REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

CONSTITUTIONAL PETITION NO 502 OF 2014

TASSIA PLOT OWNERS ASSOCIATION ……...PETITIONERS

VERSUS

THE MANAGING TRUSTEE OF THE NATIONAL

SOCIAL SECURITY FUND …….. 1ST RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES ……...……..…..2ND RESPONDENT

RULING

1. In its petition dated 10th October 2014, the petitioner, an association of persons registered with the Ministry of Gender, Children & Social Development seeks the following orders:

> ***a) That a declaration that the fundamental rights and freedoms guaranteed to the members of the petitioner especially under article 2, 3 20(1), 20(2), 21(1), 22(1), 23(1), 28, 40, 47 and 50(1) of the constitution have been contravened by the respondents.***
>
> ***b) That this Honourable Court be pleased to issue an order of permanent injunction against the 1st and 2ndrespondents either jointly or severally restraining them from imposing on the petitioner and its members an additional cost of Ksh920,000.00 per person towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the petitioner.***
>
> ***c) That this Honourable Court be pleased to issue an Order of permanent injunction restraining the 1st and 2nd respondents either jointly or severally from implementing the Tassia II and III Regularization Plan on Infrastructure Development.***
>
> ***d) That an order restraining the 1st and 2nd respondent from unilaterally and arbitrarily repossessing the petitioners' plots and selling the off to unknown persons who are not members of the petitioner.***
>
> ***e) That an injunction restraining the 1st and 2nd respondent either jointly or severally from offering for sale public utility plots.***

f) That an order of injunction restraining the 1st and 2nd respondents from offering for sale, and / or demolishing the petitioners' properties within the Tassia II and III settlement scheme.

g) That the costs of the petition be borne by the respondents.

h) That this Honourable Court be pleased to make any further orders as it may deem just and fit to grant.

2. The petitioner also filed an application by way of Notice of Motion in which it sought orders restraining the respondents from evicting its members or carrying out any demolitions of their properties. The basis of the application and petition was that the respondents had issued a notice of their intention to evict the members of the petitioner, or to demolish their properties, which was in violation of their right to property under Article 40. The petitioner contended that its members are the legal and equitable owners of the property at issue, and the issuance of title deeds to them by the respondents should not be conditional on their paying to the respondents the sum of Kshs 920,000,000 for the construction of a tarmac road. Both the application and petition were supported by affidavits sworn by Mr. Charles Kenyatta, the Organising Secretary of the petitioner.

3. In response to the petition and the application for conservatory orders, the respondents filed an affidavit in response sworn by Mr. Charles Ouko, the 1st respondent's Legal Manager, as well as an application seeking to strike out this petition as being *res judicata*, In the said application dated 17th October 2014, the respondents seek the following orders:

1. ***That the petition dated 10th October 2014 be struck out.***

2. ***That costs of and/or incidental to this application be borne by the petitioner or Charles Kenyatta as the court may deem appropriate.***

3. That the court be at liberty to make such further or alternative orders as the (sic)

4. The respondents' application was based on the following grounds:

1. ***The substance of the claims being agitated as well as the grounds upon which they are being agitated by the petitioner are res-judicata having been conclusively determined in Judicial Review Application No 218 of 2014 Republic vs the National Social Security Fund ex parte Tassia Plot Owners Association***

2. This Court lacks jurisdiction to impinge a decision from a court of concurrent jurisdiction; and

3. ***The petition, objectively considered, does not present any justiciable issues falling within the ambit of a constitutional petition or which are not already res judicata;***

4. ***The Court should not indulge the petitioners who are intent on bringing successive actions in respect of the same subject matter where an appropriate statutory alternative appellate process has been clearly provided and is being pursued by the petitioners; and***

5. ***The application is a gross abuse of the court's process and the petitioner and its purported members are intent on abusing the court's process through a game of judicial lottery which cannot be condoned under any circumstances.***

6. ***This court has inherent jurisdiction to strike out an action for abuse of process at any stage in the proceedings; and***

7. The law, the balance of equities, the greater public interest as well as the authority and

dignity of the court require this court to forthwith strike out both the application as well the petition with costs to NSSF.

