



Dsoshi & 2 others v Director of Public Prosecution & 6 others (Environment & Land Petition E017 of 2023) [2023] KEELC 20516 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E017 OF 2023
OA ANGOTE, J
OCTOBER 5, 2023**

BETWEEN

**ASHOK LABSHANKER DSOSHI 1ST PETITIONER
PRATIBHA ASHOK DOSHI 2ND PETITIONER
MAGNUM PROPERTIES LIMITED 3RD PETITIONER**

AND

**DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT
NATIONAL POLICE SERVICE 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
MILIMANI LAW COURTS 6TH RESPONDENT
GREENVIEW LODGE LIMITED 7TH RESPONDENT**

RULING

Background

1. Before the court are two Notices of Preliminary Objection. In the first Notice of Preliminary Objection dated 3rd May, 2023, the 1st Respondent has averred as follows:
 - a. That the issues raised in the Petition and the Petition in its entirety are Res Judicata, having been heard and determined by the High Court in Mombasa in *Ashok Labshanker Doshi & another v Director of Public Prosecutions & 3 others; Greenview Lodge Limited (Interested party)* [2021] eKLR;



- b. That no appeal or review has ever been preferred by the Petitioner against the decision of the Honourable Court in Mombasa in *Asbok Labshanker Doshi & another v Director of Public Prosecutions & 3 others; Greenview Lodge Limited (Interested party)* [2021] eKLR;
 - c. The Honourable Court therefore lacks the jurisdiction to determine this suit.
2. In the 2nd Notice of Preliminary Objection dated 8th May, 2023, the 7th Respondent has averred that the 1st and 2nd Petitioners filed Mombasa Constitutional Petition No. 44 of 2020 *Asbok Labshanker Doshi & Another vs Director of Public Prosecutions & 3 Others; Greenview Lodge Limited (Interested party)* [2021] eKLR, which matter was fully heard and a judgment delivered by the Honourable Justice E.K. Ogola on 28th day of September, 2021.

Submissions

3. The Court directed that the parties canvass the Preliminary Objection by way of written submissions. The parties complied and filed their submissions. In support of the Preliminary Objections, the 1st Respondent (the DPP), submitted that Mombasa Constitutional Petition No. 44 of 2020 was heard on merit and the decision delivered therein on 28th September and that this decision has neither been reviewed nor appealed against.
4. The 1st Respondent submitted that the decision was rendered by a court having jurisdiction over both the subject matter and the parties in question. Counsel relied on Petition 14, 14A, 14B & 14C of 2014 (Consolidated) *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] eKLR where it held that:

“[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on “issue estoppel”, to bar the 1st, 2nd and 3rd respondents’ claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is 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.”
5. Counsel for the 1st Respondent also relied on the Judgment of the Court in Mombasa Constitutional Petition No. 44 of 2020 and submitted that the court found that the criminal trial is the best avenue for testing the accuracy and correctness of evidence gathered in an investigation and that any attempt to invite this Honourable court to reconsider these issues offends the doctrine of res judicata.
6. The 1st Respondent’s counsel submitted that litigation should come to an end; that the Petitioner’s failure to review the decision or appeal against it should not be visited upon the 1st Respondent and that clearly, the Petitioners are relitigating the decision to institute criminal charges against them for the offences committed in respect of Land Reference No. 209/3850 (Grant No. I.R. No. 56396). Counsel thus urged the court to find the Petition to be fatally defective, uphold the 1st Respondent’s Preliminary Objection and dismiss the Petition with costs to the 1st Respondent.
7. The 7th Respondent’s counsel submitted that the present Petition and application seek the same relief as Mombasa Constitutional Petition No. 44 of 2020 and that the current Petition amounts to a disguised



