



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 8 OF 2018

IN THE MATTER OF ARTICLES 19, 20, 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 40 READ WITH 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 19, 20, 21(1), 24, 26, 40, 47 AND 65 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 66 OF THE REGISTERED LAND ACT (CHAPTER 300 OF THE LAWS OF KENYA)

Now Repealed and Transitioned as SECTION 57(2) OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)

AND

IN THE MATTER OF SECTION 72 OF THE REGISTERED LAND ACT (CHAPTER 300 OF THE LAWS OF KENYA)

Now Repealed and Transitioned as SECTION 89 OF THE LAND ACT (NO. 6 OF 2012)

AND

IN THE MATTER OF SECTION 2 AND 6 OF THE LAND CONTROL ACT, CHAPTER 302 LAWS OF KENYA

AND

IN THE MATTER OF THE BANKING ACT, CHAPTER 488 OF THE LAWS OF KENYA

BETWEEN

NAITORE M'IBURI.....1ST PETITIONER

MARY NGUGI NKATHA.....2ND PETITIONER

VERSUS

THE HONORABLE ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

AND

SEBASTIAN KAARIA.....INTERESTED PARTY

RULING

Background

1. This ruling is in respect of a Preliminary Objection raised by the 3rd respondent and the interested party. The background facts are that the petitioners commenced this suit vide a petition dated 26th July 2018 in which they sought various injunctive and declaratory reliefs and in the alternative damages for violation of their fundamental rights as well as compensation for illegal disposal of land parcel L.R NO. **NKUENE/TAITA/252** (hereinafter **'the Suit Land'**).

2. The petition was supported by the affidavit of Naitore M'Iburi, where it is contended that on 29th June 1992 the 2nd Petitioner, daughter to the 1st petitioner, was granted an overdraft facility of Kshs. 150,000/- by the 3rd respondent which was secured by creating a charge over the Suit Land whose title belonged to the 1st Petitioner. The 2nd petitioner opened an account with the 3rd respondent with the aim of settling the overdraft. The 2nd petitioner settled the amount plus interest within one year. The 1st petitioner visited the offices of the 3rd respondent on several occasions demanding the discharge and release of her title but the manager kept pushing the dates and not offering any substantive direction.

3. On or about 18th July 1996 a suit was filed in **Nkubu Civil Case No. 56 of 1996: Evangeline Wanja Nahaman & anor v Naitore M'Iburi** where the proprietorship of the suit land by the 1st petitioner was being challenged. Arising from the suit, on 4th September 1996 a caution over the land was issued to James Kirimi who was claiming licensee's interest. During the pendency of this suit, on 4th March 1997 the 3rd respondent entered into another agreement with the 2nd petitioner where the former advanced Kshs. 300,000/- to the 2nd petitioner. The bank did not bother with securing the said advancement through a further charge. However, the officials of the 3rd respondent secretly and fraudulently charged the Suit Land as security for the advancement without her knowledge and consent.

4. As at 8th May 1997 the amount had risen to Kshs. 811,883.35 being the amount due to the 3rd respondent. The latter lodged a claim against the 2nd petitioner in **Meru HCCC No. 68 of 1997; National Bank of Kenya Limited v Mary Ngugi Nkatha** where the case proceeded to its conclusion and judgment was entered against the petitioners for the Suit Land to be auctioned. The auction was scheduled for 29th August 2000 but the District Commissioner Meru Central interceded. As at 15th January 2001 the amount payable was at Kshs. 1,880,510.80/-. The 1st petitioner had no knowledge of the further charge and she could not understand why the 3rd respondent could not discharge her title considering the initial loan had been paid.

5. The 2nd petitioner reading malice considering she had been remitting certain sums towards settlement of the loan decided to investigate the matter. It is at this juncture the 1st petitioner discovered of the further charge and anomalies in the account being used to service the loan. The investigation revealed that the bank manager was involved in manipulating the account by conducting unauthorized debits in collusion with certain advocates. It also revealed that **HCCC No. 68 of 1997** was actually instituted in secrecy by collusion between the 3rd respondent's manager and their in-house advocate without the petitioner's knowledge which led to judgment being entered against them.

