



Dzombo & 2 others v KCB Bank Kenya Limited (Environment & Land Case E061 of 2022) [2023] KEELC 20474 (KLR) (2 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E061 OF 2022**

**LL NAIKUNI, J
OCTOBER 2, 2023**

BETWEEN

NICHOLAS DZOMBO 1ST PLAINTIFF

RACHAEL BESSIE DZOMBO 2ND PLAINTIFF

DANICHA INVESTMENTS LIMITED 3RD PLAINTIFF

AND

KCB BANK KENYA LIMITED DEFENDANT

RULING

I. Introduction

1. The Defendant/ Applicant herein, KCB Bank Kenya Limited moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 16th November, 2022. It was brought against the Plaintiffs, Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investment Limited herein under a Certificate of urgency and the dint of the provisions of Sections 1A, 1B, 3A, 5 and 7 of the [Civil Procedure Act](#), CAP. 21.
2. Upon service, on 6th April, 2023 the 2nd Plaintiff herein filed a Replying affidavit dated 31st March, 2023 opposing the said application accordingly.

II. The Defendant/ Applicant's case

3. The Defendant sought for the following orders: -
 - a. That the suit filed by the Plaintiff commenced by way of Originating Summons dated 03rd June, 2022 and filed in Court on the same date together with the ensuing proceedings be struck out on account of being res judicata to Mombasa High Court Civil Case Number 52 of



2013; Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investments Limited vs Kenya Commercial Bank Limited.

- b. That upon transfer of ELC No.015 Of 2021 - Kioko Sunza Kilonzo-vs-stephen Oddiagabe consolidated with this instant suit and the be heard and determined together.
 - c. That the cost of this application be in the cause.
4. The application by the Defendant /Applicant herein was premised on the grounds, testimonial facts and averments made out under the 25 Paragraphed Supporting Affidavit of Paul Munyao sworn and dated 16th November, 2022 with nine (9) annexures marked “KCB – 1 to 9”. The Plaintiff/Applicant averred that:
- a. The Plaintiffs had expressly admitted under the contents of Paragraph 3 of the Supporting Affidavit sworn by RACHEL BASSIE DZOMBO on 03rd June 2022 that matters touching on the repayment of the outstanding loans advanced to the Plaintiffs by the Defendant [“Bank”] were similar matters in issue between the same parties in Mombasa “High Court Land Case Number 52 of 2013; Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investments Limited – Versus - Kenya Commercial Bank Limited” in which a Consent Judgment was recorded in Court on 17th October, 2013 with the suit therein being marked as fully settled.
 - b. By way of a Plaint dated 11th April, 2013 and filed in Court on the same date, the Plaintiffs’ commenced the suit in Mombasa HCCC No. 52 of 2013 seeking the following reliefs: -
 - i. A declaration that the Defendant’s action to cause the advertisement of the property known as LR No.MN/III/18378/34 and developments thereon without any statutory notice is unlawful;
 - ii. A permanent injunction does issue restraining the Defendant either by itself, its agents, employees and any other person whomsoever and howsoever, interfering with the Plaintiff title, quiet possession and enjoyment LR No.MN/III/18378/34;
 - iii. An order that the Defendant does provide the Plaintiffs with a detailed statement of loan account on subject to the charges on LR No.MN/III/18378/34 loans;
 - iv. The Plaintiffs be allowed to sell a number of the apartments on LR No. MN/ III/18378/34 equal to settle the sums of money owing to the Defendant within a reason time determined by the Court;
 - v. Any other order or award the Honourable Court may deem just and expedient to grant in the circumstances. (Annexed and Marked as “KCB – 1” is a copy of the Plaint by the Plaintiffs in Mombasa HCCC No. 52 of 2013).
 - c. Contemporaneous to the aforesaid Plaint, the Plaintiffs filed under urgency a Motion application dated 11th April, 2013 seeking the following orders: -
 - a. That pending hearing “inter partes, an order of injunction does issue restraining the Defendant either by itself, its agents, employees, and any other person whomsoever and howsoever from entering unto, trespassing unto, constructing on, offering for sale, selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiffs’ title, quiet possession and enjoyment of all that property known as LR No.MN/III/18378/34 and developments thereon.



- b. That pending hearing and determination of this suit, an order of injunction does issue restraining the Defendant either by itself, its agents, employees, and any other person whomsoever and howsoever from entering unto, trespassing unto, constructing on, offering for sale, selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiffs' title, quiet possession and enjoyment of all that property known as LR No. MN/III/18378/34 and developments thereon.
- c. That the Defendant does supply the Plaintiffs with all the statement of accounts for the loan accounts no. MG0907100325 and MG0907100325.
- d. That cost of this application be provided. (Annexed and marked in the affidavit KCB 2 is a copy the Notice of Motion filed by the Plaintiffs in Mombasa HCCC No. 52 of 2013).
- d. In response to the Plaintiffs application, the Defendant filed Affidavit in Reply dated 04th June, 2013 in Court on 11th June, 2013, praying for the Plaintiffs application dated 11th April, 2013 be dismissed with costs (Annexed and marked as KCB 3 is a copy of the Affidavit in Reply filed by the Bank in Mombasa HCCC No. 52 of 2013).
- e. During the pendency of HCCC No.52 of 2013, the Plaintiffs vide their Advocate's letter dated 20th June, 2013, made a proposal to settle the outstanding loan amounts with the Bank at a proposed sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-) by way of monthly instalments spread out over a period of 12 months. (A copy of the Plaintiffs' letter dated 20th June, 2013 is annexed and marked "KCB – 4").
- f. Upon receiving the above proposal, the Bank was acceptable to the terms proposed therein, albeit with the condition that the Plaintiffs were to deposit an initial sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) towards the settlement of the outstanding loan. The Plaintiffs complied with the Bank's conditions and remitted a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) in favour of the Bank on 19th August, 2013. (A copy of the Plaintiffs' Advocates letter is annexed and marked as "KCB – 5").
- g. Subsequently, the Plaintiffs forwarded to the Bank a revised proposal wherein the Plaintiffs proposed to settle the balance of the outstanding amount of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) over a period of 11 months commencing 20th September, 2013. (A copy of the letter is annexed and marked as "KCB – 6")
- h. The Bank reviewed the terms of the proposal by the Plaintiffs in the letter dated 26th August, 2013 and thereby clarified that the outstanding loans stood at a sum of Kenya Shillings Thirty Four Million Two Seventy Seven Thousand Three Sixty Nine Hundred and Fifty Six (Kshs. 34,277,369.56) as at 10th September, 2013 and not a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-) as alleged by the Plaintiffs. The Bank further revised the terms for the proposed settlement to include payment of the costs incurred in the Bank's recovery action, which comprised valuation, auctioneer and advocates legal fees. A copy of the statement for the Plaintiffs' loan account for the period commencing 29th August, 2012 to 10th September, 2013 is annexed and marked KCB 7.
- i. Consequently, by way of a Consent Judgement recorded in Court on 17th October, 2013 the Plaintiffs and the Bank agreed to compromise the suit and application in Mombasa HCCC on the following terms:-