- appeal thereof; that the matters raised by the Petitioners in the application were subject of the Mombasa Petition which was heard and determined on merit and the parties in the two suits are also the same.
8. It is the 7th Respondent's counsel's submissions that the Petitioners are seeking to bring to the court in another form the same cause of action which has been determined by courts of competent jurisdiction and that the Petitioners have merely combined in one Petition what they prayed for and lost in the previous Petitions.
 9. In support of their submission that the Petition and the application are res judicata, the 7th Respondent's counsel relied on the case of The *IEBC vs maina Kiai & 5 Others*, Nairobi CA No. 105 of 2017 (2017) eKLR, *John Florence Maritime Services Limited & Another vs CS Transport & Infrastructure & 3 Others* among others.
 10. On the issue of abuse of court process, the 7th Respondent's counsel submitted on the issue of institution of different actions between the same parties in different courts, in respect of the same right and seeking for reliefs in the subsequent suit which was denied in the first court. In support of this argument, the 7th Respondent's counsel relied on *Satya Bhamu Gandhi vs The Directors of Public Prosecutions & 3 Others* (2018) eKLR and JR No. 202 of 2019 *Joyce Cherop Kapsandoy & 609 Others vs Kenya Power & Lighting Company Limited* (2019) eKLR.
 11. Counsel went further to argue that the forum for attacking a judgment is not through filing of a second suit but through an appeal (See *Virnekas Mwanabaius Nihazi vs Boniface Kabindi Katana* (2019) eKLR.
 12. Opposing the Preliminary Objections, the AG (5th Respondent) filed their submissions dated 5th June, 2023 in which they relied on numerous authorities. It was submitted by the Attorney General that a Preliminary objection is canvassed on the basis that facts as pleaded by the adverse party are deemed correct and admitted and further that a Preliminary Objection cannot be ventilated if the claimant seeks to avail or supply evidence to the court of whatever nature.
 13. As to whether the court has jurisdiction to deal with the subject matter, learned counsel for the 5th Respondent submitted that the substratum of the dispute relates to the alleged unlawful and irregular cancellation of the title to parcel L.R. No. 209/3850; that the cases sought to be stayed relate to conspiracy to defraud, forgery, and forcible detainer as relates to the said parcel of land and that as per Article 162 (1)(b) of the *Constitution* and section 13 (1) & (2) of the *Environment and Land Court Act*, this Honourable Court is seized of the jurisdiction to determine the Notice of Motion Application and the Petition.
 14. On the issue of abuse of the court process, the 5th Respondent's counsel submitted that abuse of the court process arise when a party uses the judicial process to irritate and annoy his opponent and the efficient and effective administration of justice; that it refers to proceedings which are wanting in bona fides and are frivolous, vexatious or oppressive and that the term abuse of process has an element of malice to it.
 15. Counsel relied on the cases of Nigerian case of *Karibu-Whytie JSc in Sarak vs Kotoye* (1992) 9 NWLR (pt 264) 156 at 188-189 (e), *Halsburys Laws of England*, 4th edition Volume 37 para 14 at 23, *Satya Bhamu Gandhi vs DPP & others* (2019) eKLR among others in support of his arguments. Counsel submitted that therefore the Petition was properly before the court and the same is not an abuse of the court process.



16. The Petitioners also opposed the Preliminary Objections and submitted that the Petition is validly before the court and is not res judicata. Counsel relied on the case of *John Florence Maritime Services Limited & Another vs CS Transport & Infrastructure & 3 Others*.
17. It was submitted that ELC Misc. Application No. 46 of 2020 *Ashok Doshi & Pratibha Doshi vs Chief Land Registrar* was not determined on merit nor was there a former judgment and/or decision which was final. The Petitioner's Advocate relied on the case of *Michael Bett Siror vs Jackson Koech* (2019) eKLR, and *Ramji Gir & Others vs Elaichidevi Air* (1974).
18. In respect of Judicial Review Misc. Application No. 66 of 2020 (*Republic vs. Chief Land Registrar Ex-Parte Ashok Doshi & Another*), it was submitted that this matter was dismissed on account of sub judice and that this suit was also neither heard nor determined on merit nor was there a former judgment or decision which was final. Counsel relied on the case of *Suleiman Said Shabbal vs IEBC & 3 Others* (2014)eKLR.
19. Relying on the case of *John Florence Maritime Services* Case, learned counsel for the 5th Respondent argued that the findings in ELC Misc. Application No. 46 of 2020 and JR Misc. Application No. 66 of 2020 being Judicial Review applications cannot give rise to res judicata since this current suit is a constitutional Petition.
20. In respect of Petition No. 44 of 2020, *Ashok Labshanker Doshi & Another vs DPP & 3 Others; Greenview Lodge (Interested Party)* (2021) eKLR, the Petitioners' counsel submitted that the first and second suits do not have the same identical parties and/or subject matter/cause of action and that after the judgment was delivered in the first Petition, a reinvestigation was conducted by the 2nd Respondent wherein the Petitioners were vindicated.
21. Counsel submitted that after delivery of the court's determination in the first Petition, the Petitioners' circumstances have materially changed; that this is coupled with the fact that at the time of the first Petition, charges had yet to be preferred against them, yet in the current one, they have been arrested and charged with offences before the court and that there exists special circumstances that would grant exemptions in the application of the doctrine of res judicata.
22. It was submitted by the Petitioners' counsel that the Chief Magistrate Milimani Law Courts and the Chief land Registrar were not parties in the initial Petition, unlike the current Petition and that the Petitioners stand to suffer grave injustice if the court chooses to invoke the doctrine of res judicata.
23. Counsel submitted that the Petitioners' Advocates have brought to the court's attention an affidavit sworn by one Mr. Peter M. Kayemba in ELC Misc. Application No. E005 of 2022 Republic vs. Chief Land Registrar ex parte Greenview Lodge Limited filed by the 7th Respondent and actioned before Justice Wabwoto, which matter was withdrawn before delivery of judgment and that it constitutes a material change in circumstances to exempt the suit from being res judicata.
24. On the issue of abuse of court process, the Petitioners counsel submitted that there can be no all-encompassing definition of the concept of abuse of court process; that an attempt to do so will limit the courts in striking out matters it considers wanting in bona fides and that since the current Petition raises the issue of the Petitioners' right to a fair hearing as enshrined at Article 50 of *the Constitution*, among other constitutional rights of the Petitioners, the Petition cannot be said to be frivolous, vexatious and wanting in bona fides.
25. Counsel submitted that the Petition raises fresh triable issues whose veracity needs to be tested by this honourable court and that it is the 1st Respondent's action of prosecuting the Petitioners contrary to



