



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 297 OF 2019

SAFE CARGO LIMITED.....PLAINTIFF

- VERSUS -

EMBAKASI PROPERTIES LIMITED.....1ST DEFENDANT

DOSHI GROUP OF COMPANIES LIMITED.....2ND DEFENDANT

ASHOK LABSHANKAR DOSHI.....3RD DEFENDANT

PRATHIBA ASHOK DOSHI.....4TH DEFENDANT

AMIT ASHOK DOSHI.....5TH DEFENDANT

THE NATIONAL LAND COMMISSION.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. This is the Notice of Motion dated 2nd March 2020 filed by the 2nd -5th Defendant. It is brought under Section 7 of the Limitation of Act and Sections 1A, 3A, and 7 of the Civil Procedure Act, cap 21 Laws of Kenya.

2. It seeks orders:-

a. This suit be and is hereby struck out.

b. Costs of this application and of this suit be paid by the Plaintiff.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 7 of the application.

4. The application is supported by the affidavit of Ashok Labshankar Doshi, the 3rd Defendant herein sworn on the 2nd of March 2020.

5. The 2nd -5th Defendants also filed the preliminary objection dated 2nd March 2020 on the grounds that: -

a. The suit is statute barred as it challenges a letter of allotment issued on 9th February 1982 and Grant No. I.R 9042/244 registered on 19th January 1990.

b. This suit is res judicata.

c. This suit is improper as it is a disguised appeal against the judgements delivered in HCC No.411 of 2003: Embakasi Properties Limited V. Safe Cargo Limited & Others and the appeal ensuing therefrom being Court of Appeal Civil Appeal No.276 of 2008: Safe Cargo Limited v Embakasi Properties Limited & Others.

d. This suit is unlawful as it seeks to set aside the judgement delivered in in HCC No.411 of 2003: Embakasi Properties Limited v Safe Cargo Limited & Others and the appeal ensuing therefrom being Court of Appeal Civil Appeal No.276 of 2008: Safe Cargo Limited v Embakasi Properties Limited & Others which can only be done in those respective suits and not in a separate case.

e. The suit is bad in law having been filed against the directors and shareholders of a limited liability company without first lifting the veil of incorporation.

f. This Honourable Court does not have jurisdiction to hear and determine this suit.

6. The 1st Defendant also filed a notice of preliminary objection dated 12th June 2020 on the grounds that:-

a. The High Court lacks jurisdiction to set aside the judgement delivered by the court of Appeal in Civil Appeal No.276 of 2008 in view of the provisions of Article 162(2) (b) and 165 (6) of the Constitution of Kenya, 2010.

b. The suit is res judicata owing to the fact that there are former suits in which the same parties in subsequent suit litigated; the matter in issue was substantially in issue in the subsequent suit and courts of competent jurisdiction have heard and determined the matter.

c. The suit is an abuse of the court process and should be dismissed with costs.

7. The 6th Defendant also filed a preliminary objection dated 25th March 2020 on grounds:-

a. The Plaintiff's suit seeks to re-litigate the question as to the legality of Grant Number I.R 48936 LR 9042/224 registered on 19th January 1990 in favour of the 1st Defendant and; Grant IR 59474 LR NO.9042/290 registered on 18th June 1993 in favour of the Plaintiff; which question was determined by the court in HCCC No.411 of 2003 Embakasi Properties Limited V. Safe Cargo Limited 7 Others and Civil Appeal 276 of 2008 Safe Cargo Limited v Embakasi Properties Limited & others. The suit herein is therefore res judicata and an abuse of the court process.

b. The material alleged by the Plaintiff as constituting new evidence i.e. the part Development plan on the question of allocation of Grant Number I.R.48936 LR 9042/224, the witness statements of Pricilla Njeri Wango and Gordon O. Ochieng was considered by the Court of Appeal in Civil Appeal (Application) No.276 of 2008 safe cargo Limited v Embakasi properties Limited and disallowed as evidence that with due diligence was available to the Plaintiff. The suit herein is therefore an attempt to re-litigate and re-open the Plaintiff's claims and evidence in HCCC No.411 of 2003 Embakasi Properties Limited vs Safe Cargo Ltd & Others and is therefore an abuse of the court process.

