



Rono & another (Suing as the legal representatives and administrators of the Estate of the Late Mathias Kimnyole Langat) v Cove Investments Limited (Environment & Land Case 95 of 2019) [2022] KEELC 104 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 95 OF 2019**

AA OMOLLO, J

MAY 5, 2022

BETWEEN

JOHANA KIPROTICH RONO 1ST RESPONDENT

JOSEPH RONO LANGAT 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF THE LATE MATHIAS KIMNYOLE LANGAT**

AND

COVE INVESTMENTS LIMITED DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 27th August, 2021. The said application expressed to be brought under Order 2 Rule 15(1) (b) (c) and (d), Order 13 Rule 2 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
2. The application seeks the following Orders:
 1. That the Plaintiffs' suit be struck out with costs to the Defendant/Applicant for being frivolous, vexatious and a gross abuse of the court process.
 2. That judgement be entered in favour of the Defendant on admission as claimed in the counterclaim.
 3. That costs of this application be borne by the Plaintiffs.



3. The application is based on the grounds on its face and supported by the affidavit sworn by one Kenneth Kiplagat the secretary of the defendant/applicant. The supporting affidavit is sworn on the 27th day of August, 2021.

FACTUAL BACKGROUND

4. This suit was commenced by the Plaintiff dated 10th August, 2019 and filed on 21st August, 2019. The Plaintiffs are the legal representatives of the estate of the late Mathias Kimnyole Langat. They pray for judgment against the Defendants for:
 - a. Kshs. 97,005,759/= being the total/aggregate amount of loss of earnings/income suffered by the Plaintiffs for the loss of use of 100 acres of land comprised in land parcel No. Nakuru/ol'ongai Phase 11/34 by the Defendant from the year 2000 to the year 2007 (both years included)
 - b. Costs of this suit be borne by the Defendant
 - c. Any other or further reliefs that this Honourable Court may deem fit to grant.
5. The Defendant filed its statement of Defence and Counterclaim on 12th February, 2021 where it prayed for:
 - a. A declaration that the title of the said Nakuru/ol'ongai Phase 11/34 has been extinguished by the Defendant's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act;
 - b. A declaration that the Defendant has acquired the leasehold interest in land parcel Nakuru/ol'ongai Phase 11/34 by its adverse possession thereof for a period of more than 12 years i.e. from at least 2000 to the present and as admitted by the Plaintiff.
 - c. An order do issue requiring and directing the Land Registrar Nakuru to register the Defendant Cove Investments Limited as the lessee of land parcel Nakuru/ol'ongai/phase 11/34 in place of the late Mathias Kimnyole Lang'at and in place of any other person(s) succeeding him.
 - d. The costs of this suit be borne by the Plaintiffs.
6. This background is set out so as to understand the nature of proceedings and appreciate the orders sought in the current application.

THE DEFENDANT/APPLICANT'S CONTENTION.

7. The Defendant/Applicant through its secretary contends that it understands the Plaintiff as well as the witness statements and documents filed by the Plaintiffs in support of their claim of Kshs. 97,005,759/=.
8. It contends that the claim for Kshs. 97,005,759/= is based on the alleged conversion of LR No. Nakuru/Ol'ongai Phase 11/34 by the Defendant for the period between the years 2000 to 2018.
9. It contends further that that the Plaintiffs' characterization of the Defendant's occupation of the suit property as a conversion is frivolous and constitutes a gross abuse of the court process when the circumstances of the Defendant's possession of LR No. Nakuru/Ol'ongai Phase 11/34 is taken to account.
10. It is its contention that it took possession of the suit property in the year 2000 after paying Kshs. 15,976,000/= to the late Mathias Kimnyole Langat pursuant to an agreement for sale.