5. This ruling relates to the application to strike out the petition.

The Case for the Applicant/Respondent

6. The applicant relied on the affidavit of Mr. Austin Ouko and submissions dated 2nd December 2014. Its Counsel, Mr. Ibrahim Aden, also made oral submissions on its behalf.

7. In his affidavit, Mr. Ouko avers that the petitioner has deliberately concealed the truth from the Court in a manner that requires the striking out of its petition. This is because it has failed to disclose that the issues and allegations being presented to this Court through this petition were in fact the subject matter of judicial review proceedings instituted recently in June 2014 in **Judicial Review Application No 218 of 2014 Republic vs The National Social Security Fund.**

8. The applicant asks the Court to consider the pleadings relating to the said application and the judgment therein, and to find that the substance of the claim being agitated in the present petition and the grounds thereof are *res judicata* having been conclusively determined in the judicial review proceedings.

9. It is also the applicant's case that the petitioner has commenced an appeal process against the decision in the Judicial Review matter by filing a Notice of Appeal. It is its contention therefore that the petition does not present any justiciable issues falling within the ambit of a constitutional petition or which are not already *res judicata*; that the Court lacks jurisdiction to impinge a decision from a court of concurrent jurisdiction and should not indulge the petitioner which is intent on bringing successive actions in respect of the same subject matter.

10. It is its further contention that an appropriate alternative statutory appellate process has been clearly provided and is being pursued by the petitioners; and that the petitioner has brought successive claims and refused to pay costs when ordered to do so in **Rachel Njoki Wainaina vs National Social Security Fund [2011] eKLR** and **Judicial Review Application No 218 of 2014 Republic vs The National Social Security Fund.** The applicant asks the Court to strike out the petition and direct that the costs thereof be paid by the officials of the petitioner, such as Mr. Charles Kenyatta, who authorized the filing of the petition.

11. In his submissions on behalf of the applicant, Mr. Aden reiterated that the claim being agitated was conclusively heard and determined in **JR 218 of 2014 – R vs NSSF ex parte Tassia Plot Owners Association**, and this matter is therefore *res judicata*. Counsel asked the Court to consider the order of Korir J in the judicial review application granting leave to the petitioner to commence judicial review proceedings, the substantive notice of motion and the affidavit in support to note that they raised the same issues as the present petition. He submitted, further, that being dissatisfied with the decision of Korir J, the petitioner had lodged a Notice of Appeal, but instead of pursuing the appeal, had now filed the present petition. Seeking the same orders as in the judicial review application, but under the guise of a constitutional petition.

12. Counsel submitted that the Court lacked the jurisdiction to impinge a decision of a court of competent jurisdiction, relying in support on the decision in **Kapa Oil vs KRA & 2 Others, Petition No 370 of 2012** and **Azim Taibjee & Another vs Attorney General and Others, Petition No 1173 of 2007** for the proposition that no human right or fundamental freedom is contravened by a judgment that is liable to be set aside on appeal for error of fact or law. It was his submission that the petition is an abuse of process and should be struck out with costs to the respondents.

The Respondent/Petitioner's Response

13. The respondent/petitioner filed an affidavit in reply sworn by its organizing secretary, Mr. Charles Kenyatta on 17th November 2014. In his affidavit, Mr. Kenyatta avers that the matters raised in the present petition, even though litigated by the same parties, are not and cannot be *res judicata* as an application for judicial review deals only with procedures and not the merits or demerits of a decision or situations; that while a judicial review court is only limited to issuing orders of Mandamus, Certiorari and Prohibition, this is not the case in a constitutional petition which deals with, among others, interpretation of the Constitution and making specific declarations where fundamental rights and freedoms have been breached or are about to be breached. It is his averment therefore that this Court, sitting as a constitutional court, does not issue the same orders as a court exercising judicial review powers.