the evidence available and National Prosecution Policy that are an abuse of the court, but not this instant Petition.

26. Counsel submitted that the Petition is neither *res judicata* nor an abuse of the process of the court. The Petitioners' Advocate relied on several authorities which I have read.

Analysis and Determination

27. This suit was instituted by way of a Petition dated 25th day of April, 2023. In the Petition, the Petitioners seek the following orders:
- a. A Declaration that the arrest, arraignment and charging of the 1st Petitioner on the four counts in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others is a violation of article 157 of *the Constitution* by the 1st Respondent;
 - b. A Declaration that the prosecution of the 3rd Petitioner Company on one count in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others is a violation of article 157 of *the Constitution* by the 1st Respondent;
 - c. A Declaration that the decision of the 1st Respondent to charge the 1st and 3rd Petitioners with the offences in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others by the 1st Respondent in light of all the evidence available to it is but an abuse of the legal process;
 - d. A Declaration that the commencement and continuation of MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others violated and will continue to violate the rights of the Petitioners under Articles 10, 27, 29, 40, 47 and 50 of *the Constitution*;
 - e. A Declaration that the arrest, arraignment and charging of the 1st and 3rd Petitioners violated the 2nd Petitioner's right and freedom to security as enshrined under Article 29(d);
 - f. A Declaration that the eviction of the Petitioners by the 3rd Respondent through the GSU from the Subject Property without an order of the court is in violation of the Petitioners' right to property under Article 40;
 - g. An Order of Certiorari do issue to remove to the High Court and quash the charge sheet and proceedings in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others;
 - h. An Order of Prohibition do issue prohibiting the 6th Respondent from giving any pre-trial directions, hearing dates or commencing and proceeding with the trial in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 others;
 - i. An Order of Prohibition do issue restraining the 1st and 2nd Respondent from arresting and preferring any Charges against the 2nd Petitioner in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others, or on any other charges on the same facts arising from the complaints made by the 7th Respondent of Jennifer Nthenya;
 - j. An Order of Certiorari do issue quashing the decision of the 4th Respondent to cancel the Title belonging to the 1st and 2nd Petitioner on the basis of the alleged fraudulent receipt as the same was conducted *ultra vires*;
 - k. An order for damages against the Respondents on account of the prejudice and embarrassment caused by their unlawful arrest and arraignment in court and in violation of the Petitioners' rights and fundamental freedoms.
 - l. Costs of the Petition;



