REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CONSTITUTION PETITION CASE NO. 48 OF 2019

COUNTY GOVERNMENT OF KILIFI

GEORGE CHONDO WANJE.....PETITIONERS

VERSUS

THE REGISTRAR OF TITLES & OTHERS....RESPONDENTS

RULING

1. Before me for determination is the Notice of Motion dated 15th February, 2021 and the Notice of Preliminary Objection filed on 16th February, 2021 by the 4th, 5th, 27th, 29th, 30th, 31st, 32nd, 34th, 39th, 41st, 43rd, 44th, 45th, 46th, 50th, 51st, 52nd, 53rd, and 54th Respondents seeking to have the Amended Petition dated 14th July, 2020 struck out on the grounds that the court lacks jurisdiction to determine the issues raised therein since the matter is res judicata and therefore an abuse of the process of the court. It is the Applicants' contention that the Petition herein is scandalous, frivolous and vexatious. The Applicants aver that the legality of the process of amalgamation of Plot Nos. 323/111/MN and 334/MN and the subsequent subdivisions of the same have been the subject of proceedings and Judgement in HCCC No. 732 of 1991 and the Civil Appeal and the Judgement thereof of the court of Appeal in Civil Appeal No. 125 of 1997 and High Court Civil suit No. 64 of 2004 which were all in favour of the 4th Respondent/Applicant herein.

2. The application is supported by the affidavit of William O. Wameyo sworn on 15th February, 2021. He has annexed copies of the Judgment in the said cases.

3. In his submissions dated 26th February, 2021, Mr. Wameyo, learned counsel for the Applicants cited the provisions of Section 7 of the Civil Procedure Act and submitted that this court lacks the jurisdiction to hear and determine the issues as raised in the Amended petition herein since the issues raised therein have been the subject of proceedings in the former suits mentioned hereinabove. Counsel relied on the case of ***Kenya Commercial Bank Limited –vs- Benjoh Amalgamated Limited [2017] eKLR*** where the court stated:

> **"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;**
>
> **a. The suit or issue was directly and substantially 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."**

d. It was submitted that in examining the rationale of the doctrine, the court in the above case cited the court of Appeal statement in **Independent Electorol & Boundaries Commission –vs- Maina Kiai & 5 Others [2017]eKLR** 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 specter 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 multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judiciary 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."

5. Mr. Wameyo also relied on the court of Appeal decision in ***National Land Commission –vs- Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & Another [2019] Eklr*** in which it was stated.

"The doctrine therefore extends to any issue that ought to be put forth for a conclusive and wholesome, rather than piecemeal, determination of the right and obligations of the parties."

6. Mr. Wameyo submitted that mindful of the above principles, the courts called upon to decide suits or issues previously canvased or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. He referred to Henderson –vs- Henderson[1843] 67 ER 313, (quoted with approval by Madam J in the case of Mburu Kinyua –vs- Gachini Tutu [1978] KLR 69) and submitted that res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

7. Mr. Wameyo cited the provisions of Articles 165(6) and (7) and 23 (1) of the constitution and submitted that this court's supervisory jurisdiction to entertain the issues raised is limited by the said constitutional provisions as the amended petition dated 14th July 2020 raises issues in which the court of Appeal had rendered itself in Civil Appeal No. 125 of 1997, Mwinyi Hamisi Ali –vs- The Attorney General and Philemon Mwaisaka Wawaka through a judgment delivered on 19th September, 1997. That the doctrine of stare decisis binds this court to the findings of the court of Appeal hence this court lacks the jurisdiction to vary the decision of the court of Appeal in Civil Appeal No. 125 of 1997 by granting prayers (b), (c), (d), (e), (f) and (g) as sought in the Amended petition. It was submitted that this court has no powers to entertain the matter as herein as doing so will amount to reviewing an order and supervising the decisions of the court of equal status and a higher court.

They relied on the case of **Kennedy Ellam Wekesa (As the representative of Estate of George Ellam Wekesa –vs- Abdulla Taib (As the representative of Estate of Sheikh Ali Taib 2020 eKLR, and Bellance Development Company Ltd –vs- Francis Gikonyo & 7 Others [2018] eKLR.**

8. In opposing the application and the objection, the Petitioners filed their submissions on 13th April, 2021 through the firm of Madzayo Mrima & Jadi Advocates. It is the Petitioners' case that their grievances are based on matters or issues that have not been subject matter of any previous litigation in respect of the property in dispute. That one of the fundamental issues that arise and ought to be considered and resolved by this court is the legal effect of the occupation by the 2nd Petitioner together with other persons in Plot Nos. 324 and 334 prior to the amalgamation, subdivision and allotment of the same before and after coming into effect of the constitution of Kenya, 2010. It is their submission that the said occupants have acquireed a right of property, duly recognized and protected under Article 40 of the Constitution. That it is not in dispute that the commissioner of lands alienated the disputed property in favour of the respondents or their predecessors in title by virtue of the fact that the said property was public land. That the second petitioner and other persons in occupation before the said amalgamation, subdivision and allotment was effected contend that the failure to consider their right and/or interest at the time was irregular, unlawful and therefore null and void. That the Petitioners' claim is not idle and ought to be given consideration in light of the provisions of Articles 67, 68 and 259 of the constitution which, they argued, have opened a new window for ventilation of present and past injustices against citizens such as the 2nd Petitioner. That Article 67 of the Constitution must have been enacted establishing the National Land Commission in place of the Commissioner of lands and the commission given vide and drastic mandate including management of public land on behalf of the national and county Governments, and clothed with powers to investigate historical land injustices and making recommendations for appropriate redress which recommendations may include revocation of title where appropriate. That the constitution also tasked parliament in mandatory terms vide Article 68(v) to enact enabling legislation of the review of all grants or dispositions of public land to establish their propriety or legality. It was submitted that the matters or issues raised by the petitioners are neither in violation of the principle of res judicata nor in contravention or in excess of the powers or jurisdiction of this Honourable court as provided under Article 165(5) and (7) of the constitution.

9. While conceding that the doctrine or principles of res judicata is aimed at bringing litigation to a conclusive end as set out in Section 7 of the Civil Procedure Act and case Law, the Petitioners submitted that the amended petition herein is not offensive to the principle or doctrine of res judicata as alleged by the Respondents. While relying on the case of ***Kenya commercial Bank Limited –vs- Benjoh Amalgamated Limited (Supra)***, the Petitioners submitted that the court of Appeal in that decision was emphatic that the five (5) set out elements of res judicata are conjunctive rather than disjunctive hence all the said elements must be present before a suit or issue is deemed res judicata on account of a former suit. It was submitted that the Respondents have failed to establish that the Petitioners were parties in the former suits or that the same were brought by parties under whom they or any of them claim.

That the former suits cannot be a bar to the 2nd Petitioner and the other Petitioners and that the issues in the former suits can only bind the parties to whom the other elements set out in the said decisions are applicable, and not the Petitioners herein. The Petitioners further submitted that they cannot be barred from the corridors of justice on account of having failed to bring out the issue of historical injustice visited upon them as occupants of the disputed property taking into consideration that this is a new cause of action that was borne out of promulgation of the constitution, 2010. The Petitioners submitted that this court has unfettered jurisdiction to ventilate disputes such as the one disclosed in the petition and added that there is no friction with National Land commission, and relied on the case of ***Republic –vs- The National land Commission and Another Ex parte Muktar Saman Olow [2015] eKLR***. The Petitioners concluded by submitting that the objection is not only made without any legal foundation, but is also an afterthought and in bad faith. This is because the same was raised only after the Respondents had been served with the Petitioners submissions in respect of the petition herein. Replying on the case of ***D.T Dobie***

Company (Kenya) Limited –vs- Joseph Mbaria Muchina & Another [1980] eKLR, the Petitioners submitted that they have disclosed very novel and reasonable cause of action in the amended petition herein. That the petitioners right to be heard is further fortified by the provisions of Article 50(1) of the constitution, which guarantees the right of hearing of all disputes or grievances as a fundamental right. It was therefore submitted that the objection herein is unsustainable and ought to be dismissed with costs to the petitioners.

10. The application and objection is supported by the other Respondents while the same is opposed by the 8th – 14th interested parties.

11. I have considered the pleadings and the submissions made. The application and the preliminary objection raised by the Respondents represented by Mr. Wameyo is mainly on the ground that the suit is res judicata. Section 7 of the Civil Procedure Act provides as follows:

> **"7. No count 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, ligating 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."**

12. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties relating to the same issues previously and finally determined by any court of competent jurisdiction. As rightly submitted by both parties herein, the res judicata principle is meant to lock out from the court system a party who has had his day in court of competent jurisdiction from re-litigation the same issues against the same opponent.

13. In the case of ***John Florence Maritime services Limited & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR***, the court of Appeal stated that the ingredients of the doctrine of res judicata firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar, secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title, and lastly, that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. The court of Appeal in that case stated 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 repeat themselves on issues already decided upon."**

14. The principles of res judicata were also elaborated in the case of ***Kenya Commercial Bank limited -vs- Benjoh Amalgated Limited (Supra)*** which was cited by both the Respondents and the petitioners.

15. I have perused the Amended Petition dated 14th July, 2020. The Petition is challenging the issuance of land titles of several pieces of land North of Mtwapa Creek in Kilifi County measuring 31.29 hectares or thereabouts, that is to say LR.MN/111/515 contained in Grant Number CR. No. 18627 registered in the name of Philemon Wawaka Mwaisaka and which was subdivided into several plots named therein and registered in the names of the 4th to 50th Respondents. The 2nd to 6th interested parties are said to be the legally registered owners of the subject matter title collectively known as Plot No. 324 (original Number 197(1) and Plot No. 334 (Original Number 197/2). It is the Petitioners' case that the 2nd Petitioner together with others have been in occupation of a portion of the subject matter for a period exceeding thirty five years. The petitioners aver that there are several individuals and families numbering over 1000 in occupation of the subject matter land and to which the public interest is represented by the 1st Petitioner herein. They aver that through operation of the law, the subject land became government/crown land during the pre-colonial period and certificate of titles were issued for Plot Nos. 324 and 334 Section 111 MN Mtwapa Kilifi for a period of about 999 years from 1.1.1935 to 1.1:2934 under the Registered Titles Act Chapter 281 Laws of Kenya (now repealed). The 2nd Petitioner avers that he and other residents remained in peaceful possession of the subject land while utilizing the same as a cultivation area and later as residential area when in or about the year 2003 the 4th to 59th Respondents laid various claims to the subject matter mother land claiming that they had title documents thereto. The 2nd Petitioner avers that he later came to learn that plot Nos. 324 and 334 where amalgamated and thereafter subdivided by the Government and allocated to various individuals from 6th January 1998 without the knowledge or participation of the occupants. The petitioners aver that the original title deeds for Plot Nos. 324 and 334 Sec. 111 MN Mtwapa Kilifi are still in existence and were produced in court during the hearing in another case relating to the subject matter mother land herein being Miscellaneous Application No. 560 of 2004. The Petitioners pray that this Honourable court to uphold the leases for the subject matter mother land being Plot known as 324 and 334 Section 111 MN Mtwapa Kilifi and find that the same pursuant to the promulgation of the constitution 2010 turned into 99 year leases and this became Government/Public land as and/or land in respect of which no heir can be identified by any legal process or the same became public land as a result of surrender and amalgamation as at the 6th January 1988 and further that the process of allocation, subdivision and registration was unconstitutional hence null and void. The petitioners pray that in the alternative, the court finds that the said plots were amalgamated and reversed back to the state and therefore became public land and the subdivision and allocation to various individuals as from 6th January 1988 without involvement of the occupants' is unconstitutional in so far allocation was done to the detriment of the occupiers and people physically in occupation. The petitioners further pray that the court upholds the decision of the 1st interested party herein to declare the subject land a public land settlement scheme with title deeds to be issued to settle the existing people on the said parcels after a procedural allocation. The petitioners therefore pray for the various remedies listed in the amended petition.

16. The application herein and the preliminary objection seeks to have the amended petition herein struck out for inter alia, being res judicata in view of proceedings and Judgements in HCCC NO. 732 OF 1991, Civil Appeal No. 125 of 1997 and HCCC No. 64 of 2004. I have perused the Judgment in Mombasa HCCC No. 732 of 1991, Mwinyi Hamisi Ali –vs- The Attorney General and Philemon Mwaisaka. I note that that suit challenged the decision by the commissioner of lands over parcels Nos. 323/111/MN and 334/111/MN which were acquired, subdivided into various subdivisions and were subsequently allocated to various personalities. The defendants filed a joint defence and counter claim. Plot No. 324/MN was also referred to in that suit. One of the issues that was determined by the court in that case was whether

the plaintiff had acquired right over Plot 324 and 334 by virtue of adverse possession. The court heard the parties in that case and delivered judgment on 18th September, 1995.

17. I have also perused the judgment dated 19th September, 1997 in Civil Appeal No. 125 of 1997. The same was an appeal from the Judgement and decree of the High Court of Kenya at Mombasa dated 18th September, 1995 in HCCC NO. 732 of 1991. No doubt, the subject matter of the appeal were Plot Nos. 324 and 334. The same Plots were also referred to in the rulings dated 3rd November, 2006 and 18th February, 2008 in HCCC No. 64 of 2004.

18. In the petition herein, the Petitioners claim is based on the fact that the 2nd Petitioner and several other individuals are in occupation of the said parcel Plot Nos. 324 and 334. From the documents filed, and in particular the Judgments and ruling annexed herein, it is clear that the former suits and the present suit are based on the same claim and the same cause.

The suit properties in all the suits are Plot Nos. 324 and 334 Section III mainland north. In the former suit, Judgement was entered on merit after parties had presented their evidence. Indeed the matter went on appeal to the court of Appeal where judgment was also delivered by the Court of Appeal 19th September, 1997.

19. In **Attorney General & another ET-vs-(2012) eKLR** 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi –vs- NBK & 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, (as he then was) in the case of Njanju –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 face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata….."**.

20. When this court applies the law into the facts before it, it is with no shadow of doubt that the petitioners in this present case have camouflaged the issues that were litigated and adjudicated upon previously before courts of competent jurisdiction. From the pleadings, it is clear that the petition has been brought on behalf of other parties who have not clearly been named. These could as well include the parties in the former suits. What is, however, clear is that the same issues that were litigated upon in the former suits and the ones being raised in the current suit are the same. From the decision cited hereinabove, it is clear that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. The statutory provisions under Section 7 of the Civil Procedure Act are also clear and bars a court from hearing a suit or other issue if the same was substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim. In the Amended Petition, the Petitioners have pleaded that the petition is purely brought on the basis of public interest. The petitioners aver that there are several individuals and families in occupation of the subject parcel of land whose interest is represented by the 1st Petitioner herein. In my view, the named individuals may as well be the parties in the former suits. By virtue of Section 7 of the civil Procedure Act, the Petitioner herein is barred by the doctrine of res judicata.

21. In the result, I find that the Notice of Motion dated 15th February, 2021 and the Notice of Preliminary objection are merited and the same are allowed. The Amended Petition dated 14th July, 2020 is hereby struck out with costs.

22. Orders accordingly.

DATED SINGED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF JUNE, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE