



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. 8 OF 2018

GRACE WAIRIMU SORORA.....1ST PETITIONER

ARTHUR MONTY SORORA.....2ND PETITIONER

=VERSUS=

NATIONAL LAND COMMISSION.....1ST RESPONDENT

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

CHAKA LIMITED.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. The subject petition was filed and/or lodged in Court on the **13th February 2018**, by and/or on behalf of the Petitioners, where the Petitioners have sought various reliefs, namely;

i. A declaration that the issuance by the Commissioner of Lands, predecessors of the 1st Respondent, the Lease hold Title to Kibucho Limited for Land Parcel L.R NO. 209/97/49 on the 23rd March 1993, constituted an abuse of his office and he acted illegally, without power and constitutionally in alienating the said land and the act was ultra-vires, null and void and with no legal effect whatsoever.

ii. Declaration that the alienation of Land Parcel L.R NO. 209/97/49 by the Commissioner of Lands, predecessors to the 1st Respondent, to Kibucho Limited was done in breach of the Rules of natural justice relating to procedurals and Administrative fairness and national values and principle of governance.

iii. Declaration that the unlawful action by the Commissioner of Land, the predecessor to the 1st Respondent to issue a Title to kibucho Limited Land Parcel L.R NO. 209/97/49 has occasioned the Petitioners immense financial loss and damages which the 1st respondent is bound to pay.

iv. An order of Judicial Review in the nature of Mandamus to compel the 1st Respondent and/or its successors entitled to cancel the grant of title Land Parcel L.R NO. 209/97/49 issued by the Commissioner of Lands on the 23rd March 1983, under the Registration of Title Act Chapter 281 Laws of Kenya, now held in the name of Chaka Limited the 3rd Respondent herein.

v. An Order of Judicial Review in the nature of Mandamus do issue to compel the 2nd Respondents and/or its successors entitle to issue a formal Lease of Land Parcel L.R NO. 209/97/49 in to the names of the Petitioners.

vi. The 1st Respondents be ordered to pay general and compensatory damages to the Petitioners for financial losses and agony occasioned to them by its unlawful act.

vii. The Respondents all together jointly and/or severally be condemned to pay the costs of this action to the Petitioners

2. The Petition under reference is supported by a Verifying Affidavit sworn by the 1st Petitioner on the 15th January 2017, to which the Petitioners herein have similarly attached various, albeit numerous annextures. For clarity, the annextures attached to the Verifying Affidavit are voluminous running to a total of 148 pages.

3. Upon the filing and service of the Petition, same was duly served upon the Respondents, who thereafter entered appearance and filed a Replying Affidavit, save for the 1st Respondent herein, who neither entered appearance nor filed any responses.

4. In brief, the 2nd & 3rd Respondents vide their Replying Affidavits sworn on the 23rd October 2018, and 15th October 2018, have denied the claims by and/or behalf of the Petitioners. In short, the 2nd and 3rd Respondent have adverted to various issues, including essentially that the Petitioners herein are abusing the Due process of the Court.

BACKGROUND.

5. From the Petition, Verifying Affidavit and the Replying Affidavits, the latter filed by the 2nd and 3rd Respondents, it is common ground that the subject Petition touches on and/or otherwise concerns the process relating the allocation, alienation and ultimate registration of *Land Parcel L.R NO. 209/97/49*, to **M/s Kibucho Limited**, which process is contested by the Petitioners to have been fraudulent and thus unlawful.

6. It is also evident and/or apparent, that *Land Parcel L.R NO. 209/97/49*, which is the suit property was allocated to M/s Kibucho Limited, by the Commissioner of Lands, now defunct, in exchange for a parcel of land which **M/s Kibucho Limited** had surrendered to the Government and was acquired for purposes of development of Moi Girls School, Nairobi.

7. Upon the allocation, alienation and registration of the suit property to **M/s Kibucho Limited** same appears to have taken a loan facility on the security of the suit property, culminating in to a charge being registered in favor of M/s Pan African Credit and Finance Company Limited, which was latter on placed under liquidation.

8. It also appears from the various Documents on record that despite the charge in favor of M/s Pan African Credit and Finance Company Limited, the chargor, namely M/s Kibucho Limited, did not liquidate and/or otherwise repay the facilities in favor of the chargee, and hence the chargee, (**namely M/s Pan African Credit and Finance Company Limited**, in liquidation), proceeded to and exercised her Statutory Power of Sale, whereupon the suit property was ultimately sold to and transferred in favor of Chaka Limited, now the 3rd Respondent herein.