- m. Any other orders, directions and or reliefs this Honourable Court deems just, fit and appropriate to grant in order to serve justice.
28. Together with the Petition, the Petitioners also filed a Notice of Motion application of an even date seeking for the following orders:
- i. That pending the hearing and determination of this Petition inter-partes, a conservatory order be issued staying the continued prosecution of the 1st and 3rd Petitioners in MCCR E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others.
 - ii. Spent.
 - iii. That pending the hearing and determination of this Petition inter-partes, a prohibitive injunction be issued restraining the 1st, 2nd and 3rd Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from harassing and arresting the 2nd Petitioner on the same facts arising from MCCR E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 others.
 - iv. Spent.
 - v. That pending the hearing and determination of this Petition inter-partes, a conservatory order be issued prohibiting the 7th Respondent from any development, alteration and or disposal of the subject parcel L.R. No. 209/3850 situated along Processional Way.
 - vi. Spent.
 - vii. That pending the hearing and determination of this Petition inter-partes, a conservatory order be issued restraining the 4th respondent from altering and or issuing any titles or making any entries on the register pertaining the subject parcel L.R. No. 209/3850 situated along Processional Way.
 - viii. That the costs of the Application be provided for.
29. The 1st Respondent and 7th Respondents have raise a Preliminary Objection arguing that the application and the Petition are res judicata Mombasa Constitutional Petition No. 44 of 2020 where the Petitioners sought for the following orders:
- a. A declaration be and is hereby issued that any intended summons, arrest, charges, prosecution, questioning, investigation, harassing and intimidation of the Petitioners on account of any alleged criminal offences or fraud relating to or concerning title, ownership, dealings and stamp duty of the property known as Land Reference No. 209/3850 (Grant No. I.R. No. 56396) is unconstitutional, violates the Petitioners' constitutional rights, is in bad faith, is an abuse of the criminal justice system and therefore unlawful, null and void.
 - b. An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents, whether by themselves agents and servants and/or whomsoever is acting under their authority or instruction, from arresting, charging, prosecuting, summoning, questioning, investigating, harassing and intimidating the Petitioners herein on account of any alleged criminal offences or fraud relating to or concerning title, ownership, dealings and stamp duty of the property known as Land Reference No. No. 209/3850 (Grant No. I.R. No. 56396).



30. It is the 1st and 7th Respondents' averment that Mombasa Constitutional Petition No. 44 of 2020 was heard and finally determined when the court pronounced that the Petition lacked merit and that the orders sought could not be granted hence dismissed the Petition with costs to the Interested Party.
31. The 7th Respondent further averred that the 1st and 2nd Petitioners also filed two matters being Nairobi Judicial Review Application No. 46 of 2020 *Asbok Doshi & Pratibha Asbok Doshi vs Chief Land Registrar* which was dismissed on 18th day of September, 2020; and Mombasa Misc. Application No. 14 of 2020 (J.R.) that was transferred to Nairobi and renamed Nairobi J.R. 66 of 2020 which was also dismissed on 18th February, 2021.
32. Further, it was argued, upon dismissal of Nairobi J.R. No. 66 of 2020, the Petitioners made another application in Nairobi Judicial Review Application No. 46 of 2020 *Asbok Doshi & Pratibha Asbok Doshi vs Chief Land Registrar* in which they sought to set aside the dismissal order of 17th September, 2020, which application was opposed by the Attorney-General, and that by a ruling delivered on 2nd November, Mbugua J dismissed the application to reinstate the suit with costs and ordered that the matter be marked closed.
33. I have considered the Preliminary Objections by the 1st and 7th Respondents, the rival submissions and the authorities. The following issues emerge for the court's determination: -
- i. Whether the Petition and the Application therein as filed offend to the doctrine of Res Judicata?
 - ii. Whether the court has jurisdiction to deal with the subject matter?
 - iii. Whether the Petition and Application as filed are an abuse of the process of the court?
34. A Preliminary Objection was described in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 as follows:
- “So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
35. In *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court quoted with approval Law J.A in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] E.A. 696 where the learned Judge observed that:
- “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
36. To ascertain whether a point is pure law, the Supreme Court in *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others* (supra) held that ‘the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.’
37. Further, a Preliminary Objection must be raised on the assumption that all facts pleaded by the adverse party are correct. It must not raise substantive issues from the pleadings which must be determined by



