



**Timoi Farms & Estates Limited v Ngeny & another (Civil Suit  
32 of 2010) [2023] KEHC 19054 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19054 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 32 OF 2010  
HM NYAGA, J  
JUNE 19, 2023**

**BETWEEN**

**TIMOI FARMS & ESTATES LIMITED ..... PLAINTIFF**

**AND**

**KINGENO ARAP NGENY ..... 1<sup>ST</sup> DEFENDANT**

**FLORENCE CHELANGAT LANGAT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court for determination are two Applications.
2. One is a Notice of Motion by the 2<sup>nd</sup> defendant dated 22<sup>nd</sup> April, 2022 and another Notice of Motion dated 3<sup>rd</sup> May 2023, filed by the plaintiff herein.
3. In the application dated 22<sup>nd</sup> April 2023, the 2<sup>nd</sup> defendant/ applicant had sought the following orders;
  1. That this application be certified as urgent and That the same be heard and orders issued ex-parte in the first instance.
  2. That pending inter-partes hearing of this application, there be a stay of further proceedings That may be instituted by the Plaintiff/Respondent.
  3. That pre-trial directions That were issued by the Court on 24.03.2022 be varied/set aside thus directing That this application be heard on 30.05.2022.
  4. That the plaintiff/respondent's suit as against the 2<sup>nd</sup> Defendant/Applicant be struck out and as the case may be, be dismissed.
  5. That pending the hearing and determination of this application, there be a stay of further proceedings That may be instituted by the Plaintiff/Respondent.



6. That further and necessary directions do issue as the court may please in the circumstances.
  7. That costs be provided for.
4. In the application dated 3<sup>rd</sup> May 2023, the plaintiff/applicant sought the following prayers;
1. That this application be certified and be heard on priority basis.
  2. That pending the hearing and determination of this application interpartes this honourable court be pleased to arrest and hold in abeyance the ruling slated for 24<sup>th</sup> May 2023.
  3. That pending the hearing and determination of this application interpartes this honourable court be pleased to review its orders of 24<sup>th</sup> March 2022 and allow the application dated 20<sup>th</sup> April, 2020 and or enjoin John C. Koech and Brigadier Alexander Sitienei as 1<sup>st</sup> defendants and necessary parties to this suit.
  4. That pending the hearing and determination of this suit this honourable court be pleased to arrest and hold in abeyance the ruling slated for 24<sup>th</sup> May 2023 until this application is heard and determined first.
  5. That this honourable court be pleased to review its orders of 24<sup>th</sup> March 2022 and allow the application dated 20<sup>th</sup> April, 2020.
  6. That in the alternative to prayer 5 above this court be pleased to enjoin John C. Koech and Brigadier Alexander Sitienei as 1<sup>st</sup> defendants and necessary parties to this suit on behalf of the estate of the 1<sup>st</sup> defendant for purposes of full and effectual determination of this suit.
  7. That costs of this application be in the cause.
5. A brief history of the matter is as follows. The plaintiff in this case through an amended plaint dated 17<sup>th</sup> June, 2019 averred That it entered into a sale agreement with the 1<sup>st</sup> Defendant Kipngeno Arap Ngeny for a purchase of L.R No. Nakuru Olenguruone/Amalo/314,315,316 and 321 at Kshs. 23,500,000/= and upon part payment of the purchase price of Kshs.8.7 million. That being desirous of completing the transaction on 12<sup>th</sup> November, 2009 it wrote a letter to the 1<sup>st</sup> defendant/deceased advocate indicating his willingness to complete the payment of the balance price and requested the said defendant to avail a current search certificates on all pieces of land; original Land Certificate; Land Control Board Consent and Rates and Rent clearance certificate from the County Council of Nakuru.
6. The plaintiff averred That it took possession and occupation of the suit property and carried out developments thereon to the value of Kshs. 103,193,600/=
7. It further averred That while awaiting the deceased to avail all the requested documents to complete the sale, the deceased instructed one Joseph Bii to resell the suit properties in disregard of the existing sale of the same properties.
8. The plaintiff contended That the deceased, having sold the suit land to it and surrendered possession thereof had no legal title That could be passed to a third party and therefore the subsequent sale of the aforesaid parcels to the 2<sup>nd</sup> defendant herein was null and void ab initio.
9. It contended that it enjoyed interrupted possession of the land until 1<sup>st</sup> July, 2012 when the Applicant came by way of a court order dated 29<sup>th</sup> June, 2012 and evicted its employees, took occupation of the land and continued to unlawfully pick its tea and claimed that she should compensate it for the value of tea picked and sold during the period of unlawful occupation. It also claimed that Kshs.1million cash was stolen in the process and that the 2<sup>nd</sup> defendant herein threw and damaged 3 chemical Pumps



valued at Kshs. 150,000/=, Furniture, TV Pruning machine, Fertilizer, white wash, wheel barrow, a packing baskets and stationaries all valued at Kshs. 3 million. It thus prayed for Judgement against the 1<sup>st</sup> Defendant/Deceased for: -