14. The petitioner asks the Court to consider the decision of Korir J and note that in his judgment, the Honourable Judge was very clear and categorical that the applicant should not have approached the judicial review court since the orders issuable by a judicial review court could not determine the issues in question, and that judicial review deals with public law and not private law. Mr. Kenyatta in particular sets out the words of Korir J in the concluding page of the judgment in which he stated that

> ***"These proceedings arise out of contractual obligations between the applicants members and NSSF. Those are matters that fall into the private law realm. Judicial review remedies are therefore not the most efficacious in such circumstances."***

15. The petitioner therefore argues that the decision in JR 218 of 2014 did not determine the issues on merit and make a conclusive judgment, and that the Court only advised that the forum was wrong and that parties should have ventilated their issues in a different form. It was its contention therefore that the issues for determination in this petition are not *res judicata*.

16. Mr. Kenyatta avers that following the decision of Korir J, the petitioner has filed the present petition seeking certain declarations with respect to infringement and breach of the petitioner's members' constitutional rights and also for determination of their rights under the contract between them and the respondents.

17. In his submissions on behalf of the petitioner, Mr. Mutua submitted that the present application is premised on the ground that the petitioner is seeking to challenge the decision in JR 218 of 2014. It was his submission, however, that the petitioner is challenging a notice in the daily newspapers to the effect that the petitioner's members would be evicted from their plots if they did not pay Kshs920,000/- for the construction of public roads and would also not be given their titles.

18. Mr. Mutua further submitted that pegging the issuance of titles to the payment of the sum of Kshs920,000/- for construction of roads contravenes the provisions of Article 40 of the Constitution on the right to own property. It was his contention that what was before the judicial review court was an issue challenging the procedure and the orders sought were Certiorari and Mandamus, while in this petition the petitioner is seeking an injunction for contravention of fundamental rights and freedoms which this Court can grant under Article 23. It was the petitioner's submission therefore that the application to strike out is misguided and misplaced and ought to be dismissed.

Determination

19. The sole issue for consideration and determination in this application is whether the issues raised in the petition are *res judicata* having been addressed in Judicial Review Application No. 218 of 2014. If they are, then the Court should strike out the petition.

20. To determine this question, I need to address myself to the meaning and implications of the principle of *res judicata.* The principle of res judicata is set out in the Civil Procedure Act, Cap 21

at section 7 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 can 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."***

21. The Civil Procedure Act has also provided explanations with respect to the application of the *res judicata* rule. Explanation 1-3 are in the following terms:

> ***Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
>
> ***Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***
>
> ***Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

22. Black's Law Dictionary (7th Edition) at page 1312 defines ***res judicata*** as follows:

> ***[Latin "a thing adjudicated"](17c) 1. An issue that has been definitely settled by judicial decision. Cases: Judgment 540,584,585] 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essentials elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or panties in privity with the original parties....."***

23. The *res judicata* rule has also been considered in this and other jurisdictions in several cases, and there is unanimity on what the rule means and implies. In **Nicholas Njeru -vs- Attorney General & 8 Others (2013)e KLR**, the Court of Appeal expressed itself as follows:

> ***"This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others -vs- The Attorney General Of The Republic Of Uganda where the court stated that for the doctrine to apply;***
>
> ***-The matter must be directly and substantially in issue in the two suits.***
>
> ***-The parties must be the same or parties under whom any of their claim, litigating under the same title; and***
>
> ***-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited -vs- Central Bank & 2 Others – Civil Appeal No. 3 of 1996."***

24. See also **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR; Charo Kazungu Matsere and 273 Others v Kencent Holdings Limited and Another (2012) eKLR**; and **Karia and Another v the Attorney General and Others (2005) 1EA 83.**

25. In considering the *res judicata rule*, the Supreme Court of India, in its decision in **Swamy**

Atmananda vs Sri Ramakrishna Tapovanam [(2005) 10 SCC 51], stated as follows*:*

> ***"[26] The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."***

26.I am mindful also of the words of the Court in the English case of **Henderson -vs- Henderson (1843-60) ALL E.R.378**, in which the Court expressed the following view:

> ***"…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 case, 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."***