- court upon perusal of evidence. No preliminary objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
38. The above goes along way to show that it is bad practice to raise the plea of res judicata as a preliminary objection within the jurisprudence of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors* (1969) EA 696. A preliminary objection must be a matter of pure law from the very beginning.
39. It cannot be a matter of fact, as may be the case for an objection based on the doctrine of res judicata. This is because evidence must be placed before the court before a determination can be made on whether the matter is indeed res judicata.
40. In the case of *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held as follows:
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”
41. Whenever a party pleads res judicata, a court has to look at the decision claimed to have settled the issues in question, the entire pleadings and the record of that previous case against the instant case to ascertain the issues that were determined in the previous case, and whether these are the same issues in the subsequent case. It is therefore indeed a bad practice by counsel to raise such a weighty issue by way of a Preliminary Objection.
42. Nevertheless, the court of Appeal in *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others* (Civil Appeal No. 42 of 2014) [2015] eKLR had this to say with regards to the manner in which the plea of res judicata may be raised:
- “We are also not aware of any legal edict that an objection to a suit taken on the basis of res judicata must be so taken on a formal application. The appellants did not cite to us any such authority. In any event, the respondents had in their various pleadings raised the issue and this was long before the hearing of the application and the appellants were therefore put on notice in good time.”
43. Although it is true that it is a bad practice and a serious breach of procedure to raise the plea of res judicata as a preliminary objection, nevertheless, this court is aware and bound by the Overriding Objectives as set out at Article 159(2)(d) of *the Constitution of Kenya, 2010* which provides that justice shall be administered without undue regard to procedural technicalities. I shall therefore consider, on the basis of the pleadings before me, if the current Petition is res judicata.
44. Res judicata is a Latin term that translates to “a thing adjudged.” The principle behind res judicata is that a thing or matter that has been finally juridically decided on its merits cannot be litigated again between the same parties.



45. The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases.
46. Res judicata is therefore a bar to subsequent proceedings involving the same issue (s) as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. As has repeatedly been said, courts in Kenya can hardly spare time to repeat themselves on issues already decided upon. Application of the doctrine of res judicata promotes stability of judgments by reducing the possibility of inconsistency in judgments by concurrent courts.
47. The doctrine of res judicata is set out under Section 7 of the [Civil Procedure Act](#) which stipulates as follows:
- “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.”
48. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the [Civil Procedure Act](#). This test was summarized in [Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others](#), (2010) eKLR, under five distinct heads as follows:
- i. the matter in issue is identical in both suits;
 - ii. the parties in the suit are the same;
 - iii. sameness of the title/claim;
 - iv. concurrence of jurisdiction; and
 - v. finality of the previous decision.
49. The first element is whether the matter in issue is identical in both suits. The Petitioners filed Nairobi Judicial Review Application No. 46 of 2020 [Ashok Doshi & Pratibha Ashok Doshi vs Chief Land Registrar](#) which was dismissed on 18th day of September, 2020 for non-attendance. They also filed Mombasa Misc. Application No. 14 of 2020 (J.R.) that was transferred to Nairobi and renamed Nairobi J.R. 66 of 2020 which was dismissed on 18th February, 2021 after the judge found that the said suit ran afoul the rule on sub judice and was an abuse of the process of the court.
50. After the two matters were dismissed, the Petitioners made another application within Nairobi Judicial Review Application No. 46 of 2020 [Ashok Doshi & Pratibha Ashok Doshi vs Chief Land Registrar](#) to set aside the dismissal order of 18th September, 2020, which application was opposed by the Attorney-General. Mbugua J dismissed the application to reinstate the application with costs and ordered that the matter be marked closed.
51. These Judicial Review Applications were decided without being heard on merit, and cannot support a plea of res judicata. However, apart from these three suits, there was Mombasa Constitutional Petition No. 44 of 2020 [Ashok Labshanker Doshi & Another vs Director of Public Prosecutions & 3 Others; Greenview Lodge Limited \(Interested party\)](#) [2021] eKLR.
52. In Mombasa Constitutional Petition No. 44 of 2020 [Ashok Labshanker Doshi & Another vs Director of Public Prosecutions & 3 Others; Greenview Lodge Limited \(Interested party\)](#) [2021] eKLR (hereafter



the Mombasa Petition), the Petitioners herein moved to court to stop their arrest and prosecution on account of allegations that the Stamp Duty payment Receipt No. 409683 and receipt indicating payment of stand premium being Receipt No. 410606 paid by M/s Harit Sheth were forged. Therein, they alleged violation of their rights under Article 3, Article 47, Article 157 (11) and Article 244 of *the Constitution* of Kenya, 2010.

53. There is no dispute between the parties that the judgement or order made in the Mombasa Petition was final and binding on the parties. There is also no dispute that the decision was made on merit after the court considered the pleadings and evidence placed before it. Parties are also in agreement that the court High Court at Mombasa was of competent jurisdiction to handle the subject matter therein.
54. Up to this point, the first three elements of the test enumerated above have been satisfied. I now examine whether the cause of action in the two Petitions are identical.
55. The *Black's Law Dictionary* (9th Edition) at Page 251 defines a cause of action as “a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”. It goes further to explain:-

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction...”
56. The cause of action in the Mombasa Petition was the letter dated 12th February, 2021 from the DPP recommending the arrest and prosecution of the Petitioners over alleged forgery. Upon learning that this recommendation had been made, the Petitioners became apprehensive that the intended arrest and prosecution was a threat to their constitutional rights and filed the Mombasa Petition.
57. From the above definition then, it would appear that the cause of action was “the threatened violation of a right.” On the other hand, the cause of action in the current Petition is “the arrest of the Petitioners and institution of proceedings in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others.”
58. The cause of action in this Petition, according to the definition above, is “a primary right of the Petitioner actually violated”, which violation the Petitioners are entitled to “restrain or prevent.” This is so because the Petition was filed after the actual arrest of the Petitioners and institution of the Criminal Cause being MCCR E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others.
59. At the point of filing the Petition, the Petitioners weren't just apprehensive of a possible violation of their rights through a prosecution that “may or may not happen”, but were facing what they perceived to be a very real violation of their rights as they had been arrested, arraigned in court and charged with the alleged offences. To this end, the causes of action in the two Petitions are different.
60. Although the issues in the two Petitions relate to the alleged forging of documents in respect of the same piece of land. In The *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR case where it was alleged that “the issues that were raised in the High Court were directly related to the issues that were properly before the Supreme Court,” the court held that as follows:

“With respect, that is not what res judicata entails. The issue is not meant to be related, (whatever that may mean) to issues in a previous suit. The requirement is that the issue be directly and substantially in issue. It behoved the appellant to demonstrate each of those



elements in Section 7 of the *Civil Procedure Act*, which we have enumerated herein. It signally failed to do so...The requirement is that the issue raised in the later litigation should have been directly and substantially in issue in the former. They were not. It is a stretching of the facts a wee bit too far to describe the petition that was before the High Court as an attempt to re-litigate the Supreme Court verdict on the 2013 Presidential poll.”

61. In answering the question whether the Petitioners’ constitutional rights had been violated, the court noted that “in the Petition, the Petitioners seek to stop their arrest and charge pursuant to investigations by the Respondents that disclose possible criminal offences.”
62. Notably, at the time of the filing of the Mombasa Petition, the Petitioners had learnt of the DPP’s recommendation to prosecute them on alleged offences relating to the two offending receipts which had at the time been declared forgeries. The exact offences had not been disclosed and the Petitioners had not been arrested or arraigned in court.
63. The court in the Mombasa Petition further stated that “in the instant Petition, the Petitioners are threatened with arrest and arraignment over allegations of fraudulent acquisition of a private property, and failure to pay lawful stamp duty thereon. These are not issues which this Court can decide.” This again reinforces the fact that at the time of the Mombasa Petition, the criminal proceedings had not yet been instituted and thus the criminal case did not form part of the deliberations of the court in the earlier petition.
64. In the current Petition, the Petitioners have moved to this court seeking to stop their prosecution in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others on account of the alleged forgery of two offending receipts. Therein, they allege violation of their rights under Article 10, Article 24, Article 27, Article 40, Article 47 and Article 157 (11) of *the Constitution*.
65. From a perusal of the pleadings filed in this Petition, some of the issues this court is expected to deal with is whether the proceedings in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others in light of the fresh developments and new circumstances on record are a violation of the Petitioner’s constitutional rights; whether the court should quash the decision of the 4th Respondent to cancel the Title belonging to the 1st and 2nd Petitioners and whether the Petitioners are entitled to damages from prejudice and embarrassment caused by their arrest and prosecution.
66. It is possible that there may be other issues for consideration by this court. However, it is clear that the issues I have highlighted above were not directly and substantially in issue in the Mombasa Petition as they were neither raised therein, nor considered and determined by that court.
67. For the avoidance of doubt, I am certain that any issue relating to or touching on the proceedings in MCCR No. E257 of 2023 Republic vs Ashok Labshanker Doshi & 2 Others was not raised and determined by the High Court at Mombasa as the said matter was non-existent at the time.
68. That aside, the parties in the two Petitions are not the same. The 1st and 2nd Petitioners herein are the Petitioners in the Mombasa Petition, whereas the 1st, 2nd, 3rd and 4th Respondents herein are named as Respondents therein. The 3rd Petitioner???? as well as the 4th and 6th Respondents were not parties in the Mombasa Petition.
69. Indeed, the 3rd Petitioner and the 6th Respondent are included in this Petition by reason of the criminal case instituted against the Petitioners. As indicated above, the two could not have been included in the Mombasa Petition because the criminal case was non-existent at the time.
70. The 4th Respondent, I deduce, has been added in the current Petition by virtue of the findings of the second investigation that the two offending receipts were in fact genuine and the recommendation that



the cancellation was done relying on a misrepresentation of facts. The parties in the two Petitions are therefore not the same, neither can they be said to be acting under the same title as the previous parties.

71. In conclusion, it is the finding of the court that neither the cause of action, nor the parties in the two Petitions are similar. As was held by the Court of Appeal in Nairobi Civil Appeal No. 107 of 2010, Kenya Commercial Bank Limited v Benjoh Amalgamated Limited, the elements of res judicata have been held to be conjunctive rather than disjunctive. As such, all the elements must be present before a suit or an issue is deemed res judicata on account of a former suit.
72. In addition to the above findings, it has been accepted that the development of fresh circumstances could be an exception to the doctrine of res judicata. In the *Siri Ram Kaura vs M.J.E. Morgan* CA 71/1960 (1961) EA 462 the then EACA held 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.”
73. The Petitioners aver that “the Government Printers in response to the 2nd Respondent’s two letters dated 3rd May, 2021 and 11th June, 2021 responded by issuance of letters dated 13th May, 2021 and 22nd June, 2021 respectively addressed to the 2nd Respondent (the DCI) confirming to the directorate that both receipts were indeed issued by the Ministry of Land and Housing on the 25th of May, 1992 and therefore genuine and valid.”
74. These letters are the outcome of the second investigation carried out by the 2nd Respondent which had not been concluded at the time of filing the Mombasa Petition or determination thereof, and thus, the findings were not pleaded or brought to the attention of the court.
75. What I gather from the Judgment in the Mombasa Petition is that the Petitioners filed their submissions therein on 12th November, 2020 and supplementary submissions on 25th day June, 2021. Although both letters were in existence, by the time of filing supplementary submissions and before delivery judgment in the Mombasa Petition, parties had already filed pleadings. The Petitioners were not at liberty to bring the issue of the letters up in their Supplementary Submissions, which were filed only three days after the date of the last letter from the Government Printers.
76. As matters stand, no court of competent jurisdiction has rendered a finding with regard to these two letters which are the outcome of the second investigation. All these facts constitute a material change in circumstances of the Petitioners enough to exempt the suit from being res judicata.



77. In view of the foregoing, this court must conclude then that the current Petition and the accompanying application are not res judicata.
78. The Respondents did argue that the Petition is an abuse of court process. The concept of abuse of court/judicial process is not precisely defined, and courts have on many occasions found that it involves varying circumstances and situations.
79. The employment of judicial process is regarded as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, the court of appeal stated as follows:-

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.” (emphasis mine)

80. Courts have tried to set out various situations which may amount to abuse of court process and some of these are outlined in *Abmad & Another vs Kadhi Mombasa; Khalifa & another (Interested Party)* (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21st October 2021) (Ruling) where the High Court in Mombasa held that:-

“32. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

33. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.



- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.
34. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process. Abuse of court process creates a factual scenario where litigants are pursuing the same matter by two court process. In other words, a litigant by the two-court process are involved in some gamble, a game of chance to get the best in the judicial process.”

81. This court has already found that the Petition is not res judicata. Having due regard to the issues that I have dealt with above, especially the alleged two contradicting investigation reports by the police, it is my opinion that the Petitioners have not abused the court process but have exercised their constitutional right to challenge the decision of the 1st and 2nd Respondents herein to institute criminal proceedings against them. Whether the Petition succeeds is a different issue all together.

82. For those reasons, the Notices of Preliminary Objections are dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Okwach for Petitioner

Mr. Githinji for 7th Respondent

Mrs Arunga for 1st Respondent

Mr. Allan Kamau for 2nd – 6th Respondents

