applications to make amendments to the pleadings and additionally defend the suit were declined.

45. The Honourable Court rendered Judgement directing that any triable issues between the Plaintiff herein and the Chamber could only be done upon taking directions which had not been done. The Defendant took all necessary steps within the provisions of the law to defend the suit. Considering the foregoing, the Learned Counsel urged this Honourable Court to find and determine on the Second issue for determination that the Plaintiff was not entitled to the orders sought.

46. On who was entitled to costs, the Learned Court to find that the Defendant herein was entitled to costs. The Learned Counsel urged the Honourable Court to apply the test developed in "Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & another[2016] eKLR", as follows:-

> "To my mind, in determining the issue of costs, the court is entitled to look at inter alia()the conduct of the parties,(ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v)the stage at which the proceedings were terminated,(vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*. [11] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs."

47. In conclusion, the Learned Counsel urged this Honourable Court to find and determine on the third issue for determination that the Defendant was entitled to costs since this matter is was "Res Judicata" and calculated to vex this Honourable Court. Based on the foregoing, the Learned Counsel prayed for the orders stipulated in the statement of defence succinctly, a declaration that this matter was "Res Judicata" having been heard and determined in Mombasa High Court Environment Land Case No. 164 of 2009 and that the Plaintiff's suit be dismissed with costs to the Defendant and any other relief that the Honorable court may deem fit. In the circumstances, urged this Honourable Court to dismiss this suit and they prayed for costs.

V. Analysis and Determination

48. I have keenly assessed the filed pleadings by all the parties herein, the oral and documentary evidence adduced by the witnesses summoned, the written submissions and the myriad of authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

49. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -

a. Whether the suit instituted by the Plaintiff vide a Plaint dated 6th April, 2021 offended the doctrine of Res Judicata?

b. Whether the Defendant was liable to satisfy the Judgement and decree obtained against the Plaintiff herein in ELCNo.164 of 2009.

c. Whether the Plaintiff's is entitled to the reliefs sought in the Plaint.

d. Who bears the costs of the suit?

Issue No. a). Whether the suit instituted by the Plaintiff vide a Plaint dated 6th April, 2021 offended the doctrine of Res Judicata?

50. Under this Sub heading, the main substratum is on allegation that the Plaintiff's suit has offended the Doctrine of Res Judicata. From the very onset, I wish to point it is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the "Burden of Proof" and is encapsulated for by Section 107 of the *Evidence Act* Cap 80 laws of Kenya which provides as follows:-

> " 107 Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

51. Nonetheless, legally speaking, 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"

52. The Black's law Dictionary 10th Edition defines "Res judicata" as

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

53. 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.

54. 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.

55. Kuloba J., in the case of "Njangu vs Wambugu and another Nairobi HCCC No.2340 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....."

56. In the Court of Appeal case of "Siri Ram Kaura vs 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."

57. Hon. Justice G.V. Odunga in "Republic vs Attorney General and Another Exparte James Alfred Koroso", expressed himself thus on the issue of access to justice: -

> " Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

58. This Honourable Court has rendered itself on the issue of res judicata in "Bandari Investments & Co. Ltd - Versus - Chiponda & 139 others (Environment & Land Case 16 of 2021) [2023] KEELC 17954 (KLR) (8 May 2023) stating as follows:

> " 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."

59. This Honourable Court has also held in that:

> "
>
> " 68. This Court takes Judicial notice to the fact that a pile and acres of papers and ink has been spent on this subject matter and therefore it has no intention to re – invent the wheel on it at all. For the doctrine of "Res Judicata" to apply in a particular matter, these ingredients ought to be there:-
>
> a. there must have been a previous suit in which the matter was in issue;
>
> b. the parties in both matters must be the same or litigating under the same title;
>
> c. the previous matter must have been heard and finally determined by a competent court and the issue is raised once again in the new suit.
>
> 1. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See the case of:- "Maithene Malindi Enterprises Limited – Versus -Kaniki Karisa Kaniki & 2 others [2018] eKLR.' Additionally, Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In the case: "John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others (supra) the Court of Appeal stated:
>
> "..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -
>
> ".....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 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 ...."

.... Simply put Res Judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

70. This Court relishes a lot on record. Like numbers, records are stubborn and always reveal the factual truth and position of each matter unless otherwise stated."

60. In this instant case the proceedings are clear, the Plaintiff herein had been sued in another suit, in May 2009 a firm by the name Rahans Investments Limited accused the plaintiff of trespass and encroachment on the parcel of land known as Mombasa/BLOCK/XXIII/185 the Defendant by a letter dated 21st May 2009 by and through its Chief Executive Officer, one T.G. Ruhiu reiterated and confirmed that the Defendant was the registered owner of the land and that the plaintiff was its lawful tenant.The said Rahans Investment Limited then filed against the Plaintiff; Environment and Land Case No.164 of 2009 at the High Court in Mombasa.

61. According to the Plaintiff, it joined the Defendant herein as a Third Party in that suit the Defendant, through its employees, servants and agents, including its lawyers, in blatant and immoral breach of the lease granted to the Plaintiff, disowned the Plaintiff.The Defendant belatedly employed other lawyers who admitted the serious acts of commission and Omission on the part of its employees and lawyers but whose attempts at correcting and rectifying the situation proved futile as they came too late in the day.