c. The material alleged by the Plaintiff as constituting new evidence does not disclose any case for willful deception of the court in both HCCC No.411 of 2003 Embakasi Properties Limited v Safe Cargo Limited 7 Others and Civil Appeal 276 of 2008 Safe Cargo Limited V. Embakasi Properties Limited & others. in that:-

i. The title held by the 1st Defendant being Grant Number I.R 48936 LR No 9042/224 registered on 19th January 1990 was the 1st in time to be held by the Plaintiff being Grant IR 59474 LR No.9042/290 registered on 8th June 1962,hence in law the 1st Defendant's title deserves the court's protection.

ii. The land contained in the Plaintiff's title Grant IR 59474 LR No.9042/290 registered on 18th June 1993 was not available for alienation in terms of Section 3(a) of the Government Lands Act (repealed).

iii. The land contained in the title held by the 1st Defendant being Grant Number IR 48936 LR 9042/224 registered on 19th January 1990 was not available for re-planning and re-survey without the land having been forfeited in terms of Section 77 of the Government Land Act (repealed) as was held in both HCCC No.411 of 2003 Embakasi Properties Limited V. Safe Cargo Limited 7 Others and Civil Appeal 276 of 2008 Safe Cargo Limited V. Embakasi Properties Limited & others.

d. As was held by the Court of Appeal in Civil Appeal Application No. 276 of 2008 Safe Cargo Limited v Embakasi Properties Limited & others, the Plaintiff relies on documents and material filed in ELC No.233 of 2009, whose veracity and authenticity is yet to be established as no judgment exists in the matter. The suit herein is an abuse of the court process.

e. The Plaintiff's suit is an attempt to annul the Judgement of the Court of Appeal (5 judge bench) in Civil Appeal 276 of 2008 Safe Cargo Limited v Embakasi Properties Limited & others. Which is contrary to Article 165(5) of the Constitution.

The Plaintiff's response to the application

8. The Plaintiff filed grounds of opposition are dated 21st day of April 2021.The grounds are;

a. That the suit is not res judicata as the question of whether the 1st Defendant's title and the judgments arising therefrom were obtained by fraud was neither directly and substantially in issue nor has it been determined in the previous suits. In any event, there is a fraud exception to the principle of res judicata.

b. The contention that the suit herein is statute –barred is incorrect as the period of limitation began running from May 2019 and the suit was instituted in September 2019 within the statutory limitation.

c. The suit herein is predicated on fraud which was not an issue in **HCCC 411 of 2003; Embakasi Properties Limited vs Safe Cargo Ltd & Others** and **Civil Appeal No 276 of 2008; Safe Cargo Ltd vs Embakasi Properties Limited & Others** hence, the Plaintiff cannot pursue an appeal on an issue that was not before the trial court and the Court of Appeal.

d. The suit herein is lawful because it is based on a fraud exception that permits the institution of a fresh suit to set aside judgements obtained by fraud.

e. The suit is proper in law as the Plaintiff has stated in the plaint the grounds for lifting the veil of incorporation of a company involved in a land dispute and the claim herein is restricted to land.

f. Whether the letter of allotment dated 9th January 1982 and the judgement arising therefrom were based on fraud is a separate cause of action and the correct procedure is not to proceed in the previous suit but to institute a new suit.

g. The application is in entirety baseless, frivolous, lacks merit and in any event, is an abuse of the court process. Accordingly, the same should be dismissed with costs.

9. On the 10th December 2020, the court with the consent of the parties directed that the notice of motion dated 2nd March 2020 and the preliminary objections be canvassed by way of written submissions.

The 2nd - 5th Defendant's submissions

10. They are dated 11th May 202. Counsel for the 2nd -5th Defendants submitted that the following issues arise for determination:

a. Whether the suit is statute barred.

b. Whether the suit is *res judicata*.

c. Whether this Honourable Court has jurisdiction to hear and determine this suit.

d. Whether the joinder of the 2nd, 3rd, 4th and 5th Defendants to this suit is proper.