27.However, I agree with the view expressed by Lenaola J in the case of **Okiya Omtatah Okoiti & Another –vs- The Attorney General and Another Petition No. 593 of 2013** when considering the application of the *res judicata* rule in constitutional petitions:

> ***"Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."***

28.I agree also with the caution he issued in the case of **Wycliffe Gisebe Nyakina vs Attorney General and Another Petition No. 403 of 2014** when he stated as follows:

> ***"… While the Courts in constitutional litigation must apply the principle of res judicata sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same Court…"***

29.Which brings me to the facts of the petition before me. As is evident from the prayers sought in the petition and the averments by Mr. Kenyatta in the affidavit in support of the petition and the

application for conservatory orders, the petitioner and its members are aggrieved by three acts of the respondents. These acts, it argues, violate its members' rights under Articles 2,3 20(1), 20(2), 21(1), 22(1), 23(1), 28, 40, 47 and 50(1).

30. It therefore seeks orders to stop the respondents from first imposing an additional cost of Ksh920,000.00 per person towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the petitioner; secondly, to restrain them from implementing the Tassia II and III Regularization Plan on Infrastructure Development; and thirdly, from unilaterally and arbitrarily repossessing the petitioners' plots and selling then off to unknown persons who are not members of the petitioner, and from offering for sale public utility plots.

31. In his affidavit in support of the petition, Mr. Charles Kenyatta gives the history to the dispute between the petitioner and the respondents. The facts, as in the Judicial Review application heard and determined by Korir J, relate to the occupation by members of the petitioner of the land in dispute; their claim in adverse possession in the case of **Rachel Njoki Wainaina vs. National Social Security fund Board of Trustees H.C.CC No 529 of 2002**; and the agreement that the respondents would sell the land to members of the petitioner.

32. Mr. Kenyatta further deposes that the respondents arbitrarily increased the agreed purchase price in respect of the plots measuring 33x66 and 50x100 from Ksh315,000.00 and Ksh800,00.00 respectively to Ksh550,000.00 and Ksh1,200,000.00 respectively; that they have unilaterally and arbitrarily approved a project towards the development of infrastructure at Kshs5.04 Billion and have further ***"unilaterally and arbitrarily procured M/s China Jiangxi International (k) Ltd as the contractor to undertake development of the infrastructure and services in the Tassia II and III Settlement Scheme without putting into consideration the voices of the petitioner members who own all the plots within Tassia II and Tassia III."***

33. Mr. Kenyatta further avers that the respondents have imposed on the petitioner and its members the payments of an additional cost to the respondents of Ksh920,000.00 towards the development of infrastructure as a precondition for the issuance of individual title deeds them.

34. The applicant respondent argues that all these matters which have been raised in the petition had been canvassed and determined by Korir, J in **Judicial Review Application No. 218 of 2014**. The petitioner concedes that the issues were raised between the same parties, but contends that they were not considered on their merits.

35. I have considered the judgment of Korir J in **Judicial Review Application No. 218 of 2014**. It has not been disputed that it was between the same parties, or that it related to the same issues that the present petition raises. The petitioner's argument is that in his decision, the Learned Judge did not consider the merits of the case. The question is whether this is correct.

36. In the judgment, Korir J set out the prayers sought by the petitioner in its substantive application dated 16th June 2014, which were as follows:

> ***"1. AN ORDER OF PROHIBITION, do issue prohibiting each and all the Respondents from imposing on the Ex-parte Applicant and its members the payment of an additional cost to the Respondents of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the Ex-parte Applicant.***
>
> ***2. AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all the Respondents from changing and increasing the purchase price of plots measuring 33x66 and 50x100 unilaterally and arbitrarily.***
>
> ***3. AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all Respondents from unilaterally and arbitrarily repossessing the Ex-parte***

Applicant's members plots and selling them off to unknown persons who are not members of the Ex-parte Applicant.

4. AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all the Respondents from offering public utility plots for sale to the public.

5. AN ORDER OF MANDAMUS do issue to compel each and all the Respondents to issue title deeds to the Ex-parte Applicant and its members who have fully paid the purchase price of their respective plots.

6. AN ORDER OF MANDAMUS do issue to compel each and all the Respondents to surrender public utility plots to the Nairobi City County free of cost as stipulated in the approved Plan under the Physical Planning Act dated 23rd January 2009.

7. The costs of this Application be provided for."

37. The Court then set out the respective cases of the parties. With respect to the applicant, it observed as follows:

"The basis of the application is that the respondents unilaterally and arbitrarily increased the agreed purchase price of the plots measuring 33x66 ft and 50x100 ft from Kshs.315.000/= and Kshs.800,000/= respectively to Kshs.550.000/= and Kshs.1.200,000/= respectively. Further, that the respondents unilaterally and arbitrarily approved the development of infrastructure at Kshs.5.04 billion and also unilaterally and arbitrarily procured M/s China Jiangxi International (K) Ltd as the contractor to undertake development of the infrastructure and services in the Tassia II and III Settlement Scheme. Consequently, the respondents imposed on the members of the Applicant an additional cost of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the Applicant.

The Applicant contends that the contracts signed between its members and NSSF towards the purchase of the plots did not stipulate any payment of an additional cost to the respondents towards the development of infrastructure and as a precondition to issuance of individual title deeds. The Applicant contends that the respondents did not consult its members when arriving at the figure to contribute towards the infrastructure development nor did they consult the plot owners when awarding the tender to M/s China Jiangxi International (K) Ltd.

According to the statutory statement, the Applicant's case is that the respondents' decisions are discriminative, arbitrary, inconsistent and unfair as they will deny its members the opportunity to own/purchase plots and homes. Further that the decision to approve Kshs.5.053 billion towards infrastructure development and to procure M/s China Jiangxi International (K) Ltd as the contractor to undertake the development of the infrastructure and services in Tassia II and III was done unilaterally and unlawfully and amounts to oppression and abuse of power. The Applicant contends that the respondents are forcefully repossessing the plots and selling them off to persons who are not members of the Applicant. The Applicant asserts that the respondents' decisions are irrational, unreasonable and made in bad faith and/or for an improper motive or purpose. Further that the decisions are bad in law and ultra vires for failure to take into account relevant factors. The Applicant also faults the respondents for failing to consult it or its members."

38. With respect to the decisions by the respondents that the applicant was challenging, the Court

stated as follows:

> ***"Upon review of the material placed before the Court, I find that the Applicant and its members are aggrieved by two decisions made by the respondents. The first decision is that of increasing the prices of plots. A 33x66 plot was increased from Kshs.315,000/= to Kshs.550,000/= and a 50x100 plot was increased from Kshs.800,000/= to Kshs.1,200,000/=.***
>
> ***The second decision challenged by the Applicant is the imposition of an additional cost of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds. In this regard, the Applicant questions the approval of a figure of Kshs.5.035 billion for infrastructure development and the award of the tender to M/s China Jiangxi International (K) Ltd."***

39. The Court then proceeded to address its mind to both these questions. It considered the respective arguments of the parties with respect thereto, then observed as follows with regard to the decision to increase the price:

> ***"The respondents have clearly stated what informed their decisions. The decision to marginally increase the prices of the plots was informed by the fact that some of the plot buyers had breached their agreements by failing to pay the purchase money within six months. NSSF was therefore losing value for money and that is why it increased the prices."***

40. The Court went on to observe as follows:

> ***"It appears from the documents placed before the Court that the Applicant and its members agreed to the revised prices. They cannot now turn around and accuse the respondents of arbitrarily increasing the prices of the plots."***

41. With respect to the second question relating to the amount of Kshs 920,000 for infrastructural development and the award of the tender in respect thereof, the Court again considered the respective positions of the parties and stated as follows:

> ***"The second decision is the imposition of a cost of Kshs.920,000/= for infrastructure development and the award of a tender of Kshs.5.035 billion for the infrastructure project. The respondents' reply is that the purchasers of the plots were all along aware that the plots were sold as un-serviced and they knew that any cost incurred for servicing the plots would be met by them.***
>
> ***The respondents' submission has backing from the documents placed before the Court. The first document is the unsigned agreement titled "AGREEMENT BETWEEN NATIONAL SOCIAL SECURITY FUND (NSSF) AND TASSIA RESIDENTS ON LAND RELATED MATTERS AT TASSIA ESTATE" which was exhibited as "JMG 7" in the verifying affidavit of the Applicant. This document was drafted by the Applicant and its members. It was also brought to the attention of the Court by the Applicant.***
>
> ***Clause 8 of the document states:***
>
> ***"Approval for infrastructure is pending with the County Government of Nairobi. Once this approval is granted, Residents will be advised on the cost of developing infrastructure."***

42. From its analysis of the documents before it, the Court concluded as follows:

> ***"This clearly confirms the respondents' assertion that the infrastructure cost was to be met by the purchasers of the plots. The Applicant's members were aware that the plan for infrastructure development was to be approved by the County Government of Nairobi. The cost would also be determined by the approved plan."***

43. In light of the very clear analysis of the issues in dispute in the matter before him by Korir J, I am unable to agree with the respondent/petitioner that the Court did not deal with the matters in dispute on merit. Indeed, a clear reading of the decision indicates that the procedural argument that the respondent/petitioner relies on as entitling it to come before this court again was just an 'additional' reason cited by the Court for not granting the orders sought by the petitioner. The Court stated in its judgment that:

> ***"I have clearly pointed out why the application before this Court should fail. <u>There is, however, another important reason why this application should not succeed</u>. These proceedings arise out of contractual obligations between the Applicant's members and NSSF. Those are matters that fall into the private law realm. Judicial review remedies are therefore not the most efficacious in such circumstances."*** (Emphasis added.)

44. As is evident from the extracts from the judgment set out above, the Court addressed itself to the respective cases of the parties before it on merit, and found in favour of the respondent, now the applicant in the present application. It observed, further, that the applicant should fail as it ought to have brought its claim, not as a judicial review application, but as a civil claim in contract.

45. Effectively, however, since the Court, a Court of competent jurisdiction, had addressed its mind to the dispute on its merits, there was no avenue, other than an appeal against the decision, that was open to the petitioner. It could not, as it has done in this case, clothe its claim in constitutional garb and litigate it afresh before this Court. That the issues raised in the petition are the same as in the judicial review application determined by Korir J is evident from the averments by Mr. Kenyatta in his affidavit in support of the petition sworn on 10th October 2014. In that affidavit, Mr. Kenyatta avers at paragraph 14-16 as follows:

> ***[14.] "That it is unconstitutional and in breach of the petitioners proprietary rights as protected in the constitution especially article 40 to require them to pay additional sums after buying their respective parcels of land and attaching the said condition to the issuance of tittle deeds.***
>
> ***[15.] That the respondents neither sought the indulgence of the petitioner and its members when computing the figure to contribute towards the infrastructure development nor did they seek the indulgence of the petitioner and its members when awarding the tender to construct the infrastructure within the petitioners parcels of land to M/s China Jiangxi International (K) Ltd.***
>
> ***[16.] That the respondents further purport that the said elaborate infrastructure development is as per conditions issued by the City Council of Nairobi (now Nairobi City County). However, upon a clear perusal of the condition, they do not provide for the development of a tarmac road. They only provide for a standard murram road."***

46. As observed elsewhere above, the matters raised in Mr Kenyatta's affidavit were all addressed fully by Korir J. To raise them again by way of a constitutional petition is to ask the Court to do what the Court in the **Kapa Oil Industries** and **Azim Taibjee** cases decried: sit on appeal on the decision of a court of competent and concurrent jurisdiction.

47. In the circumstances, I agree with the respondents that this petition is an abuse of the Court

process, and the application dated 17th October 2014 succeeds. The petition is therefore struck out in its entirely with costs to the respondents such costs to be paid by the officials of the petitioner.

Dated, Delivered and Signed at Nairobi this 15th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Mutua instructed by the firm of Kithi & Co. Advocates for the petitioner

Mr. Adan Ibrahim instructed by the firm of Wetangula, Adan, Makokha & Co. Advocates for the 1st & 2nd respondents