11. The Applicant further contends that the late Kimnyole had agreed to give the Defendant possession of the subject property as a purchaser upon payment of 50% of the purchase price.
12. It is its contention that in June 2017, the Plaintiffs/Respondents in this suit as legal representatives of the late Mathias Kimnyole Langat offered to refund the said Kshs. 15,976,000/= with interest at the rate of 21% (Kshs. 3,354,960) making a total of Kshs. 19,330,960/= and that their contention that it did not pay half of the agreed purchase price before taking possession is false and amounts to prosecution of a dishonest case.
13. It further contends that the payments were made in the period between August 1999 and September 2000 which payments were acknowledged by the late Mathias Kimnyole Langat in previous proceedings and in respect of which the Plaintiffs/Respondents offered to make a refund with interest in the year 2017.
14. It is its contention that under the Agreement for Sale the obligation to obtain and provide the consent of the Land Control Board together with all the other completion documents was on the late Mathias Kimnyole Langat as the vendor.
15. It contends further that the late Mathias Kimnyole Langat failed to supply the Defendant/Applicant with the completion documents after receiving the sum of Kshs. 15,976,000/= and sought to invalidate the sale under the pretext that the consent of the Land Control Board had not been obtained which it resisted.
16. It is the Defendant/Applicant's contention that an application for consent of the Land Control Board was prepared on its behalf and given to the late Mathias Kimnyole Langat who was to lodge it with the Land Control Board and that he stated that he had lodged it before the board but he later claimed that the transaction was invalid because he had not applied for the consent.
17. It further contends that it is the responsibility of the vendor to provide the consent to transfer the property which he failed to do so and that the Defendant/Applicant sought extension of time to apply for the consent of the Land Control Board in Nakuru ELC Petition Number 360/2017 which was granted in the judgement that was delivered on 18th May, 2021.
18. It is its contention that while Nakuru ELC Petition Number 360/2017 was ongoing before Hon. Justice Ohungo, the Plaintiffs/Respondents in this matter filed this suit and only served it after a period of one year had lapsed and after the court had retired to do its judgement.
19. It contends that there is clear evidence of mischief and a pervasion of the course of justice and that the matters in the Plaint herein amount to an abuse of the court process and should be struck out as the cause of action is res judicata. That the Plaintiffs/Respondents ought to have filed a counterclaim in the previous suit.
20. It also contends that its possession of the suit property has been held to be lawful by a court of competent jurisdiction and that the Plaintiffs/Respondents were ordered to vacate the suit property after forcibly entering it during the pendency of ELC Petition No. 360 of 2017 while an order of maintenance of status quo was in existence.
21. The Defendant/Applicant also contends that the Plaintiffs/Respondents having been ordered to vacate the suit property could only Appeal against the said order and that a new suit could not revive a cause of action which had been extinguished.



22. It is its contention that the parties in Nakuru ELC Petition Number 360/2017 were the same as this suit and that the firm of M/S Karanja Mbugua & Company Advocates representing the Plaintiffs herein were also on record in the previous suit.
23. It contends further that the Plaintiffs/Respondents acknowledge in their Plaint that the Defendant/Respondent has been in exclusive possession of the subject property since the year 2000 which is a period of over twelve years which entitles it to the ownership of the suit property under the doctrine of Adverse Possession.
24. It ends its deposition by stating that the Plaintiffs/Respondents suit herein be struck out and judgement entered in its favour as prayed in the counterclaim.

THE PLAINTIFFS'/RESPONDENTS' RESPONSE

25. In response to the application, the Plaintiffs filed a Replying Affidavit sworn on 15th October, 2021. It is sworn by one of the Plaintiffs-Jonah Kiprotich Rono. It is sworn on his own behalf and on behalf of the co-Plaintiff.
26. He deposes that he together with his Co-Plaintiff are administrators of the Estate of their late father Mathias Kimnyole Langat (deceased).
27. He deposes further that he has read and understood the Defendant/Applicant's application dated 27th August, 2021 and that in response to prayer (a) which is seeking for the Plaintiffs/Respondents suit to be dismissed for being vexatious and a gross abuse of the court process, he states that for a suit to be labelled as frivolous, the Applicant must show the court the suit has no substance and that putting a defence to that suit would be a waste of the court's time and yet in this matter, the Defendant/Applicant has filed a defence in which it admits the court's jurisdiction.
28. He also deposes that it is upon the Defendant/Applicant to prove that the Plaintiffs/Respondents suit is vexatious by establishing that the suit has no foundation which it has not done so and that the Plaintiffs suit is neither evasive nor obscuring the real issues for determination.
29. He deposes further that the Defendant has admitted that its legal rights to the suit property are yet to be determined in court and that is why it is seeking to be declared as entitled to the suit property by way of adverse possession and that until that determination is made, the Plaintiffs/Respondents will be deemed by the law to be the owners.
30. He deposes that the present suit is not res judicata because the issues raised in Nakuru ELC Petition Number 360/2017 were constitutional in nature and that legal issues could not be canvassed in a constitutional petition.
31. He also deposes that he has been advised by his advocates on record that the counter claim is more res judicata than the Plaintiffs/Respondents claim as provided for under Section 7 explanation 4 of the [Civil Procedure Act](#).
32. He deposes further that one of the prayers sought in the constitutional petition was for the Hon. Deputy Registrar to execute any necessary transfer forms necessary for obtaining the Land Control Board's consent which the court granted in its judgement delivered on 18th May, 2021.
33. He also deposes that the said orders were stayed on 17th June, 2021 and that until the judgement is affirmed by the Court of Appeal, the Defendant/Applicant is a trespasser on the land and that the Plaintiffs are entitled to bring the present suit against it.



34. The Plaintiff/Respondent deposes that a Plaintiff should be struck out in the clearest of cases and with a lot of caution on the part of the court lest a party be driven from the seat of justice without being heard.
35. He deposes further that there exists both factual and legal issues in this case which cannot be dealt with summarily without hearing the parties and their witnesses and their evidence tested on cross examination.
36. It is in Response to the prayer for judgement to be entered in favour of the Defendant on admission as claimed in the counterclaim, he reiterates that the counter claim is *res judicata*. That for a court to enter judgement on admission, the admission must be clear, unambiguous, unequivocal and sufficient and that in this case, unlike liquidated claims, the Defendant is enjoined to prove its counterclaim at a full hearing where oral evidence is taken and tested on cross examination and that the law does not provide for interlocutory judgements in an unliquidated case.
37. He ends his deposition by stating that from the material on record, the Notice of Motion dated 27th August 2021 should be dismissed with costs.

ISSUES FOR DETERMINATION

38. The Defendant/Applicant filed its submissions on 24th January, 2021 while the Plaintiffs/Respondents filed their submissions on 1st March, 2022. The Defendant/Applicant also filed further submissions on 3rd March, 2022.
39. The Defendant/Applicant in its submissions filed on 24th January, 2021 addressed the court on the question relating to tort of conversion and whether it is liable for it. The defendant applicant also submits that the Plaintiffs/Respondents did not raise the issue that it was guilty of the tort of conversion in respect of the suit parcel and that they had every opportunity to do so. The Defendant/Applicant then urges the court to strike out the Plaintiffs/Respondents suit and allow the prayers in the counterclaim.
40. The Plaintiffs/Respondents addressed the court on the following issues:
 - a. Whether the counterclaim filed by the Defendant/Applicant is *res judicata*.
 - b. Whether the pleadings of a tort of conversion were to be included as a relief in a constitutional petition.
41. The Defendant/Applicant in its further submissions addressed the court on the Judicial decisions relied upon by the Plaintiffs/Respondents. The decisions seek to answer the question whether the issues raised in this suit are *res judicata vis a vis* the issues determined by the court in Nakuru ELC Petition Number 360/2017. It also submits on the response by the Plaintiffs/Respondents that the tort of conversion is a continuing wrong that is not subject to a plea of Statutory Limitation.
42. After perusal of the Application, the affidavit in support and annexures, the response to the application, the rival submissions filed in respect of this Application, my considered view is that the issues for determination at this point are:
 - a. Whether this suit is *res judicata*.
 - b. Whether judgement should be entered in favour of the Defendant as prayed in the counterclaim
 - c. Whether this suit is frivolous, vexatious and an abuse of the court process.



- d. Which party bears the cost of the application?

ANALYSIS AND DETERMINATION.

- A. Whether this suit is Res Judicata.
- B. Whether judgement should be entered in favour of the Defendant as prayed in the counter claim.
43. I will address the first two issues for determination together. The Defendants/ Applicants seeks orders that this suit be struck out. This prayer is hinged on two things:
- a. That it is frivolous, vexatious and an abuse of the court process
 - b. That it is Res judicata.
44. The Defendant/Applicant contends that the Plaintiff's characterization of its occupation and possession as conversion is frivolous, vexatious and an abuse of the process of the court. It is his submissions that this is on account of the circumstances under which it came into occupation.
45. The Defendant/ Applicant has gone to great lengths to explain the circumstances under which it came into occupation of the suit land.
46. I am particularly drawn to the judgment in ELC petition no. 360 of 2017 which offers useful insights on the twin issues of Res judicata and alleged frivolous and vexatious nature of the suit.
47. In ELC petition no. 360 of 2017, the petitioner is the Defendant/ Applicant herein. The Plaintiffs herein were the 1st Respondents while the Attorney General was the 2nd Respondent.
48. The judgment sets out the prayers sought in the petition and I reproduce them as hereunder:
- a. Leave be granted for the Petitioner to apply for land control board consent under section 8 of the [Land Control Act](#) relying on the good and valid reasons disclosed in the Petition herein and by further reasons that the parties herein has, at the execution of the agreement for sale herein, agreed under which the vendor would obtain the Land Control Board Consent.
 - b. The Deputy Registrar of this Honourable court be mandated to execute any necessary forms, transfer instruments necessary for obtaining the said Land Control Board Consent.
 - c. A declaration that the 1st Respondent hold LR. No. Nakuru/Ol'Ongai Phase 11/34 in trust for the Petitioner and the Respondent be directed to formally transfer the suit property and execute the transfer documents within 14 days failing which the Deputy Registrar of this court be authorized to execute such transfer documents in favour of the Petitioner and the Land Registrar Nakuru to forthwith cancel the title to the suit property issued in the name of the 1st Respondent and re-issue a new title in the name of the Petitioner.
 - d. Compensation for the loss and damage as set out at paragraph 4.5.4

IN THE ALTERNATIVE

- e. A declaration that S6 of the [Land Control Act](#) in so far as it invalidates controlled land transactions where land control board consent has not been obtained not more than six months after agreement for sale has been executed is unconstitutional null and void and that



such consent may be obtained at any time before the transfer is registered on the grounds that S8 (1) of the Land Control Act in declaring that dealing in a controlled transaction is null and void unless consent is obtained within six months of the making of the agreement for the controlled transaction:

- i. Does not comport with any rational legitimate purpose of the Land Control Act;
 - ii. Is unconscionable, harsh and unreasonable;
 - iii. Amounts to an unjust enrichment in favour of one party against the other;
 - iv. Unnecessarily interferes with the constitutional rights of citizens to own and deal in property as envisaged in article 40 of the Constitution;
 - v. Is against the public policy of Kenya.
- f. Any other or further order that this Honourable court may deem fit to grant.
- g. costs

49. I am constrained to continue giving highlights in the judgments in Nakuru ELC Petition No. 360 OF 2017 so as to appreciate the contention of the Applicant and the response thereto. At paragraph 65 the learned Judge states;

The circumstances in William Kipsoi Sigei v Kipkoech Arusei & another(supra) are on all fours with the situation herein. Although the Petitioner has slightly under 5% of the purchase price to pay, the terms of the agreement for sale are clear as to when the balance of the purchase price was payable: the deceased had to obtain and provide the Petitioner with all the consents necessary for completion of the transfer 15 days before the completion date. I am satisfied that the equitable doctrine of constructive trust and proprietary estoppel are applicable herein and that the Petitioner is entitled to a declaration that the 1st Respondents hold the suit property in trust for it and that an order of extension of time to apply for the consent should issue. Having sold the suit property to the Petitioner and having received almost the entire purchase price and having put the Petitioner in possession for about 21 years now, the 1st Respondents have a duty in equity to complete the transaction. (Emphasis is mine).

50. At paragraph 67 of the Judgment, the learned Judge makes the following orders:

- a. The Petitioner to deposit in court the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) being balance of the purchase price due to the 1st Respondents. The deposit to be made within 21 (twenty-one) days from the date of delivery of this judgment.
- b. Time within which to apply for consent of the Land Control Board in respect of the transaction over the parcel of land known as LR. No. Nakuru/Olongai Phase 11/34 comprised in the Agreement for Sale dated 1st December, 1999, between Mathias Kimnyole Langat and the Petitioner herein, is hereby extended for a period of 6 (six) months from the date of delivery of this judgment.
- c. The 1st Respondents to execute all necessary forms and transfer instruments necessary for obtaining the said consent of the Land Control Board within 30 (thirty) days from the date of delivery of this judgment. In default, the



Deputy Registrar of this court to execute all such necessary forms and transfer instruments on behalf of the 1st Respondents.

- d. A declaration is hereby issued that the 1st Respondents hold the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 in trust for the Petitioner.
- e. The 1st Respondents are hereby directed to formally transfer the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 to the petitioner and to execute the transfer document within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute the transfer document on behalf of the 1st Respondents.
- f. Upon transfer being registered in favour of the petitioner and issuance of title in the name of the petitioner, the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) referred to under order number a) above be released to the 1st Respondents.
- g. Costs of the petition are awarded to the Petitioner and shall be borne by the 1st Respondents.

51. Subsequent to delivery of the judgment in Nakuru ELC Petition No. 360 of 2017, 1st Respondents (Plaintiffs/Respondents herein) sought and were granted orders of stay pending appeal on 17/6/21. The orders of stay were to remain in force for a period of one year from the date of delivery of the ruling unless otherwise extended by the court of Appeal.

52. As at the time of writing this ruling, the orders of stay pending Appeal are still in force.

53. The law relating to Res Judicata is found in section 7 of the *Civil Procedure Act*. The wording of the sections is as follows:

7. Res judicata.

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.

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

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

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

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

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



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

54. The legal doctrine of Res judicata has been explained in numerous decisions both in and outside of Kenya. The Defendant/Applicant has made reference to the decision in *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others*, Nairobi CA No. 105 OF 2017 [2017] eKLR. This decision sets out the elements that must be satisfied for a bar of Res judicata to be effectively raised and upheld. We are reminded that the elements are not in disjunctive but conjunctive terms- meaning that all the elements must be present for a determination that a suit is Res judicata. The elements are:
- a. The 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.
55. As rightly observed in that decision, the doctrine of Res judicata is intended to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.
56. The decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR also offers useful guidance on the element of Res judicata. It rendered the elements as;
- a. The former judgment or order must be final;
 - b. The judgment or order must be on merits;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of parties, of subject matter and cause of action.
57. In *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR, the court of Appeal while restating its position in the *IEBC v Maina Kiai* case (*Supra*) quoted from the said decision in explaining the aim of the doctrine of Res judicata as follows;
- “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and



brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

58. Therefore, in order for a bar of Res judicata to be effectively raised and upheld, the Defendant/Applicant must meet the criteria set out in section 7 of the [Civil Procedure Act](#) read together with numerous decisions that have been rendered by Kenyan courts on this matter.
59. The first criterion is that matters directly and substantially in issue in the former suit must be directly and substantially in issue in the present suit.
60. The Plaintiffs/Respondents in their submissions contend that the counterclaim raised by the Defendant in the present suit is also Res judicata explaining that the reliefs sought in the counterclaim are same as those that were sought in the petition (former suit) and that a court of competent jurisdiction heard the parties and pronounced itself on the said petition. The Plaintiffs/Respondents urge this court to instead find that the counter claim by the Defendant is Res judicata.
61. The prayers sought in the counter claim are a declaration that the title of the suit property has been extinguished by the Defendant’s adverse possession thereof and that the Defendant has acquired the leasehold interest in the suit parcel by its adverse possession thereof on account of admission by the Plaintiff that it has been in possession from the year 2000 to the present.
62. I agree with the Plaintiffs/Respondents contention that indeed these issues were dealt in the petition and that the court gave orders that the Respondents transfer the suit land to the Defendant/ Applicant herein. This decision was not on account of adverse possession but on account of the equitable doctrine of constructive trust and proprietary estoppel. This court cannot now purport to make another decision on ownership on the basis of adverse possession.
63. From the Plaintiffs/Respondent’s submissions they do not, however, believe that the present suit as filed by them is Res judicata. They have reproduced the prayers in the Plaint reiterating that the claim by them is for loss of earning suffered by them between the year 2000 and 2017 when the Defendant/ Applicant herein converted the suit land and that their continued use of the suit land caused them loss of earnings. According to them the loss of earnings is Kshs. 97,005,759.
64. The Plaintiffs/Respondents contend that loss of earnings is not a constitutional issue and that they could not have urged it in the constitutional petition as submitted by the Defendant/Applicant. The Plaintiffs/Respondents in support of this contention have referred to the decision in [Godfrey Paul Okutonyi and others v Habil Olaka and another](#) [2018] eKLR, [Benard Murage v Fine Serve Africa Ltd & others](#) [2015] eKLR and [Patrick Mbau Karanja v Kenyatta University](#) [2012] eKLR.
65. It is not in contention that there is a former suit filed in this court and that former suit is Nakuru ELC Petition No. 360 of 2017. The prayers sought in the petition and in this suit have been outlined in the preceding paragraphs. It is apparent that the subject matter in the petition and in the present suit is the parcel of land known as LR. No. Nakuru/Ol’ongai Phase 11/34.
66. The Plaintiff states that the question of loss of earnings arising from the tort of conversion could not have been raised by it in the constitutional petition. I am minded to distinguish the decisions relied on by the Plaintiff in support of this contention. In the case of [Godfrey Paul Okutonyi \(supra\)](#), the Learned Judge was speaking to the trend adopted by litigants in instituting constitutional petitions to resolve matters that were not constitutional in nature and were in fact matters that could reasonably be resolved by statute as they had no bearing on denial, infringement, violation or threat to rights and fundamental freedoms. In the decision of [Patrick Mbau \(supra\)](#) the Learned Judge observed that rights and fundamental freedoms are owed by the government towards its citizens and that citizens



can therefore claim them against the government but not against individuals or group of individuals. The Learned Judge goes on to state that simple matters between individuals which are purely civil or criminal in nature should follow the route of Article 165 (3) and to be determined as such. I note that article 165 establishes the High Court and sets out its jurisdiction. The decision in [Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot](#) [2021] eKLR, the learned Judge also cautions against disguising matters as constitutional petitions which matters, he states, do not call for the courts constitutional interpretive mandate under the bill of rights provision. In this case the Learned Judge found that there was no violation or infringement of any constitutional provision under the bill of rights and proceeded to strike out the petition.

67. My observation is that Nakuru ELC Petition No. 360 OF 2017 was instituted and dealt not with fundamental rights and freedoms but the constitutionality of section 6 and 8 of the [Land Control Act](#) among other prayers. These prayers have been set out in the preceding paragraphs.
68. In my view, therefore, nothing would have been easier than for the Plaintiff/Respondent to either object to the court determining the other questions that were not constitutional in nature or also seek the courts audience on matters such as the ones being raised in the present suit. In my view the conduct of the Plaintiffs/Respondents is akin to acquiescence. The judgment in the petition shows that apart from a pronouncement that the sections 6 and 8 of the [Land Control Act](#) were constitutional, this court gave other orders that transcended the constitutional question raised.
69. Explanation 4 to section 7 of the [Civil Procedure Act](#) offers further guidance on this subject. It provides:

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

70. In an effort to further demonstrate that the contention by the Plaintiffs/Respondents on inability to raise the question of compensation for the alleged tort of conversion cannot hold, I wish to refer to the decision in [Kenya Commercial Bank Limited v Benjob Amalgamated Limited](#) [2017] eKLR. Wherein the learned Judge quoted the decision in *Mburu Kinyua v Gachini Tutu* (1978) KLR 69. In it, Madan, J Quoting with approval Wilgram VC in [Henderson v Henderson](#) (1843) 67 ER 313 stated:

“Where a given matter becomes the subject of litigation in, and of 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 in special circumstances) permit the same parties to open the same subject of litigation in respect of a 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 judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis is mine)

71. A continued reading of the said judgment in ELC Petition Number 360 of 2017 at paragraph 60 casts more light on the fact that alleged unlawful use and occupation by the defendant applicant herein and the claim for compensation as set out in this suit was already dealt. In particular the Learned Judge states;

From the material on record, it is apparent that the petitioner has been in possession since 1999, for a period of 21 years now, pursuant to the sale agreement dated 1st December



1999. (Emphasis is mine). The 1st Respondent suggested that they regained possession in 2018. Suffice it to state that the 1st respondents' attempt to get possession in the year 2018 was found by this court in the ruling dated 27th July 2018 to have been in violation of an order of the court. The court granted a mandatory injunction reinstating the petitioner in possession. The 1st respondents cannot use that short-lived unlawful interruption to claim that they have been in possession.

72. The obiter dictum as contained in paragraph 60 of the judgment lays the basis for the final order issued in the judgment. The order was that the Plaintiffs/Respondents herein do execute necessary documents to enable the Defendant/Applicant herein obtain consent of the Land Control Board so as to have the suit parcel transferred to the Defendant/Applicant herein.
73. The Plaintiffs/Respondents herein had every opportunity to ensure that the issues of compensation for alleged unlawful use raised in the present suit were raised, heard and determined in the former suit by way of a cross petition or otherwise. Section 13 (7) of the *Environment and Land Court Act* provides that this court in exercise of its jurisdiction shall have power to make and order and grant any relief as the court deems fit and just including:
- a. Interim or permanent preservation orders including injunction
 - b. Prerogative orders
 - c. Award of damages
 - d. Compensation
 - e. Specific performance
 - f. Restitution
 - g. Declaration; or
 - h. costs
74. The Plaintiffs/Respondents didn't raise the issue of compensation in the former suit and they had every opportunity to do so. They are barred from doing so now.
75. I have stated in the preceding paragraph and I state again that the petition dealt with question pertaining to constitutionality of certain sections of the *Land control Act* among other questions that were not constitutional in nature. The Plaintiff/Respondent did not raise any objection to them being dealt in this court, this court has rendered itself on all the questions that were put before it. The only recourse, in my view available to Plaintiff/ Respondent is to Appeal and they have.
76. I do not wish, I have no intention and shall not be seen as sitting on Appeal against a decision by a Judge of this court. I am persuaded enough to deem the issues being raised in the present suit as having been directly and substantially in issue in the former suit expressly and by virtue of explanation 4 to section 7 of the *Civil Procedure Act*. The Learned Judge while hearing the petition addressed himself to them and gave judgment.
77. In *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR, Kiage, JA cites the decision in *Civicon Limited v Kenya Revenue Authority & another* [2014] eKLR. This decision was rendered by Muriithi, J and the Learned Judge of Appeal observed as follows;

Muriithi, J after examining various decisions on the subject, expressed himself quite strongly on the impropriety of parties attempting to reopen and relitigate decided issues in original



form through the subterfuge of clothing them in constitutional garb; “I agree with the judicial policy that is variously set out by the authorities relied by the 2nd Respondent-Peter Ng’ang’a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No. 203 of 2006 and Ventaglio International SA and Anor v The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under article 165(6) of *the Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of Appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings (emphasis is mine)

78. The second criterion is that the suit must be between the same parties, or between parties under whom they or any of them claim. As observed in the preceding paragraphs the parties in this suit are the same as those in Nakuru ELC Petition No 360 of 2017, save for the Attorney General. This means that the second element for raising a bar of Res judicata has also been met.
79. The third criterion for success in raising Res Judicata as a bar is that that the judgement in the former suit must be final. The finality of the decision in Nakuru ELC Petition No 360 of 2017 is not in doubt. The Judgement in the petition was delivered on 18th May, 2021. The terms of it have been set out in the opening paragraphs of this ruling. Subsequently, an order of stay pending Appeal was granted on 17th June, 2021 which order is in force until 17th June, 2022 unless extended by the Court of Appeal.
80. The fourth criterion is that the judgment or order must be on merits. At paragraph 7 of the Judgement in Nakuru ELC Petition No 360 of 2017, the Learned judge explains that the Petition was heard partly through oral testimony and partly through affidavit evidence.
81. The fifth criterion is that the judgement must have been rendered by a court having jurisdiction over the subject matter and the parties. Judgment was rendered by this court on 18th May, 2021. There is no record of a dispute on the question of jurisdiction or allegation that the court lacked jurisdiction, more importantly, none has been raised in opposition to this application.
82. In the decision of The *Independent and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, The Court explained the role of the doctrine of Res judicata and stated:

“...The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and 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 foundations of res judicata thus rest in the public interest for swift, sure and certain justice...”
83. For the reasons set out in the foregoing paragraphs, I find that this suit and counterclaim are Res judicata. It is in public interest that all litigation must, sooner than later, come to an end. Equity,



justice and good conscience also require that a party who has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

84. My finding on Res judicata is adequate to settle this matter but I am inclined to render myself on the question whether this suit is frivolous vexatious and an abuse of the process of the court.

C. Whether this suit is frivolous vexatious and an abuse of the process of the court.

85. In *Civicon Limited v Kenya Revenue Authority & another* (*supra*) it was held that;

“...I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional Petition or indeed any other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter...”(emphasis is mine)

86. In *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, the Learned Judges of Appeal quite eloquently and elaborately discussed the question of abuse of process of the court while citing decisions from South Africa and Nigeria. They say;

“To re-inforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In *Beinosi v Wiyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again, the Court of Appeal in Abuja, Nigeria in the case of *Attahiro v Bagudo* 1998 3 NWLL pt 545 page 656, stated that 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 bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case *Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined by Karibu-Whytie JSc

“ The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- a. “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action 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 courts 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 a respondent's notice.
- d. (*sic*) meaning not clear)
- e. Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the Respondent.”

- 87. The circumstances in this case are on all fours with concept of abuse of the court process as set out in (a) (b) and (c) in the Nigerian case of *Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 by Karibu-whyte J Sc and relied upon by the Court of Appeal in Muchangia Investment Ltd Case (Supra).
- 88. I find, therefore, that this suit is an abuse of the court process.

C. Which party bears the cost of the application?

- 89. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

DISPOSITION

- 90. The Upshot of the foregoing is that the court finds that this suit together with the counterclaim are Res judicata and an abuse of the process of this Honourable Court.
- 91. Consequently, this suit and counterclaim are struck out with no order as to costs.
- 92. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF MAY 2022.

L. A. OMOLLO

JUDGE.

In the presence of: -

No appearance for the Defendant/Applicant.

Mr. Karanja Mbugua for the Plaintiffs/ Respondent.

Court Assistant; Ms. Jeniffer Chepkorir