11. On whether the suit is statute barred, counsel submitted that the Plaintiff made factual allegations from the bar vide its written submissions claiming that, "the letter of allotment dated 9th January 1982 was filed for the 1st time in **HCC No. 233 of 2009** and that based on the said factual allegation, the Plaintiff claimed that time for purposes of the limitation period in this matter should be computed from May 2019.

12. He submitted that contrary to the Plaintiff's contention that time for purposes of limitation should commence from May 2019 when it conducted a search, limitation period cannot be underpinned on an action which the Plaintiff purports to have undertaken but from the time the action complained of took place and in this case, time started running from 9th January 1982 and from 19th January 1990 when the 1st Defendants letter of allotment and Grant were issued respectively.

13. He also submitted that while Section 26 of the Limitation of Actions Act precludes limitation for an action based on fraud, the limitation period for an action based on fraud does not run until the Plaintiff has discovered the fraud and in this case, the Plaintiff cannot benefit from that provision.

14. He added that the Plaintiff's claim for fraud is hinged on the letter of allotment dated 9th January 1982 which the Plaintiff alleges to have been procured before the 1st Defendant was incorporated and the allegation that the alleged fraud was discovered in May 2019 thus the Plaintiff could not have raised that issue in HCC No.411 of 2003.

15. He submitted that through the ruling dated 8th January 2019 on the Plaintiffs application dated 31st December 2018 seeking to introduce additional evidence in the Court of Appeal in **Civil Appeal No.276 of 2008**,the Court of Appeal rejected the proposed new evidence on grounds that proposed evidence could have been discovered by the plaintiff after due diligence. The said evidence included the allotment in contention among other documents.

16. Counsel relied on the case of **Margaret Wairimu Magugu v Karura Investment Limited & 4 Others [2019] eKLR** and the case of **Paragon Finance V. D B Thackerar & Co [1999]1 ALL ER 400** to submit that provisions of Section 26 of the Limitation of Actions Act only protects a Plaintiff who could not have discovered the evidence with due diligence.

17. On the issue whether the suit is *res-judicata*, counsel submitted that the court should consider that the dispute herein revolves around the issue of who between the Plaintiff and the 1st Defendant is entitled to the suit property and in **HCC No. 411 of 2013**.He submitted further that in **Civil Appeal No.276 of 2008**,the Court of Appeal(5 judge-bench) upheld the judgment of the court in HCC No.411 of 2013.

18. In rebuttal to the Plaintiff's submission that the suit is not *res judicata* since fraud was not determined in the previous suit, he submitted

that in the previous suits, parties had an opportunity to present their respective cases in one bout. He relied on the Principle in **Henderson v Henderson [1843] 3 Hare 100, 67, ER 313** which entails that the court requires the parties to litigation to bring forward their whole case. He further submitted that courts have applied the principle which is now largely referred to as, “**Henderson v Henderson estoppel**”. He cited the cases of **Thomas Owen Ondiek & Another V. National Bank of Kenya Limited & Another [2015] eKLR**, **Edward Akongo Oyugi & 2 Others v Attorney General [2016] e KLR** and **Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 Others [2020] eKLR** in which courts have applied the aforementioned principles.

19. He also submitted that a party can only be allowed to split claims if there are special reasons to justify or explain the claims having been split. He relied on the courts explanation of the exception of “**Henderson v Henderson estoppel**” as stated in **Edward Akongo Oyugi (supra)**. He added that only a party who could not bring forward the issue in dispute despite exercising due diligence is protected from res-judicata.

20. On the issue whether this court has jurisdiction, he submitted that the Plaintiff’s contention that a Court of law in a subsequent suit can set aside a past judgment if fraud is alleged is only exercised if the judgement sought to be set aside was delivered by a Court with concurrent/inferior jurisdiction and as such this court has no jurisdiction to set aside a valid judgement of the court of appeal. He relied on the case of **Kenya Hotel Properties Limited v Attorney General & 5 others [2018] e KLR**.

21. On the issue whether the joinder of the 2nd -5th Defendants is proper, he submitted that based on the *locus classicus* case of **Salomon & Co. Ltd v Salomon [1897] A.C.22 H.L** that directors and shareholders of a limited liability Company cannot be sued directly in their own names unless and until the veil of incorporation is lifted.

22. He further submitted that while the plaint contains a prayer seeking the lifting of the 1st and 2nd Defendants veil of incorporation, the plaintiff has jumped the gun and sued the shareholders as 2nd, 3rd, 4th and 5th Defendants. He also submitted that shareholders are protected by the veil of incorporation and until it is lifted, they can never answer to any allegations in their own capacity.

The 1st Defendant’s submissions.

23. They are dated 9th March 2021. Counsel for the 1st Defendant submitted that the issues raised by the Plaintiff which are the issues of the legality and ownership of Grant Number I.R No. 48936 Land Reference No.9042/224 and Grant I.R No. 59474 Land Reference No.9042/290 were directly and substantially in issue in both **HCC No.411 of 2003 Embakasi Properties Limited v Safe Cargo Limited & Others** and in **Civil Appeal No.276 of 2008; Safe Cargo Limited v Embakasi Properties Limited & Others**. He added that the parties in the previous suits are the same parties in the instant suit and are litigating under the same title and further that that the High court and the Court of Appeal which heard and determined the said matters were courts of competent jurisdiction to hear and determine the suit at different stages.

24. It was his submission that the suit is barred by the doctrine of res judicata captured at Section 7 of the Civil Procedure Act. He relied on **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] e KLR**.

25. On the Plaintiff’s contention that there is now new evidence-that is, the Part Development Plan relating to Grant No. I.R 48936 Land Reference No.9042/224, he submitted that the witness statements of Pricilla Njeri Wango and Gordon O. Ochieng was considered by the **Court of Appeal (Application) No.276 of 2008; Safe Cargo Limited v Embakasi Properties Limited & Others** where the Court of Appeal by its ruling dated 8th February 2019 rejected the purported new evidence on grounds that the additional evidence could have been discovered after due diligence and that it had not been demonstrated to the satisfaction of the court that the proposed additional evidence would remove any vagueness or doubt on the issues in the Appeal. He further submitted that if there was additional evidence, it ought to have been made grounds of defence or attack in the former suits and should be considered as a matter directly and substantially in issue and barred by the doctrine of *res judicata*. He relied on the Court of Appeal’s decision in the case of **John Florence Maritime Services Limited & Another V. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] e KLR**.

26. He further submitted that one of the prayers set out in the plaint seeks to set aside the judgment of the Court of Appeal in **Civil Appeal No.276 of 2008** but the same is not tenable in view of Article 162(2) (b) which provides that the Environment and Land Court is a court of equal status to the High Court and Article 165(6) of the Constitution which provides that this court has supervisory jurisdiction over subordinate courts thus it cannot exercise that supervisory jurisdiction over other superior courts.

The 6th Defendant’s submissions.

27. They are dated 17th June 2021. Counsel for the 6th Defendant largely submitted that the suit is res-judicata on the grounds already put forward by the other parties in support of the application.

The Plaintiff’s submissions

28. They are dated 21st April 202. Counsel for the Plaintiff submitted on the following issues;

a. Whether the suit is res judicata.

b. Whether the suit is statute barred.

c. Whether the 3rd, 5th and 5th Defendants ought not to have been joined without a prior application to pierce the veil of incorporation.

29. He submitted that the suit is not *res judicata* since the matters in issue in **HCCC No.411 of 2003; Embakasi Properties Limited v Safe Cargo Limited & Others** which judgment was confirmed by the Court of Appeal in **Civil Appeal No.276 of 2008; Safe Cargo Limited v Embakasi Properties Limited & Others [2019] eKLR** are not directly and substantially in issue in this case.

30. He further submitted that the issue in the afore stated suit was the validity of the Plaintiff's title **L.R No.9042/299** having been excised from the 1st Defendant's lawful title being **L.R No. 9042/224** arising out of lawful allotment made to the 1st Defendant on 1st February 1982 when it was as a matter of fact not incorporated while the matter in this suit is whether the letter of allotment produced by the 1st Defendant in **HCC.No.233 of 2009; Embakasi Properties Limited v Kuehe & Nagel Limited & Others** and showing that the 1st Defendant was allotted the land **L.R No.9042/224** on 9th January 1982 yet it was incorporated over 6 years later on the 1st July 1988 was fraud by the 1st Defendant, its directors and shareholders.

31. He also submitted that there is fraud, mistake and lack of jurisdiction exception to the doctrine of *res judicata*. He relied on the cases of **Silas Make Otuke v Attorney General & 3 Others [2014] eKLR** and **Lazarus Estates Limited vBeasley [1956] ALL ER 341**.

32. On the 2nd -5th Defendant's contention that the suit is time barred as it challenges a letter of allotment issued on 9th February 1982 and **Grant No. I.R 9042/244** registered on 19th February 1990, he submitted that according to Section 26 of the Limitation of Actions Act, where fraud has been pleaded and particularized, the period of limitation runs from the date when the fraud was discovered. He further submitted the letter of allotment issued to the 1st Defendant was first produced in **HCCC No. 233 of 2009; Embakasi Properties Limited v Kuehne & Nagel Limited** for the 1st time. He deponed that the period of limitation accordingly run from May 2019 when a search carried out revealed that the 1st Defendant was incorporated in 1988.

33. On the 2nd-5th Defendant's contention that the suit is bad in law having been filed against the directors and shareholders of a limited liability company without first lifting the veil of incorporation, he submitted that such requirement is neither provided for nor exists in law and that the right to lift the veil of incorporation arises whenever fraud is pleaded and the particulars thereof provided.

34. He relied on the decision in **Protus Opwora Wabotto v Ken Manda & 2 Others [2020] eKLR** to submit that the Plaintiff is only required to plead and establish by evidence fraud or improper conduct. He further submitted that the Plaintiff has expressly pleaded and particularized fraud as its cause of action and when giving evidence, the Plaintiff will elaborate on the fraudulent acts of the directors to warrant lifting the veil.

35. I have considered the Notice of Motion dated 2nd March 2020, the affidavit in support, and the grounds of opposition. I have considered the preliminary objections dated 2nd March 2020, 12th June 2020 and 25th March 2020 together with the written submissions filed on behalf of the respective parties. The issues for determination are:-

i. Whether the suit is *res judicata*.

ii. Whether the suit is statute barred.

iii. Whether the joinder of the 3rd – 5th “Defendants is proper.

iv. Who should bear costs?

36. It is not in dispute that Judgement was already entered in favour of the 1st Defendant in HCCC 411 of 2003 and in Court of Appeal Civil Appeal No 276 of 2008. The Judgment of the Court of Appeal was delivered on 5th February 2019.

37. The Plaint herein dated 9th September 2019 seeks the following orders:-

a. An order directing that the veil of incorporation of the 1st and 2nd Defendants be lifted and upon such lifting determination as to who the shareholders thereof are.

b. A declaration that the letter of allotment dated 9th January 1982 in favour of the 1st Defendant was fraudulently obtained as the 1st Defendant was not incorporated until 19th July 1988.

c. A declaration that the 1st Defendant and 2nd Defendants together with their shareholders, the 3rd, 4th and 5th Defendants obtained judgment by fraud in HCCC No 411 of 2003: Embakasi Properties Limited vs Safe Cargo Limited & Others and Civil Appeal No 276 of 2008: Safe Cargo Ltd vs Embakasi Properties Limited & Others.

d. A declaration that the 1st Defendant together with the 3rd Defendant procured the Grant of L. R. No. 9042/244 (IR 48936/1) by fraud and accordingly the said Grant in unlawful, null and void.

e. An order that Grant No LR 9042/244 (IR 48936/1) registered in the name of the 1st Defendant be removed from the Register and the Certificate in respect thereof return and cancelled.

f. The Judgement granted by this Honourable Court in HCCC No 411 of 2003: Embakasi Properties Limited vs Safe Cargo Limited & Others and by the Court of Appeal in Civil Appeal No 276 of 2008: Safe Cargo Ltd vs Embakasi Properties