- a. It is hereby agreed as between the Defendant "the Bank" and the 1st, 2nd and 3rd Plaintiffs, that the amount due and owing from the 3rd Plaintiff to the Bank on account of the Plaintiffs' loan with the Defendant as at 10th September, 2013 is as follows: -

Principal Sum

Kshs34,277,369.56

Recovery Costs:

Legal Fees

Valuation Fees

Auctioneers Fees

Kshs.943,376.92

Kshs. 148,420.00

Kshs.449,000.00

Total. Kshs. 35,818,166.48

- b. The principal amount outstanding shall continue to accrue interest at the rate of 17% until full payment.

- c. The Plaintiffs shall liquidate the total amount due being a sum of Kenya Shillings Thirty Five Million Eight Eighteen Thousand One Sixty Six Thousand and Fourty Eight cents. (Kshs. 35,818,166.48) as follows: -

a) 20th September 2013

b) 22nd October 2013

Kshs.2,500,000.00

Kshs.2,500,000.00

c) 23rd November 2013

Kshs.3,500,000.00

d) 20th December 2013

Kshs.3,500,000.00

e) 30th January 2014

Kshs.3,000,000.00

f)28th February 2014

Kshs.2,500,000.00

g) 30th March 2014

Kshs.2,500,000.00

h)31st April 2014

Kshs.2,500,000.00

i)30th May 2014



Kshs.2,500,000.00

j)30th June 2014

Kshs.2,500,000.00

k) 30th July 2014

Kshs.2,500,000.00

l) 30th August 2014

Kshs.2,500,000.00

m) 30th September 2014

n) 30th October 2014

Kshs.3,000,000.00

Kshs.318,166.48

Total Kshs.34,277,369.48

- d. The final installment shall be advised by the Defendant after application of interest and it shall be paid on or before 15th December, 2014.
- j. The Bank's statutory power of sale having duly arisen following the issuance of statutory notices dated 6th September 2012 and 13th October 2012 in respect of the charged property, the Bank shall, in the event of default in the payment of any of the stated instalment by the Plaintiff under this Consent, be at liberty to proceed with the exercise of its statutory power of sale, by auctioning the charged property. For avoidance of doubt, the Bank shall not be required to issue fresh statutory notices to the Plaintiffs.
- k. In the event of any other default by the Plaintiffs in the payment of the outstanding monthly installments as agreed to this Consent Judgment, the entire outstanding principal and interest as at the date of default was to become due and payable in full and that the Bank was at liberty to proceed with exercise of its statutory power of sale in respect of the charged property and at the peril as to costs and expenses attendant to the exercise of the statutory power of sale.
- l. Upon payment of the outstanding Principal Sum plus interest and the recovery costs, the charged property shall be fully discharged forthwith.
- m. The Plaintiff shall bear the Defendant's advocate's costs of this suit as well as their own advocates costs of the suit. (A copy of the consent judgment recorded in Mombasa HCCC No. 52 of 2013 is annexed and marked as "KCB – 8")
- n. Subject to the express terms of the Consent Judgment, the Plaintiffs were to pay the first instalment of a sum Of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-on 20th September, 2013. Consequently, on 18th September, 2013, the Bank, through its Advocates, wrote to the Plaintiffs' Advocates to prompt them to make payment of the said instalment as it fell due on 20th September, 2013. A copy of the Bank's Advocates letter dated 18th September, 2013 is annexed and marked as "KCB – 9").
- o. Nonetheless, even with the said reminder by the Bank, the Plaintiffs failed to make the monthly instalments as agreed and in effect, the Plaintiffs defaulted on the terms of the Consent



Judgment resulting in their loan accounts running into arrears on top of the outstanding principal, accruing interest and other charges thereon.

- p. Instead of honoring the terms of the aforesaid Consent Judgment, the Plaintiffs defaulted on the terms of the Consent Judgment and, notwithstanding the default, proceeded to file this suit.
- q. Despite the foregoing, the Plaintiff vide the suit herein seeks to relitigate on similar matters in issue over the same subject matter between the same parties or their representatives as Mombasa HCCC No.52 of 2013, which was marked as settled vide the aforesaid Consent Judgment.
- r. Failure by the Plaintiffs herein to apply for review and/or setting aside and/or appeal against the Consent Judgment recorded on 17th October, 2013 means that this Honourable Court is devoid of jurisdiction to re-open, review and reconsider issues of validity of the Consent Judgement and/or any other matters relating to the Consent Judgment as urged by the Plaintiffs.
- s. Both the Plaintiffs and the Bank entered into the Consent Judgment with open eyes, both parties aware of all material facts. It was the parties' consensus to compromise the suit in Mombasa HCCC No.52 of 2013 on very clear terms including inter alia action to be taken by the Bank in the event of default of the terms of the Consent Judgment by the Plaintiffs.
- t. It is settled law that the Consent Judgement entered into between the Plaintiffs and the Bank had a contractual effect and that it could only be interfered with by the Court on grounds that would justify setting aside of a valid contract.
- u. It has not been argued or alleged by the Plaintiffs that any of such grounds justifying setting aside of contract were present at the time of entering the Consent Judgment. In fact, the validity of the Consent Judgement has never been a matter in issue in these proceedings.
- v. The Consent Judgment recorded in Mombasa HCCC No. 52 of 2013 is a final determination of the matters in issue between the parties therein, who the same parties herein, and the matters raised by the Plaintiffs in this suit were matters capable of being raised or ought to have been raised in the said Mombasa HCCC No.52 of 2013.
- w. Thus, until and unless the said Consent is set aside and/or varied under the known principles of interfering with contracts, the Plaintiffs cannot be seen to be relitigating any matters litigated upon in finality between the parties herein in the said Consent Judgement.
- x. It is therefore evident that the Bank shall suffer immense prejudice in relitigating matters that were capable of being litigated in Mombasa HCCC No.52 of 2013 while the loans borrowed by the Plaintiffs remain in arrears on top of the outstanding principal, accruing interest and other charges thereon.
- y. Further, the Plaintiffs' suit is bound to make an unfair demand on the Court's time and resources which can be significantly put to better use in serving other deserving litigants before the Court.
- z. Thus, it is only fair and in the interests of justice for the Court to strike out with costs the suit filed herein by the Plaintiffs vide the Originating Summons dated 3rd June, 2022 for being res judicata and otherwise an abuse of the Court process.