- i. An order of injunction restraining the defendant by himself his agents, servants from selling any of the suit property namely Nakuru Olenguruone/Amalo 314,315,361 and 321 until the suit is heard and decided;
  - ii. A declaration that the Plaintiff has fully purchased the suit properties from the defendant;
  - iii. An order for specific performance by the defendant;
  - iv. A declaration that the defendant currently holds the suit property in trust for the plaintiff and holds no legal capacity to sell the same; &
  - v. Costs of the suit.
10. The 1st defendant in its defence and counterclaim dated 23<sup>rd</sup> July, 2012 in ELC 606/2015 similarly reiterated the cause of action as stated above and prayed for judgement against the plaintiff for:-
- i. Dismissal of the Plaintiff's case;
  - ii. A declaration that the 2<sup>nd</sup> defendant herein forceful entry into the suit land was unlawful and illegal and so was the subsequent eviction of the 1<sup>st</sup> defendant's now the plaintiff's workers;
  - iii. A declaration that the Plaintiff now the defendant purchase and transfer of the suit land was subject to the 1<sup>st</sup> defendants' rights;
  - iv. An order cancelling the title deed registering the plaintiff as the registered owner of the suit property;
  - v. An order of temporary injunction against the plaintiff, her agents or servants restraining her from entering, picking tea and in any way interfering with the suit property or the 1<sup>st</sup> defendant's use and enjoyment thereof till the hearing of the Application interpartes;
  - vi. A permanent order of injunction against the plaintiff her agents or servants restraining her from entering, picking tea and in any way interfering with the suit property or the 1<sup>st</sup> defendant's use and enjoyment thereof till the hearing and determination of the suit;
  - vii. An order for compensation for unlawfully picked tea; &
  - viii. Costs of the suit.
11. The 2<sup>nd</sup> defendant filed Nakuru High Court civil suit No. 231 of 2012 at Nakuru against the plaintiff herein, and one Isaya Kiptarus Kimeywo, in which she sought among other prayers that she be declared the rightful/lawful owner of the parcels of land mentioned above. The suit was then transferred to the ELC Nairobi and it became ELC case no. 606 of 2015.
12. In the course of the trial herein, in 2013, the 1<sup>st</sup> defendant passed on. In 2019, the plaintiff filed an application dated 20<sup>th</sup> April 2020, in which it sought to have the suit against the 1<sup>st</sup> defendant revived after it abated, and join the executors of the estate as parties to the suit. In his ruling delivered on 24<sup>th</sup> March 2022, Justice J. Ngugi (as he then was) dismissed that application. That left only the plaintiff's case against one defendant, the 2<sup>nd</sup> defendant.
13. The application dated 22<sup>nd</sup> April 2023 was argued and the court gave a date for ruling on 24<sup>th</sup> May 2023, but before that date, the plaintiff /applicant filed the latter motion dated 3<sup>rd</sup> May 2023. Having



- considered the latter application I stayed the delivery of the ruling in respect to the first motion, and directed that I would deal with the two applications simultaneously.
14. The court was made aware of the delivery of Judgment in Nairobi ELC case No. 606 of 2015, which had been pending at the time the first application was filed.
  15. In response to the plaintiff's application, the Representatives of the estate of the 1<sup>st</sup> Defendant namely John C. Koech and Brigadier (RTD) Alexander Sitienei, filed a Notice of Preliminary Objection (P.O.) dated 18<sup>th</sup> May, 2023.
  16. The P.O. is brought under Order 51 Rule 14(1)(a) of the [Civil Procedure Rules, 2010](#) and it is based on the grounds that: -
    - a. All the issues that have been raised in the in Application before court are now Res judicata.
    - b. Application dated 3<sup>rd</sup> May, 2023 does not meet the threshold that has been set in a wealth of decisions that has been made by various courts in regard to granting review orders under Order 45 (1) and (2) of the [Civil Procedure Rules, 2010](#).
    - c. The Application before court is scandalous, frivolous and vexatious and it amounts to an abuse of the court process.
  17. The P.O was argued orally before this court on 22<sup>nd</sup> May, 2023.
  18. The Counsel for the defendants/Respondents, Mr. Sigira submitted that the suit was now res judicata in view of the Judgement that was delivered in Nairobi ELC No. 606 of 2015 on 18<sup>th</sup> April, 2023.
  19. The Counsel further argued that this court is functus officio since all the issues between the parties were determined with finality in the aforesaid ELC matter.
  20. He also submitted that the court had already made a finding that any action against Kipngeno Arap Ngeny had abated and that any suit that has abated against a party cannot be revived especially after such an inordinate delay.
  21. Counsel also stated that the plaintiff herein cannot file a suit against the trustees since the land in question did not form part of the estate of Kipngeno Arap Ngeny and as such the aforementioned Application dated 3<sup>rd</sup> May, 2023 is vexatious and a waste of time.
  22. He further argued that in their aforesaid notice of motion dated 22<sup>nd</sup> April, 2022 they had stated that the issues raised by the Respondents were sub judice the ELC case and given that the ELC case has since been determined, their application is spent and if this court is to determine the same application, it should find that it is now res judicata.
  23. He also argued that the Respondent's application does not meet the threshold of a review and urged the court to dismiss the same.
  24. The Advocate for the Plaintiff, Mr. Kirimi, in rebuttal, referred this court to the case of *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd.*, (1969) EA 696 and submitted that a Preliminary Objection is premised on a pure point of law yet the Applicant has not cited any provision of the law.
  25. He also submitted that by annexing a copy of the judgement, the Applicant is introducing facts and evidence which puts the matter outside the ambit of a Preliminary Objection.
  26. He submitted that in the instant matter and the ELC one parties are the same but the prayers sought are different and that there was no order of consolidation of the two suits.



27. He contended that their application has been brought under Order 1 Rule 9 and 10 and seeks to introduce new parties who are executors/trustees of the deceased and as such it is completely a new matter.
28. He averred that their application was necessitated by the finding of the ELC case that there was need to determine the validity of the sale agreement and this court is yet to hear the evidence of both parties and as such this matter is not res judicata and that the court is not functus officio.
29. He also stated that the plaintiff/respondent approached this court under Order 31 Rule 1 and sought to join the trustees of the deceased and therefore considering the existence of the present suit there was no need of filing another one.
30. He contended that they cannot tell whether the property forms part of the estate and this is a question of evidence that is not subject to a P.O. He urged this court to disallow the Objection.
31. In a quick rejoinder, Mr. Sigira for the defendants submitted that Res Judicata is provided for under Section 7 of the *Civil Procedure Act*.
32. He also submitted that the subject matter of this case has been determined by the ELC and reiterated that the instant suit has since abated and as such the Respondent's Application is frivolous and urged the court to allow the Objection.
33. I note the Applicant filed a further statement of grounds of opposition on 23<sup>rd</sup> May, 2023 after the close of submissions. It is not clear whether the same was served upon the Respondent and the respondent may not have a chance to respond to the issues raised therein. In the interest of justice, this court will disregard the same.
34. Having considered the Preliminary Objection and the respective parties' submissions, I opine that the following issues arise for determination:
  1. Whether or not there is a valid Preliminary Objection as envisaged by law.
  2. Whether or not the Preliminary Objection has merit on;
    - a. Whether or not the suit is res judicata.
    - b. Whether or not the Application dated 3.5.2023 is frivolous, scandalous and vexatious that it amounts to an abuse of the court process.
  3. What orders to make on costs.

### **Whether or not there is a valid Preliminary Objection**

35. The threshold of a preliminary objection was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 relied on by the Respondent herein. In the case the court held that;

“...a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”



36. The court further held that;

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

37. The Court of Appeal in the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR stated:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

38. In the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR, the Supreme Court stated that:

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

39. In the case of *Oraro v Mbaja* [2005] 1 KLR 141 Ojwang J, (as he was then) expressed himself as follows:

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

40. In *JN & 5 others v Board of Management, St. G. School Nairobi & another* [2017] eKLR Mativo J, observed as follows:

“... a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”

41. Form the foregoing decision, it is clear a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point, and must be argued on the assumption that all facts pleaded by the opposite party are correct. A preliminary objection cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

42. The Preliminary Objection raised by the defendants herein relates to a plea of res judicata, and that application dated 3.05.2020 does not meet the threshold for grant of review orders under Order 45(1) and (2) of the *Civil Procedure Rules* and abuse of court process.



43. The plea of res judicata and abuse of the court process have been raised on points of law that emerge from the pleadings filed by the parties and thus it satisfies the requirements for a preliminary objection.
44. Regarding the ground that the Application by the Respondent does not meet the threshold for grant of review orders, no proper submissions were advanced and in my view the same requires probing of facts and thus it doesn't qualify as a valid P.O.

#### **Whether the suit is re judicata**

45. The Applicant submits that the suit is res judicata because the main subject matter it raises was the issue in Nairobi ELC No. 606 of 2015 which has since been determined with finality vide the ELC judgement of 18<sup>th</sup> April, 2023.
46. According to the respondent the suit is not res judicata as the prayers sought herein are different from those sought in the ELC case.
47. The *Civil Procedure Act* defines what the component of the doctrine of res judicata is. it states:

“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 in which such issues has been subsequently raised, and has been heard and finally decided by such court”.
48. The doctrine of res judicata was discussed by the Supreme court in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR. In paragraph 86, the court restated the elements that must be proved before a court may arrive at the conclusion that a matter is res judicata. The court stated:

“For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:

  - a.) There is a former judgement or order which was final.
  - b.) The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and
  - c.) There must be between the first and second action identical parties, subject matter and cause of action.
49. The undisputed facts are as follows;
  - a. The parties in the Nairobi ELC 606 of 2015 are *Florence Chelangat Langat v. Timoi Farms & Estates Limited & Isaya Kiptonui Kimeywo*;
  - b. In the instant suit parties are, Timoi Farms & Estate Limited v Kipngeno A. Ngeny and Florence Chelangat Langat.
50. It is clear from the pleadings herein and the undisputed judgment in Nairobi ELC No. 606 of 2015 that the cause of action in both cases is similar and both involve the same parcels of Land i.e L.R NO. Nakuru/ Olenguruone/ Amalo/ 314, 315,316 &321. It is also not in dispute that the question both courts are called to determine who between the plaintiff and the 2<sup>nd</sup> defendant is the rightful owner of the aforesaid property.



51. Both suits also involve the same parties and both parties claim that they bought the suit property from the deceased Kipngeno Arap Ngeny who is the 1<sup>st</sup> defendant herein. Principally, the issues raised are similar in all aspects.
52. It is also uncontroverted that in Nairobi ELC No. 606 of 2015, Justice S Okongo vide a Judgement dated 18<sup>th</sup> April, 2023 declared the 2<sup>nd</sup> defendant herein as the legal owner of the aforesaid suit parcels.
53. The main issue, the ownership of the suit land in both suits, has therefore been substantially determined by a court of competent Jurisdiction. Whether that decision is correct or not is not for this court to determine. That decision is subject to an appeal to a higher court. To ask this court to proceed to entertain this case would be to flout the well settled law on *res judicata*. It is my considered view that the instant matter is *res judicata*.

#### **Whether or not the suit is an abuse of the process of the court**

54. On this point the intended defendant's position is that the Application dated 3.5.2023 is scandalous, frivolous and vexatious and amounts to an abuse of the court process in view of the Ruling by Judge Joel M. Ngugi (as he then was) delivered on 24<sup>th</sup> March, 2022. In this ruling the court dismissed the Respondent's Application dated 20<sup>th</sup> April, 2020 which it sought to revive the suit against the deceased and thereafter substitute him with his executors. The court found that the suit against the deceased abated when the Respondent herein failed to file the requisite Application on or about 1<sup>st</sup> July, 2015 i.e. a year after the deceased's death and that the suit could not be revived as there was an inordinate delay of 6 years to do so. The plaintiff herein through the above application dated 3.5.2023 is seeking to review the aforesaid Ruling. In my view, the plaintiff ought to have appealed against that decision, and not seek a review.
55. It is my humble view that since the main issue in the instant suit has since been substantially determined in the Nairobi ELC matter, then this application is an abuse of the Court process. Even if there is joinder of the intended parties, the issue of ownership has been determined by a court of equal status to this court. There is the danger of two courts of equal status being called upon to decide parallel suits over the same subject matter, hence the *res judicata* rule.
56. I am inclined to find that grounds 1 and 3 of the preliminary objection to have merit and the same are upheld.
57. The upshot of the foregoing is that this Court cannot entertain the application dated 3.5.2023 and proceeds to strike it out.
58. Since there was the second Application dated 22<sup>nd</sup> April, 2022, by the 2<sup>nd</sup> Defendant/Applicant, I am obligated to consider it, even though in light of my finding on the Preliminary Objection it is a mere academic exercise. The only relevant prayer in the application is;
  - a. That the respondent plaintiff's suit as against the 2<sup>nd</sup> defendant/applicant be struck out and as the case may be, be dismissed.
  - b. That pending the hearing and determination of this application, there be stay of further proceedings that may be instituted by the plaintiff/respondent.
  - c. That further and necessary direction does issue as the court may please in the circumstances.
  - d. That costs be provided.
59. The Application was premised on grounds that;



- a. The court vide a ruling delivered on 24<sup>th</sup> March, 2022 found that the suit as against the 1<sup>st</sup> defendant had abated and proceeded to dismiss the plaintiff's application dated 20<sup>th</sup> April 2020 with costs;
  - b. That the court through a ruling that was delivered on 1.2.2013 did give the plaintiff leave to amend its plaint so as to join Florence Chelangat Langat as a 2<sup>nd</sup> defendant whereas Civil Suit Number Nairobi ELC NO.606 OF 2015 (Amended on 12.10.2018) was first filed in Nakuru Environment and Land Court as Nakuru ELC No.231 of 2012 on 29.6.2012;
  - c. That the subsistence of the suit herein offends the sub-judice rule, is scandalous, frivolous ,vexatious and it amounts to an abuse of the court process;
  - d. That by striking the suit herein, the plaintiff shall not be prejudiced since its defence and cross suit i.e. Counterclaim is about to be concluded in Nairobi ELC NO.606 of 2015;
  - e. It is usually in the clearest of the cases such as the current suit that the court will exercise its discretion to strike out a suit and the applicant is humbly pleading with the court to stamp its authority and thus strike out the suit as against the 2<sup>nd</sup> defendant;
  - f. That the plaintiff/respondent is all out to waste valuable/limited judicial time by unnecessarily clogging the court's diary.
60. The Application is supported by an affidavit of the 2<sup>nd</sup> Applicant Florence Chelangat Langat sworn on 22<sup>nd</sup> April, 2022.
  61. The Plaintiff/ respondent opposed the application through a replying affidavit sworn by its director Isaya Kiptonui Kimeiywo on 25<sup>th</sup> May, 2022. He deposed that the 2<sup>nd</sup> defendant/applicant is desirous in delaying the prosecution and conclusion of this suit on merit.
  62. He averred that the Applicant's ground of sub judice is fatally wrong and misplaced fact since the instant suit precedes the aforesaid Nairobi suit as it was filed on 10<sup>th</sup> February 2010 whereas the Nairobi ELC No. 606 of 2015(Formerly Nakuru Civil Suit No. 231 of 2012) was filed on 29<sup>th</sup> June,2012.
  63. He deponed that the cause of Action against the Applicant remained in force notwithstanding the fact that she was later enjoined in 2013 through a court order.
  64. It was his deposition that the Applicant is aware that the efforts to consolidate the matters and hear them together were completely frustrated and she eventually applied to transfer the matter to Nairobi citing lack of trust in the Nakuru Courts.
  65. The applicant swore a supplementary affidavit on 20<sup>th</sup> June, 2022. She averred inter alia that the instant suit was first filed against the 1<sup>st</sup> defendant in 2010 has long abated and on 1<sup>st</sup> February 2013 the respondent was given leave to join her in the instant suit when she had already filed the aforesaid Nairobi ELC Suit.
  66. She accused the Respondent for failing to disclose to the court the active participation of Isaya Kiptonui Kimeiwu in the aforementioned Nairobi ELC Suit.
  67. The Application was canvassed via written submissions. The Applicant filed her submissions on 28<sup>th</sup> July, 2022 whereas the Respondent filed his on 31<sup>st</sup> October, 2022. The Court has duly considered the parties' submissions.
  68. The main issue for determination therefore is whether the instant suit is sub judice when the application was filed.



69. A Court cannot proceed with the trial of any suit which is substantially in issue in another Court or similar matter before another Court of competent jurisdiction. Section 6 of the [Civil Procedure Act](#) which provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

70. The Applicant conceded that the issue on sub judice has already been spent in view of the aforesaid ELC judgement and that when she filed the same the ELC case was pending.

71. I'm in agreement with the Applicant's view that since the said ELC matter has now been determined, the Application dated 22<sup>nd</sup> April, 2022 has been overtaken by events.

72. Having already found that the instant suit is res judicata, it follows that this Court should down its tools. Litigation must come to an end and parties have an unlimited right to appeal to the Court of Appeal.

73. In conclusion, the Court holds and finds that this suit is res judicata, and proceeds to strike it out entirely.

74. It is trite that costs follow the events, and since the intended 1<sup>st</sup> defendants and the 2nd defendant have been successful they should be awarded costs.

75. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE, 2023.**

**H. M. NYAGA**

**JUDGE.**

In the presence of:-

Court Assistant Jennifer

Mr. Kirimi for Plaintiff/Applicant

Ms Cherono for Defendant/Respondent