6. The petitioners conducted two investigations on 18th August 2001 and 14th March 2002 and both revealed that there was only one charge dated 1st July 1992 of Kshs. 150,000/- and a caution dated 4th September 1996 but no further charge on the title. The further charge was not obtained through proper channels which lacked the Land Control Board Consent and payment of stamp duty.

7. On 18th February 2002 the 3rd respondent through a public auction sold the property to one Sebastian Kaaria, the current interested party who was the highest bidder at Kshs. 800,000/-. The 2nd petitioner on 13th March 2002 took out a caution over the Suit Land as a licensee in order to protect it but the same was removed as well as the one placed by James Kirimi and title was issued to the Interested Party.

8. On 14th March 2002 the Interested Party wrote to the petitioners requiring vacant possession and upon probe it revealed that the Suit Land is worth Kshs. 8,650,000/-. This prompted the petitioners to lodge a suit in protest in **HCCC No. 43 of 2002: Naitore M'Iburi & Mary Ngugi Nkatha v National Bank of Kenya – Meru Branch & Sebastian Kaaria**. On 21st July 2004 their counsel on record in collusion with the 3rd respondent withdrew the case without consulting them and they have lodged a complaint at the Advocates Complaints Commission. The actions of the 3rd respondent were illegal and unconstitutional which caused them to lose proprietorship of the Suit Land which as it stands the interested party is listed as the registered proprietor.

9. Both the 3rd respondent and the interested party have filed respective affidavits in opposition to this suit. They have given a lengthy account of how the dispute came to be, but in summary, they contend that this suit is incompetent as the issues were raised in previous suits, hence the preliminary objections. The 1st and 2nd respondents have associated themselves with the sentiments of the 3rd respondent and the interested party.

The preliminary Objections

10. The notice of preliminary objection dated 03/05/2019 has been raised by the 3rd Respondent, where the following grounds have been

captured:

a) ***The petition is time barred pursuant of provisions of Section 7 and 17 of the Limitations of Actions Act (CAP 22 Laws of Kenya)***

b) ***The petition is res judicata in the light of the outcome in form of judgments and/or rulings and/or decree(s) in Meru HCC No. 68 of 1997 and Meru HCC No. 43 of 2002.***

11. I note that the Interested party had raised more or less similar grounds in his response to the Petition and this is contained in paragraph 12 of his replying affidavit dated 17.9. 2018.

12. The preliminary objection was canvassed by way of submissions. The 3rd respondent submitted that the issues raised in the petition are a fabrication of an ordinary suit that is christened to be constitutional in nature. There is no contention that they exercised their statutory power of sale and auctioned the Suit Land on 18th February 2002 which land was transferred to the Interested Party who was the winner of the bid. The 3rd respondent contend that the suit is time barred by ***Section 7 and 17 of the Limitation of Actions Act***, where it is stipulated that no action may be brought to recover land after 12 years from the date the right accrued. At the expiration of the said period title of that person to the land is extinguished. Transfer to the interested party was done in 2002 which is more than 16 years ago, hence this petition is time barred and the petitioners cannot argue that the provisions of the Limitation of Actions Act are unconstitutional.

13. Secondly, the principle of *res judicata* is not a technicality and it goes to the root of the jurisdiction of the court to determine a dispute. It applies to constitutional petitions like it does to ordinary civil suits. The 3rd respondent contends that the issues in Meru ***HCCC No. 68 of 1997 and HCCC No. 43 of 2002*** are similar as well as the parties. In the instant suit the introduction of the 1st and 2nd respondents cannot circumvent the doctrine of *res judicata*. The two cases were determined on merits and no appeal was preferred. Thus, the petitioners are prohibited from litigating on the same.