62. The bond of contention in Environment and Land Case No.164 of 2009 at the High Court in Mombasa was trespass by another party who is not a party in this instant suit against the Plaintiff in this present suit accusing the Plaintiff of trespassing and encroaching their land without having the authority to do so. In the instant case, the Plaintiff has brought a suit against the Defendant by virtue of a lease dated the 16th December 2008 the Defendant let to the plaintiff premises known as Mombasa/BLOCK/XXIII/185 in the County of Mombasa for 5 years and 3 months at the monthly rent of Kshs.14,000/-for the first year of occupation which rent would be increased by 5% for each completed year. It was an implied term and condition of the said lease and the Defendant thereby warranted that he had the right to lease the land to the Plaintiffs and that the plaintiff should have quiet enjoyment of the land, and further that the Defendant had a good title to the land, Mombasa/BLOCK/XXIII/185. A lease which caused a judgment to be entered against the Plaintiff in ELC No. 164 of 2009, consequence of which the Plaintiff was ordered to pay the said Rahans Investments Limited a total of Kshs 2,719,551.18 as general and aggravated damages.

63. Be that as it may, this Honourable Court takes note that this suit based on a contract in land against the Plaintiff and the Defendant for the lease agreement entered into for premises known as Mombasa/BLOCK/XXIII/185 in the County of Mombasa for 5 years and 3 months on 16th December, 2008. Being that in the previous suit the Plaintiff in the suit was seeking prayers on trespass and being that the instant suit is on a contractual agreement between the parties, res judicata does not apply in this matter as the principle of Res judicata applies to a matter decided in an earlier suit and upon its general principles it applies to proceedings in the same suit as well. Was the issue of the contract between the parties decided in previous suit? The answer would be no.

64. The provision of Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity.

65. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists a decree in ELC No. 164 of 2009 but the same did not touch on the case at hand which is premised on the lease agreement between the parties making it contractual claim.

Issue No. b). Whether the Defendant is liable to satisfy the judgement and decree obtained against the plaintiff herein in ELCNo.164 of 2009

66. Under this sub title, the sticking point between the parties is whether the Plaintiff entered into a lease agreement with the Defendant. On the one hand the Plaintiff asserts that it entered into a contract with the Defendant while the Defendant claims to be the registered owner of the suit property but denied having entered into a lease agreement with the Plaintiff. The Plaintiff has brought a suit against the Defendant by virtue of a lease dated the 16th December 2008 the Defendant let to the plaintiff premises known as Mombasa/BLOCK/XXIII/185 in the County of Mombasa for 5 years and 3 months at the monthly rent of Kshs.14,000/-for the first year of occupation which rent would be increased by 5% for each completed year. It was an implied term and condition of the said lease and the Defendant thereby warranted that he had the right to lease the land to the Plaintiffs and that the plaintiff should have quiet enjoyment of the land, and further that the Defendant had a good title to the land, Mombasa/BLOCK/XXIII/185. The Plaintiff has produced a lease agreement between them and the Defendant proving that there existed a contractual relationship between them.

67. Section 3(3) of the *Law of Contract Act* provides that;

> " No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> a. the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> a. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party..."

68. In "Kukal Properties Development Limited vs Tafazzal H. Maloo & 3 Others [1993] eKLR" Muli JA held as follows on the applicability of the above provision of the Law of Contracts Act:

> " With the greatest respect, the learned trial judge misdirected himself. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?
>
> It is trite law on this point and is made beyond doubt under Section 3(3) of the Law (Cap 23 Laws of Kenya)
>
> I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law"

69. The Defendant has not disputed that there existed a lease agreement between them neither did it dispute the contents of the lease agreement itself. And the said lease was terminated by the suit which was instituted against them in ELC 164 OF 2009 by a third party who claimed ownership of the suit property. To clarify the position, the Plaintiff through its director sent a letter to the Defendant

company who assured them through a letter dated 21st May, 2009 that it was the owner of the suit property and that nobody should deal with their client, Plaintiff except they deal with them directly.

70. That being the case, the lease agreement is a confirmation that the Plaintiff herein had entered and executed a contract with the current registered owner of the suit premises which is the Defendant and as such is a lawful tenant of the suit premises. Therefore I am inclined to make the declaration that the Defendant is liable to satisfy the judgement and decree obtained against the plaintiff herein in ELC No.164 of 2009 as at the time the suit for trespass was being filed they were the legal owners of the suit property and the Plaintiff was just a tenant who had a beneficial right as it paid rent to the Defendant and rates to the County Government of Mombasa which at that time was the Municipal Council of Mombasa.

Issue No. c). Whether the Plaintiff's is entitled to the reliefs sought in the Plaint.

71. Under this Sub-title we examine if the Plaintiff is entitled to the reliefs sought in the Plaint. As I have previous established in this Judgment, the Plaintiff was a legal lessee of the Defendant's property from 16th December, 2008 which lease was to commence from 1st February 2009 and end in around March 2015, by May 2009 a firm by the name Rahans Investments Limited accused the Plaintiff of trespass and encroachment on the parcel of land known as Mombasa/BLOCK/XXIII/185. The Plaintiff's tenancy was then affected by a legal battle for the suit property which according to PW 1, the Defendant was not involved in and even after being enjoined as a Third Party belatedly employed other lawyers who admitted the serious acts of commission and Omission on the part of its employees and lawyers but whose attempts at correcting and rectifying the situation proved futile as they came too late in the day. The Cambridge online Dictionary defines the term quiet possession thus:-

> " The right to own or use property or goods without anyone causing you any difficulty." The Business Dictionary defines "quiet possession" as:-
>
> "Freedom to enjoy a possessed property without interference...."

72. There was a valid contract between the Defendant and the Plaintiff in that there was an offer made on the suit property, a mutual agreement which was put down in writing in form of the lease agreement and consideration which is proved by the receipts produced by the Plaintiff. The Supreme Court of the United Kingdom stated as follows in the case of "RTS Flexible Systems Ltd – Versus - Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]" :

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

73. The case law may only be of persuasive value but they set out sound and the correct legal principles applicable to common law jurisdictions on contract law.It is common cause and trite law that not all agreements need be in writing. An agreement will be deemed duly formed and binding where there consideration in present and accepted having been offered. An agreement need not be in any special form or in writing unless statute expressly provides for it: see for example the *Law of Contract Act* (Cap

23).Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek re-write the contract for the parties: see "National Bank of Kenya Ltd – Versus - Pipe Plastic Samkolit (K) Ltd & Another [2002] EA 503".

74. In the case of:- "Gichinga Kibutha – Versus - Caroline Nduku [2018] eKLR", the Court stated:-

> " It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue."

75. It is trite that once the Defendant's signature has been proved or admitted the Plaintiff has discharged his or her burden and the burden is then on the Defendant to prove fraud, misrepresentation, illegality, duress or whatever defence he or she might have. The burden likewise shifts once it is shown that an agreement, oral or otherwise, exists. As I previously stated above apart from the Defense filed and the submissions the Defendant did not call its evidence or prove in any way that the agreement claimed by the Plaintiff to have been executed by its officials was illegal and did not emanate from their office.

76. Under the agreement the Defendant was to avail quiet and peaceful enjoyment of the suit property which was the not the issue as the Plaintiff did not utilize the suit property at all. The Plaintiff now seeks that the Defendant be ordered to make good of the agreement and compensate the Plaintiff for the premature termination of their agreement.

77. In the case of "Chimanlal Meghji Naya Shah & Another – Versus - Oxford University Press (EA) Limited (2007) eKLR" , Hon Warsame (as he then was) held as follows;

> " Equally there is no doubt that the subject lease did not contain and/or provide a termination clause to enable the tenant to end its relationship with the Plaintiffs. Perhaps it is also essential to point out that no landlord can force a tenant to stay in his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way.
>
> If for example, the lease provides for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies."

78. PW 1 in his evidence told the court that due to the frustrations the Plaintiff was experiencing in conducting its business, it lost a lot of business and monies paid by way of rent and rates, Legal fees to

defend: the claim in ELC No.164 of 2009 and settling the judgement obtained against the plaintiff in ELC No., 164 of 2009. Accordingly I find the Plaintiff's claim for general damagestenable.

79. On aggravated damages, Spry V P had this to say in the case of "Obongo & Another – Versus - Municipal Council of Kisumu [1971] EA p 91" at page 96 letter B:

> " It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress."

80. Aggravated damages will be ordered against a Defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize. By and large, the conduct of the Defendant and to the case, and his state of mind are all matters for consideration in assessing aggravated damages in so far as they bear on the occasioned to the Plaintiff's business. In my own view, the Plaintiff's claim for aggravated damages succeeds.

Issue No. d). Who bears the Costs of the Suit?

81. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

82. In the present case, the Plaintiff has been able to establish its case as pleaded from the filed pleadings. Therefore, he is entitled to be awarded costs of the suit to be borne by the Defendant accordingly.

VI. Conclusion and Disposition

83. In the end, having caused such an indepth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:

    a. That Judgement be and is hereby entered in favour of the Plaintiff against the Defendant herein.

    b. That a declaration be and is hereby made that the Defendant is liable to satisfy the Judgement and decree obtained against the Plaintiff herein in ELC No.164 of 2009.

    c. That an order made to the effect that the Plaintiff be and is hereby awarded general damages of sum of Kenya Shillings Three Million, Five Hundred Thousand (Kshs 3,500,000/-) to be paid by the Defendant.

    d. That the Plaintiff is also hereby awarded aggravated damages of Kenya Shillings Three Hundred and Fifty Thousand (Kshs 350,000/-) to be paid by the Defendant.

e. That the Plaintiff shall have the costs of the suit as against the Defendant.

It Is So Ordered Accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2023.

.....

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT, AT

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Yumna – the Court Assistant

b. Mr. Mwawasi Advocates for the Plaintiff

c. M/s. Njuguna Advocates for the Defendant