REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 88 OF 2015

ABDI MOHAMED NOOR.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TURKANA.....1ST DEFENDANT

LOJAAM LUQA ENERGY CO. LTD.....2ND DEFENDANT

RULING

1. This is a Ruling on a Preliminary Objection dated **17/2/2020** raised by the respondents to the application dated **24/1/2020** on the grounds that:

(1) The application is *res judicata*, the suit having been concluded on 18/5/2016.

(2) The application is frivolous, vexatious and otherwise an abuse of the court process.

2. The 1st respondent filed his submissions on **29/6/2020**. The applicant filed submissions on **6/7/2020.**

3. The main issue raised by the preliminary objection is whether the instant application is *res judicata* and whether the court is *functus officio.*

4. The background is that the plaintiff filed this suit against the defendants and this court found that the plaintiff had proved his claim to the required legal standard. A declaration was therefore made that the plaintiff is the lawful owner of **plot number 268** situated at **Lokichogio Township in Turkana** County. An order of permanent injunction was issued against the defendants and their agents restraining them from interfering with the plaintiff's quiet possession of the suit land. The plaintiff's claim for damages for trespass and *mesne profits* was disallowed. The defendants were also condemned to costs of the suit. That was on the **18th May, 2018**. On the **24th January, 2020** the applicant brought the instant application which is the subject of the preliminary objection. That application sought the following orders:

a. …(spent)

b. That this honourable court be pleased to grant an order of compensation to the plaintiff/applicant in the sum of Kshs.28, 000,000/= or any reasonable amount on account of the subject matter of the suit with costs and interest.

c. That this honourable court in its discretion do set a timeline within which the ordered compensation should be paid in default of which execution should issue.

d. That the respondents be condemned to pay the costs of this application.

5. That application is premised on the grounds that the respondents allegedly defied this court's order restraining them from constructing a building on the suit land but the respondents nevertheless proceeded to complete the building. In the end, a permanent injunction was issued against them. The applicant alleges that the respondents have begun to carry out statutory business on the suit premises in flagrant disregard of this court's orders made in the suit. It is also averred that they have failed to pay the costs of the suit. The applicant appears to bear a sympathetic eye for the respondents in that he states that the 1st respondent has invested substantial public funds on the suit premises such that eviction *is not the best option*. He prefers compensation. He alleges that he has obtained a valuation report that gives the value of the property as **Kshs. 28,000,000/=** but despite seeking a settlement none has been forthcoming from the respondents.

6. In his submissions the applicant's counsel states that the application is not barred by **Section 7** of the **Civil Procedure Act**. He states that the issues in the suit having been determined by the court and no appeal having been filed, the application does not seek to retry the issues in the suit. He cites **Section 34** of the **Civil Procedure Act** which states as follows:

> **"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."**

7. Further, he quotes the case of **Leisure Lodges Limited Vs Japhet S. Asige & Another 2018 eKLR** which quoted the case of **Mombasa Bricks And Tiles & 5 Others Vs Arvind Shah & 7 Others 2018 eKLR** as follows:

> **"I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation.**
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> **It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.**
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> **It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.**
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> **As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.**
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> **Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.**
>
> **I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before."**

8. He also quotes the case of **Justus Kyalo Musyoka Vs John Kivungo 2019 eKLR** as cited in the case of **Machira T/A Machira & Co Advocates Vs East African Standard (No 2) 2002 KLR 63** where the court stated as follows:

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

9. He submits that under equity no wrong is without a remedy and this court can not declare that it is now *functus officio* as that would render the entire litigation an academic exercise, thus sanctioning the wrongs occasioned the applicant by the respondents. He restates the overriding objective of the **Civil Procedure Act**: facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

10. The 1st respondent's counsel responded by submitting that the applicant never initiated committal proceedings or, in the alternative amended the plaint to include a prayer for demolition after the orders of court were defied. He highlights the fact that the court denied the applicant damages for trespass and *mesne profits* which had been expressly sought in the plaint. He avers that the applicant is seeking to depart from his pleadings and cites the case of **Malawi Railways Ltd Vs Nyasalu 1998 MWSC (3)**. He cites the definition of *res judicata* the **Black's Law Dictionary**.

11. He relies on the case of **Samuel Njau Wainaina Vs Commissioner Of Lands & 6 Others 2012 eKLR** and cites the following passage from that case:

> **"In this respect, I would do no better than quote the case of Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported) where the court stated, "[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 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. 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 ....”

12. He also relies on **Nathaniel Ngure Vs Housing Finance 2018 eKLR** and relies on the **Black’s Law Dictionary**, this time for the meaning of *functus officio*. He quotes the case of **Raila Odinga and Others vs the IEBC & 3 others, 2013 eKLR** as quoted in **Serve in Love Africa (SILA) Trust Vs Abraham Kiptarus Kiptoo & 2 Others [2019] eKLR as follows:-**

> **“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”**

13. He states that compensation can only be awarded in lieu of declaration of ownership. Intimating that the applicant wants to compel the compulsory acquisition of the land, he avers that there are proper mechanisms in law for the purpose and the applicant can not give up the land in compulsory acquisition as it would defeat the meaning of “compulsory acquisition”.

DETERMINATION

14. I have considered the application and the response. The doctrine of *res judicata* is premised on the public policy that litigation should have an end. In the case of **Benjoh Amalgamated Ltd & Another -vs- Kenya Commercial Bank [2014] eKLR** it was stated as follows by the Court of Appeal of Kenya:

> **“In Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd [2009] S GHC 234, the Court of Appeal (of Singapore) examined the doctrine of re judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res judicata as a substantive principle of law are first “the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions” and second, “the rights of the individual to be protected from vexatious multiplication of suits and prosecutions.”**
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> **The Court went on to state that:**
>
> > **“The courts have never accepted res judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court’s erroneous decision were to form the basis of an estoppel against the aggrieved party.... In such a case, the tension between justice principle and the finality principle is resolved in favour of the former.”**
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> > **“... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (“the finality principle”) outweighs the public interest in achieving justice between the parties (“the justice principle”) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because “a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal.”**

15. In the case of **Republic v City Council of Nairobi & 2 others [2014] eKLR** the court quoted the decision in **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** where the former East African Court of Appeal stated as follows:

> **“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 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 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…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”**

16. A perusal of the instant application shows that the applicant’s main prayer is for compensation. He seeks compensation in the sum of **Kshs 28,000,000/=** and the provision of a timeframe within which the payment should be effected. The two prayers do not identify which of the defendants should bear that compensation. This alleged compensation was not awarded in the judgment of the court issued on **18/5/2016**. The main argument of the applicant is that the 1st respondent has invested a colossal amount of public funds on the suit property and therefore compensation, and not eviction, is not the best option in the circumstances.

17. In this court’s view it does not require any deep research to establish that the issue of compensation was dealt with with finality in the main suit. A look at the pleadings and other documents filed in the suit will suffice. It is clear that the plaintiff sought damages and *mesne*

profits in his plaint which were denied.

18. The principle of *res judicata* is reflected in **Section 7** of the **Civil Procedure Act** which provides as follows:

> **"7. 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."**

19. In the case of **Samuel Njau Wainaina V Commissioner Of Lands & 6 Others [2012] eKLR** it was stated as follows:

> **"17. The doctrine of res judicata has three ingredients. First, the issue in the first or previous suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and Another v Attorney General and Others [2005] 1 EA 83, 89)."**

20. Since in the instant suit the current application has been brought at the post-judgment stage in this litigation, the provisions of **Section 7** of the **Civil Procedure Act** therefore must be applied to test whether the instant application is res judicata.

21. The issue of damages and *mesne profits* as far as the parties in the instant suit was decided in the judgment on the basis of the available evidence and the plaintiff was unsuccessful in that regard. Therefore, unless that issue was raised in an appeal against the judgment in the instant suit, the plaintiff, having been denied that remedy for want of evidence, can not be permitted to re-litigate the same issue against the same defendants either in an application in this suit or in another suit without violating the provisions. To apply the language employed in the **Mombasa Bricks & Tiles Case (Supra)**, the applicant is seeking a "merit-based decision" in the instant allocation; that would be permitting the plaintiff to reopen the proceedings and have a second bite at the cherry, which the application of the doctrine of *res judicata* is meant to prevent.

22. In the present case the defendants would be correct in insisting that all the evidence that should have been but was not raised at the hearing can not form the basis for a fresh agitation for a remedy that had been sought in the plaint in the instant suit.

23. In this court's view, since the judgment clearly indicated that the claim for damages and *mesne profits* was denied for lack of evidence, allowing the same now would amount to either a retrial of the suit or an appeal; this court has no mandate to retry the suit or sit on appeal over its own decisions.

24. The only power exercisable by this court in a concluded suit may only be the power of review of its judgment and that would be in a limited number of cases and subject to the conditions set out in **Order 45** of the **Civil Procedure Rules**. The instant application has not been brought under those provisions but under **Section 34 (1)** of the **Civil Procedure Act**. That section provides as follows:

> **"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." (Emphasis mine)**

25. The questions relating to the execution of the decree in this matter can only be dealt in this suit and the applicant appreciates that position very well as captured in **Section 34** of the **Civil Procedure Act**. Does the question arising in the instant application relate to the execution, discharge or satisfaction of the decree? In this court's view, the decree having expressly denied the plaintiff damages and *mesne profits*, the instant application must be considered a fresh proceeding seeking compensation ordamages. It is plain for all to see that it is not an application *"relating to the execution, discharge or satisfaction of the decree."* The provisions of **Section 34(1)** are therefore irrelevant to the instant application.

26. Perchance it was even possible to allow the instant application, it is noteworthy that the valuation report has been unilaterally obtained by the applicant. There was no input of any other party yet the valuation report forms the main evidence, the substratum of the application. Besides, that report is only being served on them for the first time together with the application. There has been no opportunity for the respondents to test that evidence either by way of cross-examination or by production of a rival expert report. The question that arises is whether there would be any fairness in allowing the respondents to be condemned, on the basis of such a report, to the sum it postulates as the damages long after judgment which did not award that sum.

27. In this court's view, it would occasion the respondents a miscarriage of justice if the court were to allow the application. In addition, it would set the wrong precedent, the re-opening of trials long after judgment was delivered in the matter and litigation would have no end, which would be against public policy. The case law cited by the 1st respondent's counsel is appropriate in this application.

28. Due to the foregoing reasons, this court is persuaded that the application dated **24th January 2020** is *res judicata* and it is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and **Delivered** at **Kitale via electronic mail** on this **27th day** of **July, 2020.**

MWANGI NJOROGE

JUDGE, ELC, KITALE.