14. The following authorities were relied upon by the 3rd respondent in support of its arguments;

(i) ***John Florence Maritime Services Limited & another Vs Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR.***

(ii) ***E.T vs Attorney General & another (2012) eKLR***

(iii) ***Mukuru Munge vs Florence Shingi Mwawana & 2 others (2016) eKLR.***

(iv) ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited (2017) eKLR.***

(v) ***Omondi vs National Bank of Kenya Limited and 2 others (2001) KLR 579.***

(vi) ***James Kanyiita Nderitu vs Attorney General & another (2019) eKLR.***

(vii) ***Mtana Lewa vs Kahindi Mwangandi (2015) eKLR.***

(viii) ***Mercy Waithira vs United Insurance Company Limited Statutory Manager & others (2019) eKLR.***

(ix) ***Ngugi vs Kinyanjui & 3 others (1989) KLR 146.***

(x) ***Richard Nduati Kariuki vs Leonard Nduati Kariuki & another (2006) eKLR.***

(xi) ***Wiliam Koros (legal Personal Representative of Elijah C.A Koros) vs Hezekiah Kiptoo Komen & 4 others (2015) eKLR.***

15. The interested party submitted that it is not in dispute that the petitioner had defaulted in the loan payments and had been accommodated by the chargee for up to five years without any successful effort to redeem their property. There was litigation in respect of the dispute in ***HCCC No. 68 of 1997*** and ***HCCC No. 43 of 2002*** over the subject matter and there was conclusion, hence this matter is *res judicata*. Furthermore, this suit was instituted 16 years after the Suit Land was transferred to him and therefore, it offends the provisions of ***Section 7 and 17 of the Limitations of Actions Act*** since time started running from the year 2002. He added that since no appeal was instigated from ***HCCC No. 68 of 1997*** and ***HCCC No. 43 of 2002***, petitioner cannot bring up a constitutional petition after the final decision after the lapse of 21 years. The interested party contends that petitioner is asking this court to sit on appeal over a decision of the High Court. Therefore, this court has no jurisdiction over the matter

16. In support of the arguments for the interested party, the following cited authorities were proffered;

(i) ***HCCC Constitution Petition No. 410 of 2012 Ventaglio International SA Luxembourg and another versus Registrar of Companies & 6 others.***

(ii) ***C.A No. 239 of 2017 Nairobi Bellevue Development Company Ltd and Hon. Justice Francis Gikonyo & 3 others and Kenya Commercial Bank & 3 others.***

17. The petitioners submitted that the preliminary objections raised by the 3rd Respondent and Interested Party does not qualify as such as, for there are vital facts which need to be ascertained and which require the production of evidence. On the issue of *res judicata*, it was submitted that the same may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.

18. With regard to case no. HCCC No. 68 of 1997, it was argued that the suit was against the 2nd petitioner however it is on record that she never heard knowledge of the suit and was never served with the pleadings. Neither was the 1st petitioner a party in the suit or the prayers sought against her. The court did not go to the merits of the case hence it cannot be rendered as *res judicata*. Likewise, the suit HCCC No. 43 of 2002 was not heard on its merit. Thus, the petition cannot be said to be *res judicata*.

19. Until the petition is heard in full, the court cannot determine whether it is a genuine constitutional petition. It is without a doubt that arising from fraud and abuse and statutory power on the part of the respondents, the petitioners rights were violated. Thus, they have a constitutional right to commence suit in order to ventilate the said violations.

20. The petitioners also contend that the suit is not time barred as the remedies sought by the petitioners are in relation to constitutional violations which were perpetrated by the respondents. Consequently, this court has jurisdiction to determine the matter.

21. The petitioners relied on the following cases in support of their arguments:

- (i) **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) E.A 696**
- (ii) **Nathaniel Kihiu vs Housing finance (2018) eKLR**
- (iii) **Kenya commercial Bank Ltd vs Benjoh Amalgamated Ltd (2017) eKLR 2017**
- (iv) **Cosmas Mrombo Moka vs Cooperative Bank of Kenya Limited & another (2018) eKLR.**
- (v) **Kiluwa Limited & another vs Commission of Lands & 3 others (2015) eKLR.**
- (vi) **Attorney General & another vs Andrew Maina Githinji & another (2016) eKLR**
- (vii) **National Bank of Kenya Limited vs Peter Kipkoech Korat and another (2005) eKLR.**
- (viii) **The Tee Gee Electricals & plastics Co. Ltd vs Kenya Industrial estates, Kisumu CACA No. 333 of 2001.**
- (ix) **State of Maharashtra and Another vs National construction Company Bombay, Supreme Court civil appeal no. 1497 of 1996.**
- (x) **Okiya Omtatah Okoiti & another vs Attorney General & 6 others (2014) eKLR.**
- (xi) **John Mugure Mbogo vs Chief Kenya Defence Forces & another (2018) eKLR.**
- (xii) **Peter N. Kariuki vs Attorney General (2014) KLR, Civil Appeal No. 79 of 2012.**
- (xiii) **Kamlesh Mansuklal Damji Pattni & another vs Republic (2013) eKLR.**
- (xiv) **Wachira vs Weheire vs AG Misc. Civil case No. 1184/03 (OS)**
- (xv) **Anarita Karimi Njeru vs Republic (1976 – 1980) KLR 1272.**
- (xvi) **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.**
- (xvii) **Redington (Ugnda) Limited vs Office of the Attorney General & another (2018) eKLR.**