III. The response by the 2nd Plaintiff/Respondent

5. The 2nd Plaintiff filed a 11 Paragraphed Replying Affidavit sworn by RACHEL BESSIE DZOMBO, the Defendant herein sworn on 31st March, 2023 in opposition of the application together with one (1) annexures marked as “RBD - 1” annexed thereof. He stated as follows:-
- a. The prayers in Suit No. Msa HCCC No.52 of 2013 and the matter herein are totally different and the other matter was commenced by way of Plaint and this one by way of Originating Summons and by their very nature they are two (2) distinct Suits and this matter is not res judicata or at all as alleged by the Defendant.
 - b. Indeed, a consent was filed in the said Suit No. HCCC No.52 of 2013 and the Plaintiffs proceeded and made full payments as per the consent recorded. The Plaintiffs noted that no discharge of their Properties was being made by the Defendant. They were disappointed even upon full payment. They sought for statements from the Defendant for loans that is per letters dated 19th July, 2021, 6th September, 2021 and 21st March 2022.
 - c. The Plaintiffs were forced to embark on a preparation of Forensic Audit verification on the Plaintiff loans with the Defendant. A report dated 10th November, 2021 was done and served upon the Defendant on 21st March,2022, however to-date and or as at 3rd June, 2022, when this matter was filed the Defendant did not or at all respond and or reply discrediting and or challenging the contents of the said report.
 - d. Its crystal clear that as between the years 2008 and 2020 the Plaintiff had paid a total sum of Kenya Shillings Fourty Four Million Five Thirty Nine Thousand Eight Eighty One Hundred (Kshs.44,539,881/-) to the Defendant. Loan No. 2 was cleared by 1st September, 2011 long before consent was recorded and consequently the Plaintiff had cleared payment in spite of the missing statements of period between July, 2009 to December, 2009 and 28th August, 2013 to date, which details the Defendants has even now failed to produce to-date.
 - e. It is assumed the details the Defendant tried to give vide its Exhibit marked “KCB-13” to the Replying Affidavit of ANTONY TUMUTI sworn on 22nd July, 2022 are correct that is especially pages 147 to 153 are correct then it means in addition to sum of Kenya Shillings Fourty Four Million Five Thirty Nine Thousand Eight Eighty One Hundred (Kshs.44,539,881/=) captured in the Forensic Report above the Plaintiff have paid a sum of Kenya Shillings Seventeen Million Eight Fourteen Thousand Six Thirty Five Hundred and Fourty Nine Cents (Kshs.17,814,635.49) making total payment to be a sum of Kenya Shillings Sixty Two Million Three Fifty Four Thousand Five Sixteen hundred and Fourty Nine cents (Kshs.62,354,516.49) plus a further sum of Kenya Shillings Three Million (Kshs.3,000,000.00/=) paid through our Advocates on 19th August, 2013 as per pages 064 and 065 of the Defendant’s Application documents, hence a total sum of Kenya Shillings Sixty Two Million Three Fifty Four Thousand Five Sixteen hundred and Fourty Nine cents (Kshs.65,354,516.49) had been paid to the Defendants. As correctly indicate on page 153 of the Replying Affidavit of the Defendants the loan amounts for this matter was now Nil as per the clear statement which reads outstanding balance nil. The Plaintiffs were entitled to the Prayers they are seeking in the Originating Summons herein which are very different from the previous matter which was now settled and closed.
 - f. The Plaintiffs having demonstrated through its own documents plus through the Defendants documents that they had clearly cleared the Defendants loan. They had no alternative but to



file this suit for very specific Orders, which are very different from the Orders which were being sought in HCCC No.52 of 2013 and hence this matter was not res judicata as alleged.

- g. He was informed by the Plaintiffs Advocate that:-
- i. The prayers in both matters were very different.
 - ii. The suit (2) were commenced by two different ways that were one by way of Plaint and another one by way of Originating Summons.
 - iii. The other suit that was HCCC No.52 of 2013 had been fully compromised and hence closed.
 - iv. That none of the Prayers in this matter was ever raised and determined in HCCC No.52 of 2013.
 - v. That HCCC No. 52 of 2013 was determined and closed.
 - vi. That from the Defendants own pleadings the Plaintiffs had duly serviced their loan and the orders being sought herein which are distinct from HCCC No.52 of 2013, ought to be allowed as prayed.
 - vii. The Plaintiff were justified to have filed this suit in light of the three (3) notices served upon the Defendant who failed, neglected and or refused to reply to any of those three notices to-date.
 - viii. The Plaintiff was not in any arrears of the principal sum, interest and other charges as above herein demonstrated.
 - ix. The Court cannot take a drastic order to dismiss this matter since it raises serious issues which can only be litigated vide a separate case and not the earlier matter as the Defendant are trying to allege.
 - x. The Plaintiff matter herein had merits. It was not res judicata and not an abuse of the Court process as alleged.
 - xi. The Defendants Application was a total abuse of the Court process and it ought to be rejected and dismissed with costs.
- h. The affidavit was in opposition of the Defendant's application dated 16th November, 2022 and prayed or the same to be dismissed with costs.

IV. Submissions

6. On 10th May, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 15th March, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 17th July, 2023 a ruling date was reserved on Notice by Court accordingly.



