**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**PETITION NO. 6 OF 2020**

**IN THE MATTER OF: A PETITION ON BY DYSARA INVESTMENTS LIMITED AND LIVIO LUIGI BERETTA**

**AND**

**IN THE MATTER OF: THE BILL OF RIGHTS AS ENSHRINED IN ARTICLES 19, 20 AND 21 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLES 162(2) (B) AND 3 AND ARTICLE 165(3) AND (6) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED INFRINGMENT OF ARTICLE 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED INFRINGEMENT OF RIGHTS UNDER ARTICLE 46 OF THE CONSTITUTION OF KENYA AND THE CONSUMER PROTECTION ACT NO. 46 OF 2012**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 22(1) AND 23(1) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**DYSARA INVESTMENTS LIMITED.....1ST PETITIONER**

**LIVIO LUIGI BERETTA.....2ND PETITIONER**

**VERSUS**

**WOBURN ESTATE LIMITED.....1ST RESPONDENT**

**WOBURN MANAGEMENT LIMITED.....2ND RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. By this Notice of Motion dated 27th July 2020, Dysara Investments Ltd and Livio Luigi Beretta (the 1st and 2nd Petitioners respectively) pray for orders: -

***3. That pending the hearing and determination of the Petition, a Conservatory Order do issue restraining the 1st and 2nd Respondents from disconnecting electricity supply and water supply or any other services from the 1st and 2nd Petitioners premises known as Apartment Number 3C Block 3 and Apartment Number 3C Block 3 and Apartment Number 3A 3 in Woburn Residence Club or in any way interfering with the 1st and 2nd Petitioners quiet enjoyment of the said premises; and***

***4. That the costs of the Application be provided for.***

2. The application which is supported by an affidavit sworn by a director of the 1st Petitioner Cecil Guyana Miller is premised on the grounds that: -

***i) The 1st and 2nd Petitioners have been paying to the 1st Respondent an initial service charge of Kshs 36,200/- and Kshs 10,000/- respectively in accordance with the Lease Agreement between the Petitioners and the 1st Respondent dated 23rd July 2013 and 17th July 2012;***

***ii) Clause 2.5 of the Lease Agreement is however unconstitutional for the following reasons: -***

***a) It is a violation of Article 165(3) (a) of the Constitution as it purports to (oust) the jurisdiction of the High Court by providing that decisions of an expert are binding and final;***

***b) It is a violation of the Petitioners' rights to a fair hearing under Article 50(1) of the Constitution on the basis that:***

***i) It provides that the person appointed to determine disputes shall act as an expert and not an arbitrator thereby denying the Petitioners a right to present their case and or arguments to the expert and also denies the Petitioners an opportunity to hear the arguments presented by the other party; and***

***ii) The Rules and procedures to be adopted by the expert appointed to determine a dispute are not spelt out in any guidelines or statutes thereby denying the Petitioners rights to a fair and public hearing before an impartial tribunal.***

***iii) The Respondent is relying on the unconstitutional Clause 2.5 of the Lease Agreements to demand exorbitant, extortionist and unjustified service charge from the Petitioners and has threatened to disconnect water and electricity supply to the Petitioners' premises if the Petitioners do not pay the extortionist service charge being demanded;***

***iv) The threats to disconnect water and electricity supply to the Petitioners premises if the extortionist service charges are not paid is a threat of violation of the Petitioners Constitutional rights under Article 46 of the Constitution which entitles the Petitioners to: -***

***a) Goods and services of reasonable quality; and***

***b) The information necessary for them to get full benefit from the services they are being charged for.***

***v) The 1st Respondent has proceeded to disconnect water supply to the 1st Petitioners premises on account of non-payment of a further Kshs 20,000/- as "repair charges for submersible water pump" yet the said repairs are covered by the monthly service charge paid by the Petitioners to the 1st Respondent;***

***vi) Unless stopped by orders of this Court, the 1st Respondent shall continue to trample on the Petitioners' rights as guaranteed by the Constitution exposing the Petitioners to untold risks and exposure during the current Global Covid -19 Pandemic;***

***vii) The Petitioners have satisfied the test for the granting of conservatory orders; and***

***viii) No prejudice shall be suffered by the Respondents if the orders are granted as the Petitioners are still paying a monthly service charge.***

3. The application and the entire Petition is however opposed by Woburn Estate Limited and Woburn Management Limited (the 1st and 2nd Respondents respectively). By their Notice of Preliminary Objection dated 14th September 2020, the two Respondents object to the hearing of both the Petition and the Motion dated 27th July 2020 on the grounds that: -

***a) This Honourable Court has no jurisdiction to hear or determine this Petition which is premised on a dispute between the Petitioners and the Respondents arising out of the terms of the Lease Agreement entered into between the 1st and 2nd Petitioners with the Respondents and which contain provisions as relates to the dispute resolution mechanisms to be adopted by the parties as agreed between themselves;***

***b) The Petitioners herein amongst other Claimants*** **filed** *Malindi ELC Case No. 51 of 2014 (Dysara Investments Limited, Livio Luigi Beretta & Others –vs- Woburn Estate Limited & Another), Civil Appeal No. 20 of 2018 (Woburn Estate Ltd & Another –vs- Dysara Investments Ltd, Livio Luigi Beretta & Others)* ***arising from the Superior Court suit referred to above and*** *Supreme Court Petition No. 40 of 2018 (Dysara Investments Ltd & Others –vs- Woburn Estate Ltd & Others),* ***the cumulative effect of which was to determine the matters now alleged to be in dispute in this Petition and upholding the dispute resolution mechanism agreed***

***between the parties in the respective leases entered into between the Petitioners and the First Respondent on 23rd July 2013 and 17th July 2012 respectively;***

***c) The dispute resolution Clause agreed between the parties in Clause 2.5 of the respective Leases between the Petitioners and the Respondents provided for disputes to be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution's successor or assign) who shall in making his decision act as an expert and not as an Arbitrator and whose decision shall be final and binding on the parties;***

***d) The Chairman of the Institute of Surveyors of Kenya, pursuant to the request made by the Petitioners and all other parties, appointed Mr. Paul Wambua to act as an expert to inspect and audit the service charge account for the purposes of determining the fairness and reasonableness thereof and he, pursuant to the joint reference by the parties, made a determination and rendered a report on the 5th November 2013 and found that no unreasonable charges had been levied on the service charge account payable by the Petitioners which he submitted to the parties and his appointing authority, the Chairman of the Institute of Surveyors of Kenya;***

***e) In the premises, this Petition is an abuse of the process of this Honourable Court and an attempt to subvert the Course of justice by attempting to negate the effect of the binding Judgment of the Court of Appeal through unlawful and irregular, frivolous and vexatious claims;***

***f) In accordance with the provisions of Section 44 of the Evidence Act, the decisions/Judgments of the Court of Appeal and the Supreme Court in Civil Appeal No. 20 of 2018 and Supreme Court Petition No. 40 of 2018 are binding*** *"in rem"* ***upon the Petitioners herein particularly as regards the upholding of the dispute resolution Clause and mechanism agreed between the parties hereto as contained in the Petitioner's respective Leases dated 23rd July 2013 and 17th July 2012 referred to hereinabove and the binding efficacy of the 5th November 2013 report of Mr. Paul Wambua;***

***g) The service charge dispute between the parties hereto was fully and finally determined by the expert determination of Paul Wambua as contained in his report following his appointment by the Chairman for the time being of the Institute of Surveyors of Kenya. The subsequent decision of the Court of Appeal which remains effective, as acknowledged by the Petitioners at paragraph 33 of the petition, confirms that the parties invoked the dispute resolution mechanism in question which ultimately resulted in the report prepared by Mr. Wambua.***

***h) It is trite that parties to a contract are free to determine terms that govern their relationship and the Court's role is limited to enforcement of those terms. It is not for the Courts to re-write contracts for the parties nor determine the fairness or otherwise of the terms agreed which is what the Petitioners herein seek;***

***i) The matters in issue in this Petition are of a purely commercial and contractual nature enforceable in Civil Courts (which the Petitioners attempted but failed) and which do not confer any Constitutional right or fundamental freedom given that the matter does not involve matters relating to the interpretation or application of the Constitution but rather were a matter of contractual interpretation;***

***j) The matters which are raised in this Petition are res judicata;***

***k) By proceeding to usurp jurisdiction in this matter, this Honourable Court would be sitting on appeal in*** *Civil Appeal No. 20 of 2018 (Woburn Estate Limited & Another –vs- Dysara Investment Ltd & Others)* ***which it does not have; and***

***l) In the premises, this Petition ought to be dismissed and struck out with costs.***

4. I have perused and considered both the Petition and the Motion for Conservatory orders on the one side as well as the Preliminary Objection raised thereto on the other hand. I have equally fully considered the rival submissions and authorities placed before me by the Learned Advocates- Mr. Wena for the Petitioners and Mr. Khagram for the Respondents.

5. The Petitioners herein are challenging the Constitutionality of Clause 2.5 of the Lease Agreement between themselves and the 1st Respondent on the ground that it purports to oust the jurisdiction of the Court to interrogate the findings of the expert on service charge contrary to the provisions of Article 165(3) (a) of the Constitution which confers unlimited jurisdiction on the High Court over all Civil and Criminal matters.

6. The said Clause 2.5, Part B of the Fourth Schedule of the two Leases provides as follows in the event of a dispute with regard to service charge;

***"If the owner shall at any time object to any item of the charges as being unreasonable or the insurance mentioned in Section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairperson for the time being of the Institute of Surveyors of Kenya (or such institution's successor or assigns) who shall in making the determination act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties provided that any objection by the owner under this Paragraph 2.5 shall not affect the obligation of the owner to pay to the company the charges in accordance with the terms of this lease and after the decision of the person appointed as aforesaid any overpayment by the owner shall either be credited against future payments due from the owner to the company under this Fourth Schedule or (if the owner requests) repaid by the company to the owner. (Emphasis mine)."***

7. The Petitioners submit that by stating that the decision of the person appointed to resolve a dispute on service charge shall be final and

binding upon all parties, the Clause purports to prevent a person aggrieved by the decision from seeking any redress in the High Court which is in violation of Article 165(3) (a) of the Constitution. The Petitioners further contend that unlike the standard arbitration clauses in contracts which still give the Court residual powers to deal with peripheral matters, to set aside the award or enforce the same, Clause 2.5 of the Lease Agreements herein purports to completely lock out the redress to the High Court from the decision of the expert so appointed to resolve the dispute.

8. In addition, the Petitioners challenge the Constitutionality of Clause 2.5 on the ground that it violates the Petitioners right to a fair hearing as provided in Article 50(1) of the Constitution of Kenya and that: -

> ***(a) By providing that the person appointed acts as an expert and not an arbitrator, the Clause essentially denies the Petitioners or any aggrieved party a normal right to present their case and/or arguments and also denies them an opportunity to hear and challenge the case or arguments presented by the other party; and***
>
> ***(b) To the extent that the rules and procedures to be adopted by the expert are not spelt out in any guidelines or statutes that leaves the process at the whims of the expert thereby infringing the Petitioners' right to have a dispute determined normally by a public and fair hearing before an impartial tribunal.***

9. By way of their Preliminary Objection however the Respondents essentially challenge the jurisdiction of this Court to hear and determine the Petition. The Respondents submit that it was not in dispute that the Petitioners, amongst other parties, did file ***Malindi ELC Case No. 51 of 2014; Dysara Investments Ltd & Others –vs- Woburn Estate Ltd & Another.***

10. The Respondents contend that the decision of the Court of Appeal in the matter referred to above is binding upon the parties and any fresh proceedings premised on the same facts and seeking a determination of the same matters are not only "res judicata" but are also binding *"in rem"* upon the Petitioners under the provisions of Section 44 of the Evidence Act.

11. In their response to the Preliminary Objection however, the Petitioners submit that a comparison of the pleadings herein and the previous pleadings in the cases referred to reveals that the causes of action are different and that the previous pleadings never took a constitutional trajectory unlike in the instant Petition. The Petitioners assert that the issue of breach of constitutional rights and the Constitutionality of Clause 2.5 of the Lease Agreements were not pleaded or canvassed in the previous cases and the subsequent appeals and that the only issue in those Courts was the contractual obligations of the parties.

12. The doctrine of res judicata is captured under Section 7 of the Civil Procedure Act as follows: -

> ***"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 the 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."***

*13.* Expounding on the essence of the doctrine in ***John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR,*** the Court of Appeal stated thus: -

> ***"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of the 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 in 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 unraveling uncontrollably.***

14. Dealing with the same subject in the ***Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others, Nairobi C.A. Civil Appeal No. 105 of 2017 (2017) eKLR,*** the Court of Appeal further lauded the role of the doctrine observing as follows: -

> ***"The rule or doctrine of res judicata serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."***

15. Arising from the foregoing, my understanding of the res judicata doctrine is that it was meant to lock out from the Court system a party who has had his day in a Court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely, it would be a waste of the Court's valuable time if there was no tool for arresting such mischief.

*16.* The Petition before me arises out of a dispute relating to the payment of service charge by the Petitioners pursuant to identical leases executed separately between the 1st Respondent and the two Petitioners herein. As I understood it, there was no dispute that the two Petitioners amongst other Claimants had earlier on instituted against the two Respondents ***Malindi ELC Case No. 51 of 2014; Dyasara Investments Ltd & Others –vs- Woburn Estate Limited & Another.***

17. From the material placed before me, the Respondents like they have done herein filed a Preliminary Objection dated 3rd April 2014 challenging the Court's jurisdiction to hear the suit. That objection was based on the ground that Clause 2.5 of the Lease Agreements provided for the manner of solving disputes. The Honourable Angote J then seized of the matter dismissed the Preliminary Objection on 15th November 2017 on the main ground that the same did not raise a pure point of law.

*18.* Aggrieved by the said decision, the Respondents lodged an appeal to the Court of Appeal. In a Judgment delivered on 20th September 2018, the Court of Appeal overturned the decision of the Honourable Angote J, and made a finding that the objection raised a pure point of law as defined in the locus classicus case of ***Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors Ltd (1969) EA 696.***

*19.* Upholding the validity of the disputed Clause 2.5 of the Fourth Schedule to the Lease Agreements, the Court of Appeal states as follows at Paragraphs 21 and 22 of its Judgment: -

> ***"21. In light of the fact that the parties to a contract are free to determine terms that govern their relationship and the Court's role is limited to enforcement of those terms*** *(see Filipo Fedrini –vs- Ibrahim Mohamed Omar (2018) eKLR)* ***we agree with the appellants that the ELC had no jurisdiction to entertain the dispute which was centred around service charge. The parties were bound by the terms of their respective leases to have the dispute resolved through the mechanisms set out thereunder.***
>
> ***22. It is also not in dispute that the parties invoked the dispute resolution mechanism in question which ultimately resulted in the report prepared by Mr. Wambua. As for the effect of the letter dated 15th January 2014 we believe that Mr. Wambua who acted as an expert within the terms of the dispute resolution mechanism lacked the mandate or power to withdraw his report. Consequently, the Learned Judge erred in relying on the allegation of withdrawal of the report as the basis of dismissing the Preliminary Objection."***

20. In the matter before me, it is apparent that the Petitioners are still unhappy with the report and the basis of their Petition if I understood them correctly is that the service charges including the recalculated amounts with interests are now being imposed unilaterally by the Respondents and that the same are premised on what the Petitioners refer to as "a purported report by Paul Wambua."

21. In this respect, I am in agreement with the Respondents that the dispute herein is squarely centred around the payment of service charge. That was the same matter that was before the Environment and Land Court in ***Malindi ELC No. 51 of 2014*** aforesaid. When the dispute escalated to the Court of Appeal the Court as we have seen above observed that the Petitioners herein having invoked the dispute resolution mechanism which resulted in the expert report prepared by Mr. Wambua could not resile therefrom and the expert himself having prepared and presented the report in the manner provided had no mandate or power to withdraw the same.

22. That being the case, pleading a Constitutional infringement now is to abuse the process of the Court with a view to subverting the decision of the Court of Appeal which is a decision binding upon this Court. If indeed the Petitioners honestly believed that the dispute on service charge had constitutional connotations, they should have invoked this right from the outset. Otherwise, it is evident that they only want to pursue that path because the Supreme Court in its Ruling rendered on 24th January 2020 declined to entertain their Appeal on account that they had neither raised any Constitutional issues in the Environmental and Land Court nor in the Court of Appeal.

*23.* As Majanja J., cautioned in ***E.T. –vs- Attorney General & Another (2012) eKLR: -***

> *"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 in another way and in a form of a new cause of action which had been resolved by a Court of competent jurisdiction."*

24. Indeed, in ***Gurbacham –vs- Yowani Ekori (1958) EA 450, 458***, the Court of Appeal for Eastern Africa while considering the doctrine of res judicata cited with approval a passage of the Judgment from the old English Case of ***Henderson –vs- Hernderson (1) 67 ER. 313*** wherein the Lord Vice Chancellor stated as follows: -

> ***"In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."***

25. Applying the law as stated, it was clear to me that the Petitioners ought to have brought the alleged Constitutional connotations of the dispute on service charge before the Courts that dealt with the previous suit all the way to the Appeal. Otherwise, this Court has an obligation to afford closure and respite to the Respondents from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court.

26. The upshot is that I am persuaded that there was merit in the Respondent's Preliminary Objection dated 14th September 2020. I allow the same, strike out the Petitioners Notice of Motion and dismiss the entire Petition dated 27th July 2020 with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.**

**J.O. OLOLA**

**JUDGE**