Limited & Others be set aside on grounds that the same were obtained by fraud.

g. Special Damages in the sum of Kshs.1 million per month from 1st March 2019 until the date of payment in full together with interest thereon at bank rates together with the costs of the bank guarantee issued by the Plaintiff in HCCC No 411 of 2003: Embakasi Properties Limited vs Safe Cargo Limited & Others.

h. Costs of this suit together and the costs in HCCC NO 411 of 2003: Embakasi Properties Limited vs Safe Cargo Limited & Others and Civil Appeal No. 276 of 2008: Safe Cargo Ltd vs Embakasi Properties Limited & Others with interest thereon.

i. Any other or further relief as this Honourable Court may deem fit.

38. The issues of who between the Plaintiff and the 1st Defendant is entitled to the suit property was canvassed in **HCCC NO 411 of 2003: Embakasi Properties Limited vs Safe Cargo Ltd** and in **Court of Appeal Civil Appeal No 276 of 2008, Safe Cargo Ltd vs Embakasi Properties Limited & Others [2019] eKLR**. In **HCCC 411 of 2003** the court ordered the cancellation of the Plaintiff's title. The said findings were confirmed by the Court of Appeal which held that the 1st Defendant has valid rights to the suit property.

39. It is the Plaintiff's contention that the Defendants' title arises out of a letter of allotment dated 1st February 1982 when it was a matter of fact that the 1st Defendant was not incorporated then. That the said letter of allotment produced by the 1st Defendant in **HCCC 233 of 2009; Embakasi Properties Ltd vs Kuehe & Nagel Ltd & Others** shows that the 1st Defendant was allocated LR NO 9042/244 on 9th February 1982 yet it was incorporated six years later on 1st July 1998. That this demonstrates fraud by the 1st Defendant, its directors and shareholders.

40. It further contends that fraud, mistake and lack of jurisdiction are exceptions to the doctrine of res judicata.

41. **Section 7** of the Civil Procedure Rules provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

42. I agree with the 2nd – 5th Defendants' submissions that the parties had the opportunity to present their respective cases in entirety in the previous cases.

43. It is on record that the Plaintiff attempted to introduce and rely on the documents they are now relying in Civil Appeal NO 276 of 2008 but the Court of Appeal rejected such attempts. In the case of **IEBC vs Maina Kiai & 5 Others [2017] eKLR** the Court of Appeal held that:-

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

- a. The suit or issue was directly and substantially in issue in the former suit.**
- b. The former suit was between the same parties and 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”.**

44. Similarly, in the case of **John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, it was held thus:-

“The rationale behind res judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency of judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata the very essence of the rule of law would be in danger of unravelling uncontrollably”.

I find that the issues raised in the Plaintiff herein were heard and determined in the previous suit.

45. It is the Plaintiff's claim that fraud was not determined in the previous suit. The Plaintiff has not demonstrated to this court that it was

prevented from putting forth the issue on **HCCC 411 of 2003**. In the case of **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR**. The Court of Appeal stated thus:-

“The doctrine is grounded on public interest and thus transcends the parties’ interests in a suit. Public interest requires or demands that litigation must at some point come to an end. In the Maina Kiai case (Supra), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand v Radha Kishan, AIR 1977 SC 789 where it was stated:

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which requires that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it-not even by consent of parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit”.

I am convinced that the issues raised by the Plaintiff in then instant suit were previously raised or could have been raised in the previous suits.

46. The Plaintiff filed herein is res judicata. In the case of **ET vs Attorney General & Another [2012] eKLR** it was held by Majanja J that:-

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

47. Similarly in the case of **Edward Akongo Oyugi & 2 Others vs Attorney General [2016] eKLR** Onguto J stated as follows:-

“14. A plea of res judicata will also intercept and include not only matters which the court was called upon to adjudicate but every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward in the previous suit: see Henderson vs Henderson [1843-60] All E R 378.

A claimant is not allowed to split claims. He will be estopped. As was stated by the court in Henderson vs Henderson (supra).

“The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement 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”. (emphasis mine)

“15. The Henderson vs Henderson estoppel, it is clear, will not apply, if there are special reasons to justify or explain the claims having been split” [underlining ours]”

I agree with the submissions by counsel for the 2nd – 5th Defendants that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties.

48. The Plaintiff seeks to challenge a letter of allotment issued on 9th January 1982 and Grant NO IR 48936 LR NO 9042/244 issued on 19th January 1990. They claim that time started running from May 2019. This could not be further from the truth. They have also relied on Section 26 of the Limitation of Actions Act. The documents which the Plaintiff sought to introduce in the Civil Appeal No 276 of 2008 are the same ones which form the basis of this case. I agree with the submissions by counsel for the 2nd – 5th Defendants that Section 26 only protects a Plaintiff who could not discover the fraud despite reasonable diligence.

49. The fraud alleged by the Plaintiff is based on the letter of allotment dated 9th January 1982 which it alleges was procured before the 1st Defendant was incorporated, that this was discovered in May 2019 thus the Plaintiff could not raise it in HCCC No 411 of 2003.

50. It appears to me that the letter of allotment dated 9th January 1982 and the subsequent Grant issued on 19th January 1990 are the center of this dispute. I find that time started running from this period.

51. In the case of **Margaret Wairimu Magugu vs Karura Investment Ltd & 4 Others [2019] eKLR** the Court of Appeal stated as follows:-

“34. There is no doubt that under the provision, where the action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud. (see for instance Kenya Ports Authority vs Timberland (K) Ltd [2017] eKLR. However, having regard to the proviso of Section 26 of the Act as highlighted above, it is inconceivable that the 19 years, in the case of the deceased, and 24 years in the case of the appellant, they would have failed to discover, with the exercise of due diligence, the alleged fraud and to act if indeed the acquisition of the property by the 1st respondent was fraudulent.

35. Due diligence entails the exercise of care required from a given person in a given situation. It entails proactivity and absence of carelessness or idleness. In English case of Paragon Finance vs D B Thackerar & Co. [1999] 1 All 400 at 418B-D, Millett LJ of the Supreme Court of England opined that:

“The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take”.

36. Considering that the 1st respondent was registered as the owner of the property on 25th October 1993 and has since been in possession, it is unthinkable that the deceased and the appellant could not, for 19 and 24 years respectively, have discovered the alleged fraud with the exercise of due diligence”.

52. I agree with the counsel for the 2nd – 5th Defendants that the Plaintiff does not qualify for protection under Section 26 of the Limitation of Actions Act. I find that the suit herein is time barred.

53. There are valid Judgments of the High Court and the Court of Appeal declaring the 1st Defendant has valid rights over the suit property. I find that this court lacks jurisdiction to set aside and or vary the decisions of the High Court and the Court of Appeal. I am guided by the case of Kenya Hotel Properties Limited vs Attorney General and 5 Others [2020] eKLR where the Court of Appeal held thus:

“Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgement of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. The Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.

Moreover, under Article 164(3) of the Constitution, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this court to re-open and re-hear a concluded appeal....

It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on hopeless adventure to nowhere

.....we think that the appellant was in effect inviting the learned Judge to defy the constitutional barriers to the extent of his jurisdiction and tread on forbidden ground. He was right to reject the invitation as he had to, terming it “unconstitutional and illegal” at paragraph 35 of his judgment. There was no error in so holding”.

54. On the final issue as to whether joinder of the 2nd – 5th Defendants is proper, I am of the view that directors and shareholders of a limited liability company cannot be sued directly in their own names unless and until the veil of incorporation is lifted. I am guided by the principle set out in the case of Solomon & Co. Ltd vs Solomon [1897] A. C 22 H. L. I find that the joinder of the 2nd – 5th Defendant to this suit is improper.

55. The upshot of the matter is that the suit herein cannot stand, for the foregoing reasons the same is struck out with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER, 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Orora for Mr. Oraro (SC) for the Plaintiff

Mr. Aremo for Mr. Mogere for the 1st Defendant

Mr. Oluga for the 2nd – 5th Defendants

No appearance for the 6th Defendant

Mr. Kamau for the 7th Defendant

Steve - Court Assistant