A. The Written Submissions by the Plaintiffs/Respondents

7. The Plaintiffs through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their submissions dated 5th July, 2023. Mr. Omwenga Advocate commenced his submission in respect of the Plaintiff's Application dated 16th November, 2022 seeking following orders: -
 - i. Strike out the suit on account being res-judicata to Mombasa HCCC No.52 of 2023.
 - ii. Costs of the Application.
8. The Learned Counsel observed that the Defendant's Application is supported by the 22 Grounds on the body of the Application and the Supporting Affidavit of Paul Munyao sworn on the 16th November, 2022 together with 9 Exhibits attached thereto. The Plaintiffs had opposed the said Application vide filing of a Replying Affidavit sworn by Rachael Bessie Dzombo on the 31st March, 2023, it had a 40 Pages Exhibit in opposition of the Application.
9. The Learned Counsel intimated that the Defendant averred "inter alia that: -
 - a. That this suit was similar in all respect as Mombasa HCCC No.52 of 2013 which was compromised vide a consent.
 - b. The Plaintiffs failed to make monthly installments as agreed, hence defaulting and now proceeded to file the instant case.
 - c. The consent entered in the earlier suit settled the matter and Plaintiffs had not applied for review, variation and or setting aside those terms.
 - d. This matter was res-judicata and hence this suit should be struck out since it was an abuse of the Court process.
10. The Learned Counsel submitted that on the other hand the Plaintiffs have averred in the Replying Affidavit inter alia as follows;
 - a. Suit No. HCCC No. 52 of 2013 is totally different in that the matter was commenced by way of Plaint, whereas this one by way of Originating Summons. The two (2) Suits were distinct, hence not the same.
 - b. The matter herein is not res-judicata.
 - c. The Plaintiffs did make full payment as per the Consent filed in HCCC No.52 of 2013.
 - d. The Defendant upon full payment refused to discharge its Titles. Statements for loans were sought but the Defendant refused to avail the same, inspite of several reminders.
 - e. A Forensic Audit report was done and the same was shared with the Defendant, the report clearly shows that the Plaintiffs had fully paid and even over paid the Defendants. Indeed a sum of Kenya Shillings Sixty Two Million Three Fifty Four Thousand Five Sixteen hundred and Fourty Nine cents (Kshs.65,354,516.49) had been paid to the Defendant by the Plaintiffs. The Plaintiffs statement is nil. Hence, they are entitled to prayers sought in the Originating Summons.
 - f. The prayers herein are different from one in HCCC No. 52 of 2013 Mombasa.
 - g. The Suit herein is not res-judicata because inter alia prayers in both matters are different.



- h. Suit commenced in two [2] different ways.
 - i. None of prayers in this matter was ever raised in HCCC No. 52 of 2022 Mombasa
 - j. HCCC No. 52 of 2013 Mombasa was determined and closed.
 - k. The loan facility was fully paid hence need for this Suit to get inter alia Discharge of Charge and Further Charge and release of the said Titles.
 - l. The Orders sought by Defendant was so drastic and ought not issue or at all.
 - m. The Suit had merits and was not an abuse of the Court process.
11. The Learned Counsel submitted that this Honourable Court to “inter alia” determine the following issues:
- a. Whether this Suit was res - judicata to the Suit filed by the Plaintiff in Mombasa HCCC No.52 of 2013.
 - b. Whether this Honourable Court had jurisdiction to hear this matter.
 - c. Was the Defendant entitled to Orders sought in its Application dated 16th November, 2022?
 - d. What were the orders as to costs?
12. On the 1st issue, the Learned Counsel submitted that this matter was not res – judicata and invited the Honourable Court to have a look at prayers in the Plaint in HCCC No. 52 of 2013 the same is dated 11th April, 2013 which read as follows:
- a. A declaration that the Defendants action to cause the advertisement of property known as L.R. No. MN/III/18378/34 and developments thereon 5 without any statutory notice is unlawful;
 - b. A permanent injunction does issue restraining the Defendant either by itself, its agents, employees and any other person whomsoever and howsoever from entering unto, trespassing unto, constructing on, offering for sale, selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiff title, quiet possession and enjoyment L.R. No. MN/III/18378/34.
 - c. An Order that the Defendant does provided the Plaintiffs with a detailed Statement of Loan account on subject to the charges on L. R. No. MN/ III/18378/34 Loans.
 - d. The Plaintiffs be allowed to sell a number of the apartments on L. R. No. MN/III/18378/34 equal to settle the sums of money owing to the Defendant within a reason time determined by the Court.
 - e. Any other order or award the Honourable Court may deem just and expedient to grant in the circumstances.
 - f. Costs of and incidentals of this Suit.



13. The Learned Counsel invited the Honourable Court to look at the prayers in the Originating summons herein which were:-
- a. That the Defendant be compelled by an Order of this Court to execute a Discharge of Charge and Further Charge registered against the TITLE NO. CR.29078 [Plot No.18378/34] Mtwapa Creek on 25th September, 2007 and 24th February,2009 respectively.
 - b. That an Order do issue as against the Defendant for the immediate release to the Plaintiffs their Original Title Document for Title known as CR. 29078 of PLOT NO.18378/34 MTWAPA CREEK together with the duly executed Discharge of Charge and a Further Charge to the Plaintiffs for registration.
 - c. That the costs of this Originating Summons to be borne by the Defendant.
14. The Learned Counsel submitted that the Honourable Court should take note that the two sets of prayers are extremely different hence this Honourable Court ought not Order that this matter is re-judicata. The Learned Counsel also invited the Honourable Court to have a look at the Defendant's Application and more so the Exhibit marked KCB-7 which is the Consent recorded. None of the issues being requested in the Originating Summons were recorded in the said consent, hence this matter was not res-judicata.
15. The Learned Counsel urged the Honourable Court to make a finding that this matter was distinct and separate from Mombasa HCCC No.52 of 2013 and proceed to dismiss the Defendant's Application. The Learned Counsel relied on the following cases.
16. In the case of "Nairobi HCA Civil Appeal No. 117 of 2018 Ngugi Kiuna v Nelly Wanjiru Mwenje & Four (4) Others:
- " 1. This is an appeal from the ruling of Aganyanya, J. (as he then was), delivered on 23rd October, 2007 in which the Court allowed an application by the 3rd and 4th respondents for dismissal of a suit (H.C.C.C. No. 986 of 2003 at Nairobi) that had been filed by the appellant on the ground that it was res judicata, on account of an earlier decision by Shields, J. in H.C.C.C. No. 2850 of 1980.
19. Section 7 of the *Civil Procedure Act* states 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."
 20. In *Maithene Malindi Enterprises Ltd v Kaniki Karisa Kaniki & 2 Others* [2018] eKLR, this Court held that for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:



“(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

21. The plea of Res Judicata also applies not only to points upon which the court was actually required by the parties to pronounce itself on, but also to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. See *Henderson v Henderson* [1843] 67 ER 313.

22. The Plaintiff that was filed by Benson Kamau Mwenje in H.C.C.C. No. 2850 of 1980 was not included in the record of appeal. But the decree is there. It shows that the claim was for:

“A. (1) A declaration that the plaintiff has acquired title to 0.95 Acres or ½ of land reference No. Muguga/Gitaru/278 by adverse possession and that the second Defendant hold (sic) the one half of the said land in trust for the plaintiff and the 2nd Defendant’s title to the said 0.95 Acres or thereabouts has been extinguished.

(2) A declaration that the 1st Defendant has at all material times held one half of the land measuring 0.95 acres in land reference No. Muguga/ Gitaru/278 in trust for plaintiff.