Determination

22. I frame the issues for determination before this court as follows:

- a) ***Whether this suit meets the threshold of a constitutional Petition.***
- b) ***Whether the petition is time barred by dint of Section 7 and 17 of the Limitations of Actions Act.***
- c) ***Whether this petition is res judicata***

The threshold of a constitutional Petition

23. The petition is rather wordy running into 21 pages. However, the claim of petitioner is discernible and is anchored on fraud. The petitioners take issue with the manner in which the suit land was alienated after the 2nd petitioner was advanced an overdraft facility by 3rd respondent on 29.6.1997.

24. Paragraph 38 and 67 of the petition captures the allegations of fraud in the creation of a further charge.

25. Paragraph 42 captures the reasons why 2nd petitioner was unable to pay the loan. Paragraph 47 – 48 contains allegations by the petitioners against the respondent of how the loan account was mismanaged.

26. Paragraph 49 contains allegations of collusion in the institution of case no. HCCC 68 of 1997 leading to the auction of the suit property. In paragraph 59, petitioners claim the suit land was sold below the market price.

27. In paragraph 60 of the petition, the petitioners contend that they filed case HCCC No. 43 of 2002 against the current 3rd respondent and interested party but their advocate clandestinely and in collusion with the counsel for 3rd respondent withdrew the case.

28. The common denominator running throughout the petition is that the petitioners are attempting to redeem the property through this petition. This is certainly not a constitutional issue. Matters of fraud are ordinarily raised in ordinary suits.

29. In the case of Abdullah Mangi Mohammed vs Lazarus Beja & 5 others (2012) eKLR the court held that;

“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for resolution of the dispute, that statutory and procedure should be utilized in the determination of the applicants claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional rights to property should be discouraged”.

30. In the case of Anne Wawuda & 3 Others vs Kenya Railways Corporation & another (2015) EKL the petitioners were seeking entitlement to various declarations including right not to be treated in a cruel, Inhuman or degrading manner. A Preliminary objection was raised on grounds inter alia that the high court can only enforce a right which exists and that where there is no right in existence nothing can be enforced. Judge Anyara Emukule while dismissing that petition stated as follows:

“The petition herein and many like it, has been presented as constitutional petitions when there is no constitutional issue at stake, when the issue is merely a dispute over eviction, or better still a question of adverse possession, merely for the sole purpose of avoiding uncomfortable questions at a hearing for the same injunctions and declarations, through an ordinary civil suit in the civil jurisdiction of the High court.

In the circumstances, the court is bound to exercise its inherent power to prevent abuse of its process. In the words of the court in Kariuki & others vs Dawa Pharmaceuticals company Limited & others (2007) E.A 235..... Nothing can take away the courts inherent power to prevent abuse or trivializing of its process by striking out frivolous and vexatious application. Baptizing such matters as constitutional cannot make them so, if they are plainly frivolous or vexatious or elevate them to a constitutional status when they are in fact plainly an abuse of the court’s process”.

Also see Anarita Karimi Njeru vs Republic (1976 – 1980) KLR 1272.

31. In this particular case, the interested party is apparently the registered proprietor of the suit land since year 2002. The rights of such a registered proprietor of land are protected and anchored under the statute **primarily section 25 and 26 of the Land Registration Act**. The impeachment of such a title can only be as provided under section 26 1 a & b of the aforementioned Act on grounds of fraud, misrepresentation illegally and corrupt scheme. This would then classify the dispute as one of ownership to be dealt with by ordinary courts and not in a constitutional petition. This is hence a matter where evidence needs to be adduced and tested as a land matter. The petitioners cannot therefore claim that they have rights which need to be protected via this petition.