9. Following the sale vide exercise of Statutory Power of Sale and the ultimate registration of the suit property in favor of the 3rd Respondent, the 3rd respondent was thereby issued with a Certificate of Title, culminating into same being the registered proprietor over and in respect of the suit property.

10. However, upon the transfer and registration of the suit property in favor of the 3rd Respondent, same attempted to take vacant possession but the attempts to enter upon and take possession thereof, were thwarted by Petitioners herein, who similarly laid a claim to and/or in respect of the suit property.

PREVIOUS LITIGATIONS AND CASES

11. It appears that the suit property has been the subject of various Court proceedings, which have pitted one Francis Sorora Oloitiptip, (now deceased) and the Administrators of his estate, now the Petitioners herein, on one hand and the Respondents herein, together with M/s Kibicho Limited as well as Ashford Kang'ethe on the other hand. However, the dispute has essentially been centered on Ownership and Title to the suit property.

12. The first suit was **NAIROBI HCC NO. 339 OF 2007 BETWEEN FRANCIS SORORA OLOITIPTIP Versus KIBUCHO LIMITED** through the Official Receivers. In respect of this suit, the Petitioners' predecessors laid a claim to the suit property on the basis of Adverse Possession. For clarity, the Petitioners' predecessors conceded that indeed the suit property belonged to and was lawfully registered in the name of M/s Kibucho Limited.

13. The second case that was also similarly filed and touching on the same suit property was **NAIROBI HCC NO. 723 OF 2008** between **FRANCIS SORORA OLOITIPTIP Versus KIBUCH LIMITED** through the Official Receiver. In respect of this case, the Petitioners' predecessors having contended that the suit property belonged to him was now challenging the sale and/or disposal thereof by M/s Kibicho Limited.

14. The third suit to be filed was **NAIROBI ELC 340 OF 2010 BETWEEN GRACE WAIRIMU SORORA Versus THE CITY COUNCIL OF NAIROBI**. The crux of this particular matter was the Title to the suit property which is also the basis of the current suit.

15. The other suit filed was **NAIROBI ELC 564 OF 2021 BETWEEN ASHFORD KANG'ETHE Versus CHAKA LIMITED & 4 OTHERS**, whereby the 1st Petitioner herein, was an interested party. Similarly, the said case touched on and/or concerned ownership, possession and title to the said suit property.

16. The fifth suit, was **NAIROBI ELC NO 592 OF 2010 BETWEEN GRACE WAIRIMU SARORA Versus CHAKA LIMITED & 4 OTHERS**, whereby the 1st Petitioner herein (who was the Plaintiff) also contested the propriety, validity and/or legality of the Title to the suit property, which at the material time, was registered in the name of the current 3rd Respondent.

17. The sixth suit, was **NAIROBI ELC NO 29 OF 2012 BETWEEN FRANCIS SORORA OLOITIPTIP Versus KIBUCHO LIMITED**. As pertains to the subject suit the issue was one of Adverse Possession touching on the same parcel of land, which is now the suit property.

18. Other than the aforesaid Civil Proceedings, which have been enumerated herein before, there is also an ongoing Criminal Case namely **NAIROBI CMCC COURT CRIMINAL CASE NO 1825 OF 2017, between the REPUBLIC (AS THE PROSECUTER) Versus GRACE WAIRIMU SORORA (THE ACCUSED)**, whereby the accused has been charged with various counts touching on forgeries of documents pertaining to the same suit property. However, it is worthy to point out that the said criminal proceedings are still pending.

19. Besides, there was also another suit, namely **MILIMANI JR APPLICATION NO. 671 OF 2017 between GRACE WAIRIMU SORORA Versus THE DIRECTOR OF PUBLIC PROSECUTION AND CHAKA LIMITED**, the latter was joined to the proceeding pursuant to an Order of the Court.

20. I must point out that the *ex-parte* Applicant in the Judicial Review proceedings namely **GRACE WAIRIMU SORORA**, sought for an Order that the leave so granted thus operate as an Order of stay of the criminal proceedings. Suffice it to say, that the Order for leave to operate as stay was declined.

21. It is important to note, that all the civil suits, whose details have been addressed in the preceding paragraphs were consolidated into **NAIROBI ELC 592 OF 2010** and thus, were heard together leading to a Judgment which was delivered of the 2nd March 2015, whereby the Honourable Court dismissed all the suits that were filed by and/or behalf of **GRACE WAIRIMU SORORA** as well as her predecessor, namely **FRANCIS OLOITIPTIP SORORA, (NOW DECEASED)**.

22. On the other hand, the Honorable Court declared and/or confirmed that the suit property, namely *Land Parcel L.R NO. 209/97/49*, lawfully belongs to the current 3rd Respondent.

23. Following the delivery of the Judgment in respect of the consolidated cases, the 1st Petitioner herein felt aggrieved and/or dissatisfied and thus filed an Appeal before the Court of Appeal vide **NAIROBI CIVIL APPEAL NO. 64 OF 2015**, whereby the 1st Petitioner herein, (who was the Appellant) challenged the entire of the Judgment and decision of the Superior Court.

24. It is worthy to note that the Appeal before the Honourable Court of Appeal was similarly heard and determined vide Judgment rendered on the 12th May 2017, whereby the Appeal was dismissed. For clarity, the Court of Appeal upheld the Judgment and decree of the Superior Court.

DEPOSITIONS BY THE PARTIES

PETITIONERS CASE

25. From the Verifying Affidavit sworn by the 1st Petitioner, it is contended and hence the position of the Petitioners that the suit property was allocated to **FRANCIS SORORA OLOITIPTIP** vide Letter of Allotment dated the 22nd January 1981, which was thereafter accepted vide written acceptance dated 25th January 1981.

26. Besides, the Petitioners contend that despite the allocation of the suit property, Francis Sorora Oloiptip and the 1st Petitioner, were already in occupation and possession thereof. For clarity, the Petitioners aver that same had constructed various buildings thereon and were operating business thereat.

27. The Petitioners further aver that despite the allocation of the suit property and the occupation thereof, the Commissioner of Lands side stepped their interest and proceeded to allocate the same suit property to M/s Kibicho Limited, without regard to the rights and/or interests of the Petitioners.

28. It is the said allocation, alienation and transfer of the suit Property to M/S Kibicho Limited and thereafter to the 3rd Respondent herein, that has provoked the subject Petition.

2ND RESPONDENT'S CASE

29. Contrary to the deposition by the Petitioners, the 2nd Respondent filed a Replying Affidavit and indicated that the suit Property was lawfully allocated and/or alienated to M/s Kibicho limited on account of compensation for the surrender of land wherein Moi Girls School is located.

30. It is further stated by the 2nd Respondent that at the time of the allocation there was an encroachment on the property comprising of illegal kiosks and open garage's, however the illegal kiosks and open garages were issued with Vacation Notices to pave way for assumption of Vacant Possession by the allottee and subsequently, the registered Proprietor thereof.

31. It is the 2nd Respondent's further contention that the issues at the foot of the current Petition, which essentially seeks declaration of the rightful ownership of the suit Property, had been determined by the Court of Appeal and in this regard the subject Petition is *Res-judicata*.

THE 3RD RESPONDENT'S CASE

32. The 3rd Respondent has contended in a Replying Affidavit filed by Hon. David Kiprono Sudi, that the suit Property was sold to and thereafter transferred to in favor of the 3rd Respondent by **Pan African Credit and Finance Company Limited (in liquidation)**, in exercise of a Statutory Power of Sale.

33. Subsequently, the suit Property was lawfully registered in the name of the 3rd Respondent and in this regard, the 3rd Respondent is the legitimate owner of the suit Property.

34. Other than the foregoing, the 3rd Respondent has also contended that the issue as to the ownership of the suit Property was decided vide Judgment of the Superior Court rendered in **NAIROBI ELC 592 OF 2010**, as consolidated with three (3) other cases wherein the suit Property was declared to belong to the 3rd Respondent.

35. Finally, the 3rd Respondent averred that upon the delivery of the Judgment vide **NAIROBI ELC 592 OF 2010**, as consolidated with three (3) others, an Appeal was lodged by the 1st Petitioner herein via **COURT OF APPEAL CIVIL APPEAL 64 OF 2015**, which was thereby heard and same was dismissed.

36. In short, the 3rd Respondent contended that the subject Petition is barred by the Doctrine of *Res-Judicata* and also constitutes an abuse of the Due process of court. On this account, the 3rd Respondent implored the Honourable Court to dismiss the Petition.

1ST RESPONDENT'S CASE

37. Though the 1st Respondent have variously been represented by Counsel, during the proceedings, same however did not file any Replying Affidavit and/or Grounds of Opposition. In this regard, there is no deposition, by and/or on behalf of the 1st Respondent.

ISSUES FOR DETERMINATION

38. Having examined the Petition, the Verifying Affidavit and the voluminous annexures attached thereto, as well as the Replying Affidavits filed by and/or behalf of the 2nd & 3rd Respondents and also upon considering the Written Submissions filed by the parties, the following issues appear to be pertinent and thus deserving of consideration, with a view to determining the subject matter;

- a. *Whether the Petition herein has been pleaded with particularity and specificity or met the competency threshold, itemizing that articles of the Constitution infringed upon and the manner of infringement.*
- b. *Whether the Petition herein amount to an abuse of the due process of the Court.*
- c. *Whether the Petition is Res-Judicata and thus contravenes the provision of Section 7 of the Civil Procedure Act.*
- d. *Whether the allocation, alienation and ultimate registration of the suit Property in favor of the 3rd Respondent was fraudulent and/or unlawful.*
- e. *Whether the Orders sought by the Petitioners are legally tenable*

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Petition herein has been pleaded with particularity and specificity or met the competency threshold, itemizing the articles of the Constitution infringed upon and the manner of infringement.

39. It is common ground that the Petition herein has been filed and/or mounted by the Petitioners pursuant to and/or on the basis of Article 40 of the Constitution, whereby the Petitioners are contending that the impleaded Respondents have violated and/or otherwise infringed upon their constitutional freedoms and fundamental rights, as enshrined in Bill of Rights.

40. Simply put, what is before the Court is a Constitutional Petition, which is geared towards the protection of the Petitioners fundamental rights and thus same has been brought pursuant to and in line with the Provisions of The Constitution of Kenya and the Mutunga Rules. To the extent that the Petitioners herein alludes to and/or alleges breach, violation, infringement and/or contravention of the fundamental rights accruing from the Constitution, there are certain fundamentals and pertinent rules of pleadings that are attached to Constitutional Petitions. In this regard, it is imperative to take cognizance of the ageless decision in the case of **ANNARITA KARIMI NJERU versus Republic [1979] eKLR**, where the court laid emphasis on the need for particularity and specificity, in the pleadings with reasonable precision, to enable the issue in dispute to be easily discerned and/or appreciated.

41. On the same issue of specificity, it is also important to take cognizance of the Decision of the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, where the Honourable Court of Appeal revisited the proposition in Annarita's case and stated as follows;

“However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with

justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

42. From the decisions alluded to, Supra, it is incumbent upon every Petitioner, the current Petitioner not excepted, to ensure that whenever same approaches the Court, courtesy of a Constitutional Petition, the grievances intended to be ventilated, must be well delineated and the particulars thereof availed. In this regard, it is imperative that the Petitioner does state the relevant Provisions and Articles of the Constitution or such other statute, which have been violated and thereafter proceed to supply the particulars, speaking to the manner of violation and by whom it has been violated.

43. It is not enough for a Petitioner to approach the Honourable Court, claiming his/her Fundamental Rights, have been violated and/or infringed upon and/or otherwise contravened but fails to allude to how such violation has accrued and who has done it. In fact, the current Petition alleges Contravention of Fundamental Rights but same has not identified the Articles of the Constitution and the manner of Contravention.

44. As things stand, it is difficult to grasp and/or appreciate the foundation and/or basis of the Petitioners claim, when it has not been stated by who and how their Fundamental Rights have been violated.

45. Before winding up the deliberations as pertains to the need to plead Constitutional Petitions with the requisite particularity and/or specificity, it is important to observe the significance of pleadings and the central role that pleadings play in the expeditious adjudication and disposal of disputes before the court.

46. To underscore the centrality of pleadings, I refer to and quote the decision in the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, where the Honourable Court observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

47. When the subject Petition came up for directions on the 8th July 2019, the parties herein agreed to have the Petition canvassed and/or disposed of by way of Affidavit Evidence and Written Submissions. Indeed, the Petitioner herein did not seek for leave to amend and/or otherwise improve the status of the Petition. Simply put, the Petitioners were content with the Petition as filed, and at this juncture the Court can only be guided by the Petition as it stands, in determining whether same has met the competency threshold.

48. Without seeking to sound technical, I must observe that the rule requiring particularity and/or specificity in pleadings and particularly Constitutional Petitions, is now established, grounded and is thus trite. Consequently, where there is infraction of the said requirements, the impugned Petition, is a candidate for striking out.

49. Taking into account the foregoing observations, it is now my finding and holding that the Constitutional Petition, filed and/or lodged by the Petitioners, is fatally deficient for want of the requisite particularity and specificity and has thus failed to meet the competency threshold. In short, the Constitutional Petition is incompetent and thus courts striking down.

ISSUE NUMBER 2

Whether the Petition herein amount to an abuse of the due process of the Court.

50. From previous litigations and/or cases filed touching and/or concerning the said suit Property, it is obvious that the issue pertaining to the propriety, validity and/or otherwise, the process of the alienation of the suit Property has been addressed and ruled upon by a Court of Competent Jurisdiction including the Honourable Court of Appeal.

51. On the other hand, it is important to note that in the first case filed, namely **NAIROBI HCC NO. 339 OF 2007** between **FRANCIS OLOITIP TIP SORORA V KIBUCHO LIMITED** through the Official Receiver, the Plaintiff therein, who’s estate is currently being administered by the Petitioners herein, swore a Supporting Affidavit dated the 19th July 2007, whereby same made the following averments;

“.....paragraph 2, that I have sued the defendant claiming land L.R No. 209/9749 (hereinafter referred to as the suit land) situate along Joseph Kang’ethe Road which I have acquired by adverse possession”

“.....paragraph 3, the defendant herein is the registered owner of the suit land (copy of the grant annexed and marked “FS01”

52. It is apparent from the deposition by the Petitioners’ predecessors that the suit land was lawfully belonging to M/s Kibicho Limited and indeed the fact of such registration is conceded in the Supporting Affidavit, who’s excerpts have been reproduced above.

53. Before considering whether the current Petition amounts to an abuse of Court process, I wish to state that where a party impleads Adverse Possession, the irrebuttable presupposition is that the land in question belongs to the Adverse party (read the Defendant), whose title is now being contended to have been extinguished by Operation of the Law. **See Section 37 & 38 of Limitation of Actions Act, Chapter 22 Laws of Kenya.**

54. In the premises, the Petitioners’ predecessors, having conceded that the suit Property lawfully belonged to and was registered in the name of **M/s Kibicho Limited**, who was the original allottee of the suit Property and thus sought to acquire Title by way Adverse Possession, the same party or his representative, (read the Petitioners) cannot now be heard to allege that the allocation of the same property was fraudulent. Simply put, Adverse Possession and fraud are antithetical and having alluded to the Adverse Possession, the same party cannot be allowed to change tact, after failing to succeed on such a claim for Adverse possession, and now start screaming fraud.

55. In my humble view, the Petitioners’ predecessors and by extension the Petitioners, having conceded, that the suit property was lawfully registered in the name M/s Kibicho Limited (who was the predecessor of the 3rd Respondent) cannot now seek to challenge the Title that they had hitherto acknowledged. In this regard, the Petitioners herein amounts to approbating and reprobating, at the same time, which is an aspect of abuse of the Court process.

56. In any event, the Petitioners’ predecessors and the Petitioners herein have filed a total of eight (8) proceedings/cases, inclusive of the current Petition as well as **court of appeal civil appeal 64 of 2015**, whereby same are addressing the propriety and/or the validity of the same Title.

57. Taking into account the number of suits, that the Petitioners’ predecessors and the Petitioners herein have filed touching on the Title of the same Property, one cannot fail to understand, the reason why the Kenyan Judiciary is burdened with several suits, most of which, are as certainly unnecessary.

58. Be that as it may, I must now say that the filing of the current Petition, by the Petitioners, on the face of the Judgment and decree of the Court of Appeal vide **CIVIL APPEAL NO. 64 OF 2015**, which *inter – alia*, declared the 3rd Respondent title lawful, is a classic abuse of the Court process.

59. In support of the foregoing findings and/or holdings I rely in the decision in the case of **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the Court of Appeal held 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..The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. 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.

ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. 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.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

60. Without belaboring the point, I would unequivocally state that the subject Petition fit squarely in the observation of the Court of Appeal, enumerated in the Muchanga investments Limited Case, (Supra). Consequently, I would on this account dismiss the Petition.

ISSUE NUMBER 3

Whether the petition is res-judicata and thus contravenes the provision of section 7 of the civil procedure act.

61. Other than the contention by the Respondents that the subject Petition constitutes an abuse of the due process of the Court, the Respondents had also adverted to and contended that the said Petition, is also barred by the Doctrine of *Res-Judicata*.

62. From the number of cases alluded to in the preceding paragraphs, it is important to recall that the issue of Title to and the ownership of the suit Property was addressed and determined by the Honourable High Court in the Judgment delivered vide **ELC CIVIL CASE NO. 592**

OF 2010, which was consolidated with three others, whereupon the 3rd Respondent herein was declared to be the legitimate and *bona -fide* owner of the suit Property.

63. It is imperative note that following the rendition of the Judgment and/or decision vide **NAIROBI ELC NO. 592 OF 2010**, as consolidated with three (3) other suits, the 1st Petitioners herein, lodged an Appeal to the Court of Appeal via **CIVIL APPEAL NO 64 OF 2015**, which was heard and disposed of vide Judgment delivered on the 12th May 2017, where the Appeal was dismissed.

64. Nevertheless, given the nature of the claims and/or reliefs that have been sought in the Petition herein, it is critical that a segment of the Judgment of the Court of Appeal be reproduced as hereunder;

“in conclusion, as the only issue that was germane was Adverse Possession, we think we have said enough to demonstrate that the Appellant failed to prove the claim. The documents were rightly rejected as forgeries that were merely contrived to support a claim of adverse possession that did not meet the legal threshold. Accordingly, this Appeal lacks merit and is hereby dismissed”

65. From the decision of the Court of Appeal, which is an Appeal filed by the current 1st Petitioner, it was observed that the documents which were being relied upon by the 1st Petitioner (and no doubt, the ones propagated herein) were forgeries and were meant to dupe, mislead and/or otherwise confuse the mind of the Court. Fortunately, the attempt by the 1st Petitioner to mislead the Honourable Court, was rightly nipped in the bud.

66. Be that as it may, the issues pertaining to whether the Petitioners herein were in occupation of the suit Property, whether the Title of the suit Property was fraudulently issued to the 3rd respondent and finally who between the disputants is the lawful owner of the suit Property, were fully decided and/or adjudicated upon by both High Court and the Court of Appeal. For clarity, the verdict was and has remained that the suit Property lawfully belongs to the 3rd Respondent.

67. In view of the foregoing, and given that the issues that color the subject Petition had been dealt with and fully determined by Courts of Competent Jurisdiction, it is my final finding that the doctrine of *Res – Judicata* applies.

68. To vindicate the foregoing finding and holding, I take refuge in the decision in the case of **KENYA COMMERCIAL BANK LIMITED V BENJO AMALGAMATED LIMITED (2017) eKLR**, where the Court of Appeal observed as hereunder;

“To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer’s accounts, has been or could have been raised before the High Court in the previous suits.

The history of this matter shows a vexatious litigant who in spite of having lost all the fourteen cases and despite the costs involved is still willing to further subject KCB and Bidii to ceaseless litigation. Justice demands that a successful party in litigation be allowed to enjoy the fruits of its litigation. It is time the respondent accepted the inevitable despite the consequences such a possibility portends to it and stops further litigation on this long running dispute which has all been about KCB’s exercise of its statutory power of sale and accounts. To open up any further litigation would complicate matters as they stand and goes against the pursuit of finality in this dispute”.

69. Before I depart from the doctrine of *Res-Judicata*, it is important to underline that though same is a Common Law doctrine which has been codified into the Civil Procedure Act chapter 21 laws of Kenya, same does not only apply to the Civil Proceedings but also applies to Constitutional Petitions as well with equal force. To buttress this point, I pay homage to the decision in the case of **E.T V ATTORNEY GENERAL & ANOTHER (2012) eKLR**, where Justice D. S. Majanja, Judge, had occasion to deal with same and proceeded to quote the excerpts in the decision in the case of **THOMAS V ATTORNEY GENERAL OF TRINIDAD AND TUBAGO (1991) LRC 1001**, as hereunder;

“In the case of Thomas v The Attorney General of Trinidad & Tobago [1991] LRC(Const) 1001, the Privy Council stated that it was, ‘satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata.’ The Board referred to a decision of the Supreme Court of India, Daryao and others v The State of UP and Others (1961) 1 SCR 574, 582-3 where Gajendragkar J stated, ‘But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32’.

70. I conclude herein by stating that the Petition herein also runs afoul of the doctrine of *Res-Judicata* and the same is thus legally untenable.

Whether the allocation, alienation and ultimate registration of the suit property in favor of the 3rd Respondent was fraudulent and/or unlawful.

71. Despite the several allegations contained in the Petition, one key issue, upon which the Petition is anchored, is that the allocation, alienation and registration of the suit Property in favor of M/s Kibucho Limited by the office of the Commissioner of Lands, was unlawful and fraudulent indeed after making the aforesaid allegations, in the body of Petition, (see paragraph 16, 18 and 19 of the Petition), the Petitioners then proceeds to seek that the alienation was unlawful, illegal and fraudulent.

72. Nevertheless, it must be recalled that where a Claimant/Petitioner pleads a case, whereby same alleges that an action was illegal, unlawful and/or fraudulent, the rules of pleading require that such a party must therefore supply/particulars thereof. It is then the party alleging fraud, can then proceed to tender evidence, in a bid to prove fraud.

73. However, as pertains to the current Petition, it is worthy to note that the Petitioners herein despite advertng to the illegality and fraud, in the alienation of the suit Property to the original owner, (contrary to the initial acknowledgement of title M/s Kibucho Limited), same have not supplied or pleaded the particulars of fraud and/or illegality. For clarity, see Order 2 Rule 10 (1) of the Civil Procedure Rules 2010.

74. In my humble view, having not supplied and/or pleaded the particulars of fraud or illegality, which have variously been alluded to by the Petitioners, the Petitioners plea of fraud and illegality therefore are stillborn. In this regard, the cause of action founded on the illegality and fraud is patently misconceived.

75. The above notwithstanding and subject to proper pleadings, the Petitioners herein could thereafter be required to tender and/or adduce credible evidence, to support the plea of the illegality or fraud.

76. Nevertheless, It must be noted that the burden of proof on a plea of fraud, is one which is beyond the balance of probabilities, but however not beyond reasonable doubt. Simply put, the standard of proof in cases of fraud, in civil matters is to the intermediate standard, which lies in the middle between balance of probabilities and beyond reasonable doubt.

77. However, in respect of the subject matter, one must not lose sight of the findings and holdings by the Court of Appeal in the Judgment rendered in COURT OF APPEAL CIVIL APPEAL NO. 64 OF 2015, where the Court of Appeal stated that the various documentary exhibits which were being relied upon by the 1st Petitioners (which are similarly the documents in support in the current Petition) were forgeries and were meant to contrive the Petitioners case, to make same look like the Petitioners had a valid case which was/is not the case.

78. The documents relied upon by the Petitioners having been previously found to be forgeries, the same documents, for which the 1st Petitioners have been charged in a Criminal Case, cannot now be relied upon in a bid to prove fraud against the Respondents. To my mind, the documents or a number of the documents (save for the pleadings filed in court and the court rulings), are devoid of probertite valley.

79. Similarly, just as the findings of issues of number 1, 2 and 3 hereinabove, I return a verdict that the Petitioners claims based on illegalities and fraud, other than suffering from fatal defect on account of improper pleading for fraud, same has not been proved as against the Respondents.

80. To fortify, the findings and holdings on the manner of pleading a claim on fraud and the nature of evidence required to prove same, I am constrained to refer in the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi J A as he then was stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

81. Besides, I also wish to refer to the decision in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR, it is trite that;

“..... any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

ISSUE NUMBER 5

Whether the orders sought by the Petitioners are legally tenable

82. With the findings in respect of the first four issues herein, I must now say that the inescapable conclusion is that the Petition by and/or on behalf of the Petitioners, which is riddled with deficiency in the manner of pleadings, coupled with the prevarications, is not only incompetent, but does not also disclose a reasonable cause of action. In this regard, the Petition is ripe for Dismissal and same is hereby dismissed.

COSTS

83. The 1st Petitioner herein, who has since been enjoined by the 2nd Petitioner, have filed a plethora of suits, touching on the title of the suit Property. In one aspect, the Petitioners concede the legitimacy of the Title in favor of M/s Kibucho Limited and by extension the 3rd Respondent, but on the other side, by sidewind same turns around and reprobate.

84. Certainly, the conduct of the Petitioners herein, which includes the ill-fated attempt to overturn the decision of the Court of Appeal vide **civil appeal no. 64 of 2015** through this Petition, must be condemned with Costs.

FINAL DISPOSITION

85. In conclusion, the Petition herein be and is hereby Dismissed with Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the presence of;