B. An order that the 2nd defendant to transfer to the plaintiff forthwith the one-half acre of land reference No. Muguga/ Gitaru/278 which one half thereof measured 0.95 Acres or thereabouts free from all encumbrances.

C. Costs of this suit and interest thereon on court rates.

D. Any other or further relief this Honourable Court may deem fit to grant.”

26. In H.C.C.C. No. 986 of 2003, the prayers that the appellant sought were as follows:

“i. A declaration that the Kikuyu Land Disputes Tribunal award and subsequent decree issued in LND 16/20/27/2002 was made



contrary to the provisions of the Land Disputes Tribunal Act and without any jurisdiction and is therefore null and void.

- ii. A declaration that the decree issued by the Senior Principal Magistrate's Court in Kikuyu Misc. Application No. 24 of 2002 is contrary to the principles of natural justice; was issued without following the due process of the law and the Court lacked jurisdiction. Consequently, the said decree is null and void.
 - iii. A declaration that the decree issued in Senior Resident Magistrate's Court Kiambu Civil Suit No. 36 of 2003 is contrary to the provisions of natural justice; was issued without following the due process of the law; the Court did not have jurisdiction and hence is null and void.
 - iv. Permanent injunction to restrain the Defendants by themselves/agents and/or their family members from entering upon the suit premises or in any way interfering with the quiet possession of the suit property.
 - v. An Order directing the 5th Respondent herein to recall all the title deeds issued after the subdivision of the suit property and cancel the same.
 - vi. An eviction order against the 1st, 2nd, 3rd and 4th Defendants (Respondents herein, their servants, and/or agents) from occupying the suit premises.
 - vii. Special damages of Kshs.500,000/=.
 - viii. General damages.
 - ix. Any other relief the Court may deem just to grant.”
27. Looking at the issues and the prayers sought in H.C.C.C. No. 986 of 2003, it is evident that they were not directly and substantially similar to the ones in H.C.C.C. No. 2850 of 1980. Secondly, Shields, J. did not make orders that were adverse to the appellant's title. The learned judge briefly examined the history of the parcel of land in dispute and concluded that Benson Kamau Mwenje, the plaintiff, had no valid claim to the share of the suit land. Consequently, the court dismissed the suit in favour of the appellant, the then registered owner.
28. H.C.C.C. No. 2850 of 1980 was not about ownership of Muguga/Gitaru/278, it sought declaratory orders that the Plaintiff therein had acquired title to 0.95 acres or one half of the said parcel of land by adverse possession and that the appellant



herein held that that one half in trust for the plaintiff. The court rejected that contention and dismissed the suit.

29. In the circumstances, it cannot be said that the issues raised in H.C.C.C. No. 986 of 2003 had been heard and finally determined in the former suit.
30. For the aforesaid reasons, we agree with the appellant that Aganyanya, J. erred in law in summarily dismissing the appellant's suit as being res judicata. This finding alone is dispositive of the entire appeal and it would be superfluous for us to consider the other grounds of appeal, and more so because a determination of some of them may be prejudicial to the parties in any subsequent litigation before the appropriate court.
32. Having found that the appellant's suit was wrongly dismissed, and summarily so, we allow this appeal, set aside the ruling dated 23rd October, 2007 in H.C.C.C. No. 986 of 2003 and substitute therefor an order that the said matter be and is hereby remitted to the Environment and Land Court for hearing and determination. The appellant is awarded costs of this appeal.

17. In the case of "Nairobi HCA Appeal No. 270 of 2014: Evanson Gachie Kariuki & 2 Others v Francis Kariuki Wachira & Another:

"16. The learned Judge appropriately restated the law on res judicata as provided in Section 7 of the *Civil Procedure Act* (Cap 21 of the Laws of Kenya); the Judge also correctly cited judicial authorities on res judicata. The essence of the doctrine of res judicata was aptly set out by this Court in *William Koross v Hezekiah Kiptoo Komen & 4 OTHERS* [2015] EKLK:-

"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

17. The issue in this appeal is whether the doctrine of res judicata applies to the pleadings and plaint filed by the appellants. It is the appellant's contention that res judicata is inapplicable as fraud and misrepresentation in the transfer and registration of the respondents as proprietors of the suit property was not in issue in the High Court Succession Cause and before the Kikuyu Land Tribunal.
19. In dismissing the appellants' suit on the basis of res judicata, the Judge held that the appellants ought to have raised the issue of fraudulent transfer of the suit property in the previous proceedings before the High Court Succession Cause and the Kikuyu Land Tribunal. It is apparent that the Judge acknowledged that fraud was not an issue in the previous proceedings. It is settled law that fraud must be specifically pleaded and proved.



23. Before the High Court and the Kikuyu Tribunal, contestation of fraudulent transfer of the suit property to the respondents was not in issue and could not be determined. Fraud is proved largely by oral evidence tested through cross-examination. In the instant matter, we find that the Judge erred in dismissing the appellants' suit based on res judicata without giving due consideration to the recommendation of the Tribunal that points towards an error in documentation; the Judge erred in failing to take into account the allegation that a ruling of the High Court delivered by Ombija, J. may be relevant to the dispute before the court. The Judge ought to have called for and examined the alleged ruling by Ombija, J. which prima facie is relevant to the suit. Further, the Judge erred in failing to consider that allegations of fraud cannot be dismissed summarily when the same was not in issue in previous suits. In failing to consider the foregoing, the Judge erred in finding res judicata was applicable to the facts and plaint filed by the appellants.
24. For the foregoing reasons, this appeal has merit. We hereby allow the appeal and set aside in entirety the ruling of the Environment and Land Court dated 21st March 2014. The appellants suit filed as ELC No.654 of 2009 be and is hereby reinstated. Each party to bear its own costs in this appeal and before the Environment and Land Court."

18. Further in the case of "Mombasa ELC No. 134 of 2021 – Suleiman Kuweah Gakuria & Another v Douglas Mwangi & 4 Others:

- " 23. From this provision, the ingredients to satisfy the condition of granting stay of the suit or proceedings in any matter in Court are as follows:-
- a). There has to be a matter pending or previously heard in court;
 - b). The matter involved a subject in issue which was directly and substantially in issue in a previously instituted suit or proceeding.
 - c). The matter must have been between the same parties, or between parties under whom they or any of them claim, litigating under the same title;
 - d). The matter must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The provision of Section 6 is a bar to parallel prosecution of cases in two forums of equal jurisdiction. These two provisions of the law are so intertwined. Thus, the legal justification as to why the provisions of both Sections 6 and 7 of the *Civil Procedure Act* as advanced by the Defendants herein are not applicable here is graphically stated out herein below.

7. "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 or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court'.
24. From the above provisions of the law, for the doctrine of Res Judicata to be achievable, the following the ingredients must to be fulfilled:-



- a. The suit or issue was directly and substantially in issue in the former case
- b. The former suit was between the same parties or parties under whom they or any of them claim;
- c. Those parties were litigating under the same title;
- d. The issue was heard and finally determined in the former suit.
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Expounding on the essence of the doctrine of Res Judicata, the court in “John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR pronounced itself as follows:

“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. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”.

Apart from the subject matter being the suit land, there is no relationship between these two suits at all. The parties and the cause of action is different and distinct.

Furthermore, this suit has not even been heard and finally determined. For that reason, the doctrine of “Res Judicata” as pleaded are inapplicable in the instant case as has been elaborately demonstrated hereof. The Preliminary Objection must fail.”

19. The Learned Counsel further relied on the case of “Mombasa ELC Petition No. 209 of 2015 Geysler International Assets Limited v The Attorney General & 3 Others”:

“ 36. On the issue of Res Judicata

Additionally, the Principles of “Res judicata” is founded under the provisions of Section 7 of the Civil Procedure Act Cap. 21 of Laws of Kenya as raised by the Petitioner.

7. “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 or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court’.



37. From the above provisions of the law, for the doctrine of Res Judicata to be achievable, the following the ingredients must to be fulfilled:-
- a) The suit or issue was directly and substantially in issue in the former case
 - b) The former suit was between the same parties or parties under whom they or any of them claim;
 - c) Those parties were litigating under the same title;
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38. The Petition holds that: - The issues raised in the application is res - Judicata, having been raised by the same parties vide the Grounds of Opposition dated 24th August, 2018 and that in its Ruling dated 14th January, 20219 this Honorable Court conclusively determined the issue by allowing the Petitioner to file Further Amended Petition.

In as much as indeed it’s the same matter that have been involved in all these proceedings but the issues are extremely distinct and different. By then the matter was on whether to amend the Petition or not. The matter was heard and determined allowing the amendment to take place. However, in the instant place the subject matter is to dismiss the Petition against the 2nd and 4th Respondents. Besides the matter has neither been heard nor concluded. Clearly, in the instant case there are no ingredients of Res - Judicata at all as alleged by the Petitioner.”

20. On the 2nd issue No. B, the Learned Counsel averred to the Honourable Court that it had powers and the jurisdiction to hear and determine this matter. This Courts power are guaranteed under Article 162 (2) (b) of *the Constitution* of Kenya 2010. Further this Court’s powers are more specifically provided



under Section 13 of the *Environment and Land Court Act* No. 19 of 2011 and hence the Court has powers and jurisdiction to hear the Originating Summons herein filed by the Plaintiffs. The Plaintiffs were seeking Orders for Discharge of Charge and Further Charge registered against specific Land Titles and that the Original Title Documents be released to the Plaintiffs. These were Land related issues and were are not commercial related issues. Hence the Court had powers to hear and determine this matter. We will refer the Court to the following Authority;

21. In the case of “Mombasa ELC No. 136 of 2021 Zipporah Njoki Kangara v Rock and Pure Limited & 3 Others:

“

- “ 1. The 1st, 3rd and 4th Defendants filed a Notice of Preliminary Objection on 15th September 2021.

That this Honourable court has no jurisdiction over the subject matter properties since they are alleged part of matrimonial property.

15. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

Under Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the ELC (Malindi) in the *Kharisa Kyango v Law Society of Kenya* [2014] eKLR.

Further, in the now famous case of “Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] IKLR dealt with a court, jurisdiction thus: -

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

17. This instant suit, the Plaintiff pursues inter alia the cancellation of the titles issued in the suit properties which she seeks to be declared as matrimonial property. The Defendants claim that this cause of action outs the jurisdiction of this court to hear and determine matrimonial property. In my view, the issue before court is one on the ownership of the suit properties that places the cause of action squarely in the jurisdiction of the ELC Act and consequently the ELC Court.

22. As stated above, the cause of action related to the alleged fraud perpetrated by the defendants in transferring the suit property from the name of the



3rd Defendant to the 1st Defendant, a company owned by the 3rd and 4th Defendant. The Plaintiff has asked court to secure her spousal rights over the matrimonial properties, which in my view fails within Section 28 of the [Land Registration Act](#). The evidence before court, demonstrates that indeed the suit properties were transferred from the 3rd Defendant to the 1st Defendant. Court will make a determination as to who owns the suit property and for that to happen judicial discretion has to be exercised.

a) That the Notice of Preliminary Objection dated 14th September 2021 has no merit. I therefore dismiss it with costs to the Plaintiff.

22. On issue No. C, the Learned Counsel submitted that in light of the above the Defendant was not entitled to the prayers sought. The Orders sought were extremely drastic and could only be allowed in a plain, clear and straight forward matter. This matter was not res-judicata. There were issues that this Honourable Court ought to investigate before it renders its judgment inter alia, the issues raised in the Forensic Audit report, issue of full payment, issue of Non-discharge of the Charge and Further Charge by the Defendant among other many issues. The Plaintiffs' Suit herein was not hopeless or a non-starter, an abuse of Court process and or lacked merit. It raised very many triable issues, it could not be just struck out on allegation of res-judicata which had no basis or at all.
23. To buttress its case, the Learned Counsel made reference to the case of "Mombasa ELC No. E228 of 2021, Enacta Limited v Martin Mureithi Nagari & 5 Others":

"36. In all fairness, and under the critical interpretation of the Law, although the portion of the rule requiring filing of an authority under seal is couched in mandatory terms, the portion on consequences of non - compliance is not. In such circumstances, therefore, the Honorable Court assumes the inherent discretion on whether or not to order for the striking out of any pleading that is non-compliant. In exercising that discretion, the Court must in all such cases be alive to its obligations under the provision of Article 159 of [the Constitution](#) of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities.

7. In other words, taking that the purpose of verifying the contents of the Plaintiff may be attained by rejecting a defective affidavit, that defect is not fatal at all. It is one that could be cured by an order made by this Court that a fresh and complying one be made and filed on record. This principle is very applicable to the instant case herein.

38. Further, the Court is aware of the binding decision by the Court of Appeal in "Kenya Commercial Finance Co. Limited v Richard A Onditi [2010] eKLR" for the proposition of law that a court of law should weigh the options available to a party before striking out an action. In this matter, I do not consider that the justice of the case would be served by striking out but rather the Plaintiff ought to be given a chance to avail the resolution before the matter is fixed for hearing of the suit by taking of evidence. In my view, whether or not there was given authority under seal is a matter of evidence that certainly cannot be resolved exhaustively through the current interlocutory Notice of Motion application filed by the 3rd Defendant/Applicant herein. I would reiterate the foregoing



determination and find that even authority to the application could be filed at any time before the evidence was taken.

39. I do not consider that failure to exhibit an authority under seal should result, in the present dispensation, to striking out of a Plaintiff or Counterclaim in the first instance. The court should give the litigant a chance to comply with the rules. It is only after failure to comply that such drastic consequences as striking out should be resorted to or come into operation.

III. Conclusion and Disposition

40. Consequently, upon conducting an intensive analysis of the framed issues herein, on preponderance of probability, this Honorable Court now proceeds to make the following determination. Specifically, these are the orders:- a) That the Notice of Motion application dated April 12, 2022 by the 3rd Defendant lacks merit and hence be and is hereby dismissed with costs. b) That the Plaintiff be and is hereby granted Sixty (60) days leave from the date of delivery of this ruling, to file and serve fresh Verifying Affidavit with full compliance with the provision of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. c) That for expediency sake, all facts remaining constant, this suit should be fixed for hearing and final determination within the next One Hundred and Eighty (180) days without fail, that is on May 17, 2023. There should be a mention of the matter on March 1, 2023 for Pre-Trial Conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010.

24. In the case of:- “Nairobi HCA Appeal No. 324 of 2005: Kenya Oil Company Limited – v Jayantilal Dharamshi Gosrani”:

“This is an appeal from the “order” of the High Court (Ransley, J.) whereby the learned Judge rejected an application to strike out the plaint and instead gave leave to the respondent herein to file a verifying affidavit within seven days.

The broad principle, reiterated by this Court in *D.T. Dobie & Company (K) Ltd. v Muchina* [1982] KLR 1 is in essence that the discretion of the court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from judgment seat unless the case is unarguable, apply with more force to discretion to strike out a plaint for want of a verifying affidavit. We say with more force because the omission to file a complaint verifying affidavit does not go to the root of the claim.

In our humble view, to allow the appeal is to circumvent the determination of the matter on merit and to render the pending appeal futile. A court of law cannot allow such a route to be used to defeat the matured rights of the respondent.

For those reasons, we find no merit in this appeal and we accordingly dismiss it with costs to the respondent.

25. Further in the case of “Mombasa HCA Appeal No. 8 of 2019: Safepak Limited v Henry Wambega & 11 Others”:

“27. On the question of jurisdiction of the ELC to deal with historical land injustice claims, the learned Judge had this to say:



“Section 13(1) of the Environment & *Land Act* gives this Court original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of *the Constitution* and with provisions of this Act or any other written law relating to environment and land I am not bound with the findings of the case of Stanley Ngethe Kinyanjui supra that parties should not constitutionalize simple processes which should be done through ordinary claims as there are different positions taken on this particularly the provisions of Article 159 (2) of *the Constitution* that requires the Courts to look at the substance rather than form. However, the petitioners claim is premised on a matter clearly provided for under Article 67 of *the Constitution*. The mode of resolving the dispute is provided to be done through the processes given under Section 15 of the *National Land Commission Act*. However, because this Court also enjoys original jurisdiction on land & environment matters, I find nothing wrong with a party who choses this Court as his first vehicle to ventilate his claim. (See the decision of Munyao J in the case of Ken Kasinga v Daniel Kiplagat Kirui & 5 others [2014] eKLR.”

30. We bear those principles in mind in considering the question whether it is within the mandate or jurisdiction of the ELC to deal with historical land injustice claims.
 34. The upshot of the foregoing is that, in our judgment, the ELC was right in holding that it has jurisdiction over the matter.
 40. The principles on which the court acts when dealing with a motion to strike out a suit are captured in *D.T Dobie & Company Ltd v Joseph Mbaria Muchina & another* [1980] eKLR where Madan, JA cautioned that a court seized of such application should act cautiously and carefully and that “a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal”.
 41. Undoubtedly the power and the remedy of striking out a suit has its place and a court should not shy away from giving it in the warranted circumstances. The power to strike out pleadings is not mandatory but permissive. It is a discretionary power. As already stated, it is a power to be exercised sparingly. It should only be exercised in the clearest of cases. It is a remedy that is sometimes considered to be draconian and unless a case be absolutely clear, that remedy should not be granted.
 42. In the present case, the Judge found that the pursuit of relief by the petitioners in different suits in different forums over the same cause of action was an abuse of the process of the court. The consequence of that finding was a matter entirely in the discretion of the Judge. It does not follow that the only remedy the Judge could grant was to strike out the petition. It was in our view a proper exercise of discretion by the Judge to direct the petitioners to elect, within the time the Judge stipulated, which of the actions to pursue and which to discontinue.
26. In conclusion and on the last issue, the Learned Counsel urged the Court once it found the Defendant’s Application to be a non-starter, lacked merit and proceeds to dismiss and costs out to follow the event.



V. Analysis & Determination.

27. I have carefully read and considered the pleadings herein by the Plaintiffs and the Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
28. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the suit breached the doctrine of Res judicata hence offending the provisions of Section 7 of the *Civil Procedure Act* taking that it is the same as ELC No. 52 of 2013?
 - b. Whether the Defendant is entitled to the orders sought.
 - c. Who will bear the Costs of Notice of Motion application 16th November, 2022.

Issue a). Whether the suit breached the doctrine of Res judicata hence offending the provisions of Section 7 of the *Civil Procedure Act* taking that it is the same as ELC No. 52 of 2013

29. Under this sub – heading, the main substratum of this objection by the Defendant herein is whether this suit offends the doctrine of “Res Judicata” or not. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the *Civil Procedure Act* which states:

“No court shall try any suit 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 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.”
30. 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...”
31. Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.
32. The doctrine of res judicata has stated has been explained in a plethora of decided cases. In the recent case of the “Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR”, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

 - a) The suit or issue was directly and subsequently in issue in the former suit.
 - b) The former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.



- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

33. The court explained the role of the doctrine thus:

“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 pragmatic and commonsensical 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 or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”

34. In order therefore to decide whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- (i) what issues were really determined in the previous case;
- (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- (iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

35. From the pleadings and submissions, it is not in dispute that the subject matter in the previous litigation and the current suit is the same. Both the former suits and the present suit are between the same parties. The plaintiffs’ argument, however, is that the issues in the instant suit were not adjudicated and/or determined in the previous litigation.

36. In the case of “E.T v Attorney General & Another [2012] eKLR” where it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”



37. In the case of “Gurbachau v Yowani Ekori (1958) EA 450”, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the Vice Chancellor in “Henderson v Henderson (1) 67 ER 313 at page 319” wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time”

38. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists a consent Judgment in Mombasa HCCC No. 52 of 2013 where in the parties came to an agreement to settle the matter and the consent recorded in Court on 17th October, 2013 where the parties agreed to compromise the suit and terms were agreed upon. The common issue in the previous suit and instant suit was the charge on the suit property. The Plaintiffs and the Defendants in Mombasa HCCC No. 52 of 2013 are the same as the ones in this instant suit.

39. The Defendant contended that by way of a Plaint dated 11th April, 2013 and filed in Court on the same date, the Plaintiffs’ commenced the suit in Mombasa HCCC No.52 of 2013 seeking the following reliefs: -

- a. A declaration that the Defendant’s action to cause the advertisement of the property known as LR No.MN/III/18378/34 and developments thereon without any statutory notice is unlawful;
- b. A permanent injunction does issue restraining the Defendant either by itself, its agents, employees and any other person whomsoever and howsoever, interfering with the Plaintiff title, quiet possession and enjoyment LR No.MN/III/18378/34;
- c. An order that the Defendant does provide the Plaintiffs with a detailed statement of loan account on subject to the charges on LR No.MN/III/18378/34 loans;
- d. The Plaintiffs be allowed to sell a number of the apartments on LR No. MN/III/18378/34 equal to settle the sums of money owing to the Defendant within a reason time determined by the Court;
- e. Any other order or award the Honourable Court may deem just and expedient to grant in the circumstances.



40. Contemporaneous to the aforesaid Plaintiff, the Plaintiffs filed under urgency a Motion application dated 11th April, 2013 seeking the following orders:-
- a. That pending hearing inter partes, an order of injunction does issue restraining the Defendant either by itself, its agents, employees, and any other person whomsoever and howsoever from entering unto, trespassing unto, constructing on, offering for sale, selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiffs' title, quiet possession and enjoyment of all that property known as LR No.MN/III/18378/34 and developments thereon.
 - b. That pending hearing and determination of this suit, an order of injunction does issue restraining the Defendant either by itself, its agents, employees, and any other person whomsoever and howsoever from entering unto, trespassing unto, constructing on, offering for sale, selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiffs' title, quiet possession and enjoyment of all that property known as LR No. MN/III/18378/34 and developments thereon.
 - c. That the Defendant does supply the Plaintiffs with all the statement of accounts for the loan accounts no. MG0907100325 and MG0907100325.
 - d. That cost of this application be provided.
41. According to the Defendant, the Plaintiffs have expressly admitted at paragraph 3 of the Supporting Affidavit sworn by Rachel Bassie Dzombo on 03rd June, 2022 that matters touching on the repayment of the outstanding loans advanced to the Plaintiffs by the Defendant ["Bank"] were similar matters in issue between the same parties in Mombasa High Court Land Case Number 52 of 2013; Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investments Limited v Kenya Commercial Bank Limited in which a Consent Judgment was recorded in Court on 17th October, 2013 with the suit therein being marked as fully settled.
42. Applying the stated law to the facts before me, it is clear that the Plaintiffs seek to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the Plaintiffs are trying to litigate a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suits.

Issue No. b). Whether the Defendant is entitled to the orders sought.

43. The Defendant has sought to have the suit struck out on grounds that it is res judicata. Order 2 Rule 15 is drawn as follows :-

- “ 15. Striking out pleadings [Order 2, rule 15.]
- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or



- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court.

44. It will be seen from the above that the court has liberty to strike out a suit if it is satisfied of the matters set out in the rule. Thus, where it is apparent that a case has been filed in order to abuse the process of court, the court may proceed to strike it out.

45. One of the grounds for striking out a suit is that it offends the provisions of Order 4 rule 1 1(f) of the Civil Procedure Rules. Order 4 rule 1(1)(f) provides that:

“1(1) The plaint shall contain the following particulars-

- (f) An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaint.”

46. The side note to Order 4 Rule 1 reads; “Particulars of Plaint”. Paragraph 3 of the Supporting affidavit sworn by Rachel Bassie Dzombo on 03rd June, 2022 that matters touching on the repayment of the outstanding loans advanced to the Plaintiffs by the Defendant were similar matters in issue between the same parties in Mombasa High Court Land Case Number 52 of 2013; Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investments Limited vs Kenya Commercial Bank Limited in which a Consent Judgment was recorded in Court on 17th October, 2013 with the suit therein being marked as fully settled. I am persuaded to join minds with the argument of the Defendant that this suit is res judicata and therefore satisfying this ground of striking out.

47. In the case of “Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the court expressed itself thus:

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

48. Similarly, in the case of “D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR”, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

49. I am persuaded by the Defendant’s averments and grounds for striking out of the present suit as set out in the preceding paragraphs is merited. In my opinion allowing this suit to proceed would be allowing



the Plaintiffs to engage in an abuse of the process of court and rubbish orders that have been made by another court in a previous suit. That ought not to be encouraged. This suit, in my view is an abuse of the process of court, and filed for purposes of avoiding compliance with Consent judgment entered by the parties and adopted by a Competent Court, and for that reason, it is liable to be struck out.

ISSUE No. c). Who will bear the Costs of Notice of Motion application 16th November, 2022 and of the suit filed on 3rd June, 2022.

50. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh” eKLR [2014] and Cecilia Karuru Ngayo – v Barclays Bank of Kenya Limited, eKLR [2014].
51. In the instant, as Court finds that the suit is liable for striking out on the grounds that it is res judicata and also an abuse of the Court process therefore the Defendant’s Notice of Motion application succeeds and therefore they have the costs of the application.

VI. Conclusion & Disposition

52. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.
53. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order: -
 - a. That the Notice of Motion application dated 16th November, 2022 being meritorious be and is hereby allowed in its entirety.
 - b. That the suit as filed by the Plaintiffs commenced by way of Originating Summons dated 03rd June, 2022 and filed in Court on the same date together with the ensuing proceedings is hereby struck out on account of being res judicata to Mombasa High Court Civil Case Number 52 of 2013; Nicholas Dzombo, Rachael Bessie Dzombo and Danicha Investments Limited vs Kenya Commercial Bank Limited and that closes the case altogether.
 - c. That costs of the suit by way of Originating Summons dated 3rd June, 2022 and of the Notice of Motion dated 16th November, 2022 are hereby awarded to the Defendant.

It is so Ordered Accordingly

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF OCTOBER 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.**
- b. M/s. Saringi holding brief for Mr, Omwenga Advocate for the Plaintiffs/Applicants.**



c. Mr. Amakobe Advocate for the Defendant/Respondent.