Limitation of Actions

32. Is the petition time barred by dint of **Section 7 and 17 of the Limitation of Actions Act?**

33. **Section 7** of the said Act provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 17 thereof provides that:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

34. The Interested Party was registered as the owner of the suit land on 14.3.2002. From that time until the filing of the petition in year 2018, 16 years have gone by. It follows that the petitioners instituted this suit after 12 years which means that the matter is time barred. The petitioners have proffered several authorities to buttress their position that there is no statutory period prescribed for commencement of constitutional petitions. However, notwithstanding that this matter was filed as a constitutional petition, still, the petitioners were required to give an explanation on the issue of delay. This was so rightly put by the Court of Appeal in the case of James Kanyiita Nderitu v Attorney General & another [2019] eKLR where it was held that:

“34. Promulgation of the 2010 Constitution is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution.

35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay. In Josephat Ndirangu vs. Henkel Chemicals (EA) Ltd [2013] eKLR, the trial court correctly held that litigants should not avoid the provisions of an Act by going behind statute and seeking to rely directly on constitutional provisions. The primary legislation should not be circumvented. In Peter Lubale Lubullellah vs. Teachers Service Commission, Petition No.145 of 2016 on the issue of circumvention of the primary legislation it was aptly stated as follows:

“To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007.” (Emphasis supplied)”

35. The rationale of the statute of limitation was aptly captured in the East African Court of Justice appeal case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013) eKLR where it was stated as follows;

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)”.

36. In the case of Popat Kotecha property vs State Bank of India Staff, SC, Civil Appeal No. 3460 of 2000, it was held inter-alia that:-

“.....the period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of the past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal..... Rules of limitation are not meant to destroy rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. (Emphasize added)..... the law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for general welfare that a period be put to litigation)”.

Also see Mukuru Munge vs. Florence Shingi Mwawana & 2 Others (2016)eKLR, Peter Kimani Njenga vs Mugo Kamabuni Mugo & 3 others (2018) eKLR.

37. The petitioners' explanation on the issue of delay is that it was not until the year 2015 that the 2nd petitioner got knowledge that their suit had been withdrawn, and that their advocate M. G. Kaume & Co. Advocates had been feeding them lies for over ten (10) years. However, it is trite law that a case belongs to the litigants and not their advocates. In the case of Tana & Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others (2015)eKLR, the court made reference to the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR, where it was stated thus;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

38. I have been able to discern the circumstances under which the execution took place in respect of the High Court matter no 68 of 1997. The decree was given in September 1997. Thereafter, the 2nd petitioner apparently filed an application of stay on 17.11.1997 and even obtained ex parte orders to that effect the following day on 18.11.1997. The ruling by Judge Etyang delivered on 20.3.1998 (copy availed by parties herein) gives a sneak preview of how the court tried to accommodate the 2nd petitioner in the prosecution of her application, which efforts came to nothing! There is no evidence to indicate that the petitioners appealed against that ruling or the Judgment. Now, 22 years down the line, the petitioners want this court to bypass the issue of limitation!

39. One of the cardinal principles in our constitution is “**the expeditious delivery of justice**” –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17th century maxim of “**Justice delayed is justice denied**”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred. My conclusion on this point is that Petitioners claim is stale and is statute barred. The preliminary objection succeeds on this point.

Res-judicata

40. **Section 7 of the Civil Procedure Act** provides 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 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.”

41. *Res judicata* goes down to the root of whether the court has jurisdiction or not. It is applicable where the former judgment was made by a court of competent jurisdiction, directly speaking upon the matter in question in the subsequent suit, and between the same parties or their privies. The Court of Appeal in the case of **Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & 3 others [2013] eKLR** held that:

“This Court has interpreted and applied the principle of res judicata in a litany of cases and one would be excused to make an assumption that the law in this area is straight forward and well settled. If that were so however, the Courts would not still be battling with this issue on a daily basis. Although generally speaking the principles are well spelt out, it is important to consider the facts of each case in order to determine if a suit which has been the subject of litigation before has become res judicata. If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters, then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following by consent of the litigating parties.”

42. Moreover, parties cannot evade the doctrine of res-judicata by introducing new parties as was put forth by Majanja J in the case of **E.T. v Attorney General & another [2012] eKLR** where he held as follows:

“57. The courts must always 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 is in the second suit 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. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata’ ”

43. In the case of **Henderson vs Henderson (1843) 67 ER 313** res-judicata was described as follows;

“...where a given matter becomes the subject of litigation in, and 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 litigations in respect of a 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 pleas 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”.

44. Are the issues in **Meru HCCC No. 68 of 1997** and **HCCC No. 43 of 2002** and parties similar? In **Meru HCCC No. 68 of 1997 National Bank of Kenya v Mary Ngugi Nkanata** the issue was that the 3rd respondent claimed KShs. 811,833.35 from the 2nd petitioner in respect of overdrafts and other financial accommodations granted by the 3rd respondent to the 2nd petitioner on various dates up to and including 28th February 1997. Judgment was entered in favour of the 3rd respondent.

45. The case **HCCC No. 43 of 2002 Naitore M’Iburi & Mary Ngugi Nkatha v National Bank of Kenya Ltd –Meru Branch & Sebastian Kaaria** was filed due to the sale of the Suit Land by the 3rd respondent to the Interested Party on 14th March 2002 which according to the petitioners was done secretly, illegally and irregularly. This matter was withdrawn as a result of consent entered by the petitioners’ counsel, and the 3rd respondent. According to the petitioners, they were not aware of this but only came to learn about it in 2015 when they were informed of its dismissal

46. The issues the petitioners seek to be tackled in this petition inter alia touch on the second advancement that was issued to the 2nd petitioner which according to 1st petitioner used the Suit Land as security without her knowledge and consent. This resulted in her land being auctioned in March 2002 and given to the highest bidder, who is the Interested Party. The petitioners allege that she was illegally dispossessed of her Suit Land. Looking at the above cases they both deal with the same issues as are raised in this petition. **The 1st**

petitioner is the mother of the 2nd petitioner and I have no doubts that she was aware of the transactions appertaining to the suit land.

47. The petitioners have submitted that the suit no. 68 of 1997 was instituted secretly by 3rd respondent and a party who posed as an advocate for the 2nd petitioner without the latter's knowledge. Presuming this to be true, then the petitioners would have been very vigilant in pursuing a review or an appeal. Well, they did file an application (records not very clear on what it was all about), and 2nd petitioner obtained a stay. But again, she blames her advocate for the non-prosecution of the said application which was dismissed. Even the fate of the subsequent suit filed by the petitioners, 43 of 2002 has been blamed on their advocate!

48. It has been submitted for the petitioners that 2nd petitioner was never served with the pleadings in suit no.68 of 21997. It follows that the petitioners are now challenging the decision in the aforementioned case. This court cannot purport to seat on appeal in respect of a Judgment and ruling delivered by a court having horizontal jurisdiction with this court.

49. As rightly submitted by the 3rd respondent, the petitioners were privy to the outcome in case no. 68 of 1997 which gave rise to the auction of the suit land, while their case no 43 of 2002 was withdrawn. The bottom line of this matter is that the petitioners were required to bring forth all the issues they are now raising in the previous suits. They didn't and they now want to have a second bite of the cherry. As rightly put by the 3rd respondent, they are forbidden from litigating in instalments. I therefore find that this matter is res-judicata.

Conclusion

50. It is not lost to this court that the petitioners are bent on convoluting this matter as much as it would be possible. Apart from blaming their advocates, they also aver that they had obtained an injunction in **Meru High Court case no. 43 of 2002** restraining the 3rd respondent and its agent from interfering with the rights and occupation of the suit land, but they were shocked to be evicted in a bizarre manner on 21.7.2004. However, the records indicate that vide a ruling by Judge Kasango Mulwa, delivered on **24.7.2003**, the application for injunction filed by the petitioners was dismissed - (See annexure "PC19" in the Replying Affidavit of Paul Chelanga for the 3rd Respondent).

51. I find that the Preliminary Objections filed by the 3rd respondent and the interested party are merited. This petition is hereby struck out with costs to respondents and the interested party.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE