**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E368 OF 2025**

**ELITE WESTALNDS TOWER LIMITED……….1ST PETITIONER**

**VAAL REAL ESTATE LIMITED………………..2ND PETITIONER**

**NURU SAID AHMED…………………………..3RD PETITIONER**

**VERSUS**

**WILLIAM EDWARD KOSAR…………………1ST RESPONDENT**

**WILLIAM KANYA KIAMA…………………..2ND RESPONDENT**

**CHARTERED INSTITUTE OF ARBITRATORS KENYA LIMITED……………………………………..3RD RESPONDENT**

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JUDGMENT

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*Introduction*

1. This petition challenges the arbitral award issued on 19th June 2024 by the 1st respondent, the arbitrator,



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on the basis that the arbitrator lacked the requisite qualification and therefore jurisdiction to determine the dispute, rendering the arbitral award null and void. The petitioners were of the view that the respondents' actions were in breach of express provisions of arbitral clause in the agreement dated 27th August 2021 and as a result, violated their constitutional rights guaranteed under Articles 10(2)(b), 25, 40 and 50 of the Constitution.

*Background of case*

2. On 27th August 2021, the 1st and 2nd petitioners entered into a sale agreement with the 2nd respondent for purchase of an Apartment erected on L.R. No.209/2144/1 situated in Nairobi for Ksh.12,000,000. The Agreement contained an arbitration clause to the effect that any disputes arising would be resolved amicably and in default, by arbitration in terms of the Arbitration Act by



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arbitrators to be appointed by parties or by the 3rd respondent. The Arbitrator's decision would be final and binding on the parties.

3. On 17th November 2022, the 2nd respondent declared that a dispute had arisen and called for its resolution as provided for in the sale agreement. Negotiations were not successful and as a result, the 1st and 2nd petitioners' advocates wrote to the 3rd respondent nominating Shafiq Taibjee Advocate as the Arbitrator. On 16th February 2023, the 3rd Respondent appointed the 1st Respondent to determine the dispute.

4. The 1st and 2nd petitioners filed pleadings, including a witness statement from the 3rd Petitioner and who was the 2nd petitioner's former Chief Legal Officer. The 1st respondent published an arbitral award on 19th June 2024 in favour of the 2nd respondent.

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5. The 1st and 2nd petitioners filed an application to set aside the arbitral award while the 2nd respondent filed a separate application for recognition and adoption of the award. At the same time, the 1st and 2nd petitioners inquired from the Law Society of Kenya whether the 1st respondent was an advocate since he was practicing as an arbitrator. In a response dated 31st July 2024, the Law Society stated that that the 1st respondent was not an advocate which meant he was not authorized practice law, a fact that was not previously known to the 1st and 2nd petitioners.

*The Petition*

6. The petitioners felt aggrieved by the revelation from Law Society of Kenya and filed this petition, arguing that the 1st respondent lacked jurisdiction to determine the dispute the subject of the arbitral proceeding. This was, according to the petitioners, because the Agreement provided that disputes



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would be resolved by an Arbitrator who is an advocate of at least 10 years' experience licensed to practice law in Kenya. The petitioners asserted that the 1st respondent is a foreigner whose legal practice in Kenya contravened section 11 of the Advocates Act.

7. The petitioners also took issue with the 3rd respondent's decision to appoint the 1st respondent without ascertaining his qualifications leading to issuance of a flawed arbitral award. They contended that the arbitral award was in breach of public policy.

8. The petitioners complained that the 3rd respondent made disparaging remarks against the 3rd petitioner who was not a party to the arbitral proceeding and had refused to respond to their complaint letter dated 27th August 2024, raising the issues.

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9. The petitioners stated that on 30th October 2024, the Environment and Land Court dismissed their application to set aside the arbitral award in *ELC Misc Application No. E003 of 2024 Elite Westlands Limited & Another v William K Kiama.* The Court allowed the 2nd respondent's application for recognition and enforcement of the arbitral award in *ELC Misc Application No. E115 of 2024 William K Kiama v Elite Westlands Limited & Another.* The 1st and 2nd petitioners' application for leave to appeal against the decision dismissing their application to set aside the arbitral award was dismissed by the Court of Appeal.

10. The petitioners contended that the Environment and Land Court did not consider the legality of the award in light of the 1st respondent's lack of qualification as an advocate. Moreover, the Court did not consider the mandatory requirements for



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appointment of two arbitrators one by each party as the agreement required.

11. The petitioners maintained that this petition is not res judicata since the 1st respondent's qualification as an advocate which affected his jurisdiction was not determined. The petitioners asserted that the entire arbitration process leading to the impugned arbitral award was a nullity. According to the petitioners, the 3rd respondent failed to appoint two qualified arbitrators in the event amicable resolution of the dispute failed, refusing to appoint the person they nominated as arbitrator, appointing an unqualified arbitrator and failing to act on their letter of complaint.

12. The petitioners asserted that the 1st respondent should be ordered to refund Ksh.255,000 arbitral costs and Ksh.108,891 paid to the 2nd Respondent in respect of taxed costs in *ELC Misc Application No.*

ORIGINAL

*E003 of 2024 Elite Westlands Limited & Ano. v William K Kiama.*

13. The petitioners maintained that they would suffer irreparable loss since the 2nd respondent had moved to execute following adoption of the impugned arbitral award. The 2nd respondent would thus, unjustly enrich himself unless the court intervened. They asserted that the 3rd petitioner has been exposed to unnecessary future litigation as she was accused of forgery and she is threatened with disciplinary proceeding over a matter she was not party to.

14. The petitioners contend that the respondents violated their rights guaranteed under Articles 10(2)(b), 25, 40 and 50 of the Constitution and sought the following reliefs:

    i. *A declaration be issued that the arbitral proceedings and arbitral award dated 19th June*

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*2024 by the 1st Respondent are a nullity as the 1st Respondent was not admitted as an advocate under Section 11 of the Advocates Act and lacked jurisdiction to conduct the arbitration.*

ii. *A declaration be issued that the arbitral award dated 19th June 2024 published by the 1st Respondent occasioned a miscarriage of justice and breached the Petitioners' fundamental rights to a fair trial and right to property.*

iii. *A declaration be issued that the appointment of the 1st Respondent by the 3rd Respondent was a nullity for having contravened Clause 20.3 of the Agreement for Sale dated 27th August 2021 by only appointing one arbitrator instead of two arbitrators and failing to consider the 1st and 2nd Petitioners' nominated arbitrator.*

iv. *An order be issued setting aside the Ruling and decree dated 30th October 2024 adopting the arbitral award dated 19th June 2024 in ELC Misc Application No. El15 of 2024 William K Kiama v Elite Westlands Limited & Another and all consequential orders pertaining to costs be set aside on grounds of nullity.*

v. *The 1st Respondent be ordered to refund to 1st and 2nd Petitioners the arbitral costs of Kshs*



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*255,000 together with interest at court rates from the date of filing the petition until payment in full.*

vi. *The sum of Kshs 109,891.67 paid by the 1st and 2nd Petitioners to the 2nd Respondent advocates in respect of taxed costs in ELC Misc Application No. E003 of 2024 Elite Westlands Limited & Another v William K Kiama be refunded forthwith with interest at court rates from the date of filing the petition until payment in full.*

vii. *The 2nd Respondent, his servants or agents be restrained from executing the decree in ELC Misc Application No. E115 of 2024 William K Kiama v Elite Westlands Limited & Another and proceeding with taxation of costs in Nairobi Civil Application No. E666 of 2024 Elite Westlands Limited & Another v William K Kiama.*

viii. *The arbitral dispute be heard de novo by an impartial and qualified tribunal appointed in accordance with Clause 20.3 of the Agreement for Sale dated 27th August 2021.*

ix. *An Order directing the 3rd Respondent not to raise any appointment fees if requested to appoint arbitrators failing agreement by the parties to the dispute and to consider the*



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*proposed names of arbitrators nominated by the disputants for appointment.*

x. *Costs of the Petition with interest at Court rates of 14% per annum from the date of filing the Petition until payment in full as shall be determined by the Court.*

xi. *Any other relief that the Court shall deem just.*

*1st Respondent's response*

15. The 1st respondent opposed the petition through grounds of opposition. The 1st respondent contended that the petition is res judicata and therefore this Court lacks jurisdiction to entertain it. According to the 1st respondent, the Environment and Land Court dismissed *ELC Misc Application No. E003 of 2024 Elite Westland Limited & Another v William K. Kiama* seeking to set aside the arbitral award.The Court of Appeal also dismissed *Civil Application No. E666 of 2024-Elite Westland Limited & Another v William K. Kiama,* which had sought leave to appeal. These

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applications were filed by the same parties against the same respondent over the same subject matter or cause of action. The Environment and Land Court allowed *ELC Misc Application No. E115 of 2024 William K. Kiama v Elite Westlands Limited & Another* which sought recognition and adoption of the arbitral award

16. The 1st respondent maintained that he was appointed by the 3rd respondent as an arbitrator but not as an Advocate, in accordance with the arbitration clause read with Chartered Institute of Arbitrators, Kenya Branch Arbitration Rules, 2020. By virtue of section 12(1) of the Arbitration Act, he argued, he was not precluded from being appointed as an arbitrator due to his nationality.

17. The 1st respondent asserted that the issue of jurisdiction was canvassed during the arbitral



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proceedings and both parties expressly submitted themselves to the jurisdiction of the arbitral tribunal. Parties having unequivocally submitted to jurisdiction, section 10 of the Arbitration Act became operational and a final award was issued.

18. The 1st respondent denied that the petitioners' constitutional rights were violated since parties were afforded an equal opportunity to be heard and present their cases. This petition is therefore an abuse of the Court process.

*2nd Respondent's response*

19. The 2nd respondent opposed the petition through a replying affidavit and a further affidavit. The 2nd respondent agreed with the 1st respondent that the matter is res judicata. According to the 2nd respondent, the dispute was heard by the arbitral

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tribunal and an arbitral award issued. The petitioners applied to set aside the arbitral award before the Environment and Land Court but the application was dismissed. An application to enforce the arbitral award was allowed. The Petitioners' quest to challenge the arbitral award in the Court of Appeal but the application for leave was dismissed in a ruling dated 30th May 2025.

20. The 2nd respondent took the view, that the petition seeks to challenge the arbitral award which can only be done and, indeed was under section 35 of the Arbitration Act. The petitioners' grievance about the 1st respondent's qualification is insincere because the 1st respondent's qualification was determined by the Environment and Land Court's ruling dated 30th October 2024. This Court cannot revisit the issue through this petition.

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21. In view of the foregoing, the 2nd respondent contended that this petition is res judicata and violates the doctrine of finality of arbitral proceedings. The 2nd respondent maintained therefore that this petition seeks to re-litigate issues that had been resolved with finality and amounts to an abuse of the court process.

*3rd Respondent's response*

22. The 3rd respondent opposed the petition asserting that the 1st respondent was appointed in accordance with the arbitration clause and its Arbitration Rules, 2020 and became *functus officio* thereafter. According to the 3rd respondent, parties' intention to refer disputes to arbitration was clear thus, the applicable law is section 10 of the Arbitration Act and rules.

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23. The 3rd respondent, just like the other respondents, maintained that the petition is res judicata. The petition is also an abuse of the Court process and an attempt to re-litigate the matter.

*Parties' submissions*

24. The petition was disposed of through written submissions with brief oral highlights.

*Petitioners' submissions*

25. Mr. Allen Gichuhi, learned senior counsel for the petitioners submitted, highlighting their written submissions, that the main issue in the petition revolves around the legality of the arbitral process in light of the 1st respondent's qualifications and appointment as the arbitrator. Learned senior counsel argued that the 1st respondent not being an advocate authorized to practice law in Kenya, could not be appointed as an arbitrator since the

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arbitration clause was clear on who should be appointed as an arbitrator, a fact the 1st respondent did not rebut.

26. Senior counsel further argued, that the 1st respondent being a foreigner not admitted to the practice law in Kenya, erroneously assumed jurisdiction over the dispute as the sole arbitrator when the arbitration clause required two arbitrators.

27. Learned senior counsel argued that these facts and petitioners' evidence were not controverted and relied on *Re Estate of Job Ndunda Muthike (Deceased)* [2018] eKLR. For this reason, the 1st respondent breached the arbitration clause and the Advocates Act. Senior counsel urged the Court not to aid an illegality. Reliance was placed on *Christian & another v Direct Pay Limited t/a DPO* [2024] KEELRC 1325 (KLR), where the Court nullified arbitral

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proceedings and the arbitral award since the arbitrator had not appointed in accordance with the arbitration clause.

28. Learned senior counsel again relied on *Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited* [2015] eKLR; *Rawal & 2 others v Judicial Service Commission & 2 others; Okoiti (Interested Party); International Commission of Jurists & 2 others (Amicus Curiae)* [2016] KESC 1 (KLR) and *Dhanjal Investments Limited v Kenindia Assurance Company Limited* [2018] KESC 16 (KLR) to support the petitioners' case.

29. According to Mr. Gichuhi, senior counsel, the 3rd respondent could not re-write the terms of the agreement from what parties had agreed. The 3rd respondent was wrong in relying on section 12(1) of the Arbitration Act and rule 8 of the Chartered Institute of Arbitrators Rules, 2020 to appoint the 1st



ORIGINAL

respondent disregarding mandatory arbitration clause which required arbitrators to be advocates of not less than 10 years in practice. The 3rd respondent further disregarded the 1st petitioner's nominated arbitrator.

30. Learned senior counsel argued that in *KTDA Power Company Limited v Jiangxi Water & Hydropower Construction Company Ltd* [2025] KEHC 2255 (KLR), the court found that the arbitrator had not been appointed in accordance with the terms of the contract and set aside the arbitrator's appointment.

31. According to learned senior counsel, the 3rd respondent's action went to the root of the matter which is a jurisdictional question. Reliance was placed on *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2008] 2 All ER (Comm) 175 for the position that non-compliance with the procedure on the appointment of the arbitral tribunal, affects the

ORIGINAL

substantive jurisdiction of the arbitral tribunal and the resultant arbitral award.

32. Mr. Gichuhi, senior counsel, maintained that the petition is not res judicata, arguing that the plea of res judicata cannot shield a process that was nullity ab initio. Senior counsel relied on *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] KEHC 3998 (KLR) for the position that the arbitral award ought to have been rendered in accordance with the law. In this case, the arbitral tribunal lacked jurisdiction making the entire process a nullity. Reliance was placed on *Macfoy v United Africa Ltd* [1961]3 ALL E.R. 1169.

33. It was learned senior counsel's position, that the petition is merited as rights guaranteed under Articles 10(2)(b), 25, 40, 50 and 159 of the Constitution were violated. He argued that the

petitioners will suffer irreparable loss if the petition is not granted.

*1st and 3rd respondents' submissions*

34. Mr. Njoroge, learned counsel for the 3rd respondent and holding brief for counsel for the 1st respondent, submitted highlighted their written submissions, that the matter is res judicata. According to learned counsel, parties submitted to the jurisdiction of the Arbitral Tribunal thus, the court should not interfere. The petition is also an abuse of the Court process. The petitioners are precluded from raising the same issues in a subsequent suit, between the same parties arising from the same cause of action and seeking to relitigate the same matter.

35. Reliance was placed on the decision in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3*

ORIGINAL

*others* [2021] KESC 39 (KLR) and *Mairani & 2 others v Director of Land Adjudication & Settlement & 3 others* [2025] KECA 400 (KLR) for the position that the doctrine of res judicata is founded on public policy to ensure finality of litigation and protect a party from being harassed twice on account of the same litigation.

36. Further reliance was placed on *Kahoro & 2 others (Suing on their Behalf and Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited* [2025] KECA 941 (KLR) for the position that the doctrine of res judicata was developed to bar parties from bringing another litigation once a final determination has been made on the merits of a similar previous litigation.

37. Mr. Njoroge maintained that the issue of jurisdiction was argued during the arbitral proceedings and pointed at paragraph 17 of the



ORIGINAL

Statement of Claim, paragraph 14 of the Statement of Defence and paragraph 44 of the witness statement.

38. Learned counsel pointed out that section 17(2) of the Arbitration Act provides explicitly that a plea that the Arbitral Tribunal has no jurisdiction, should be raised not later than at the submission of the statement of defence. The issue of jurisdiction cannot be raised through this petition.

39. Learned counsel maintained that parties having submitted to the 1st respondent's jurisdiction, the matter is res judicata and section 10 of the Arbitration Act became operational. Reliance was placed on *Bomas of Kenya Limited v Standard Investment Bank Limited* (Civil Application E456 of 2021) [2023] KECA 544 (KLR).



ORIGINAL

40. Learned counsel argued there was no violation of the petitioners' constitutional rights and the petition does not meet the threshold to support the petitioners' claims.

*2nd Respondent's Submissions*

41. Mr. Peter Wanyama, learned counsel for the 2nd respondent, argued also highlighting their written submissions, that the petition is incompetent and lacking in merit. According to learned counsel, it is a settled principle in arbitration law and practice that an arbitrator has full powers to determine a challenge to his or her own jurisdiction. Reliance was placed on section 17 of the Arbitration Act for the position that the Arbitral Tribunal may rule on its own jurisdiction, including on any objections with respect to the existence or validity of the Arbitration Agreement. The petitioner's argument on jurisdiction outside section 17 is not legally permissible.



ORIGINAL

42. Learned counsel argued that parties submitted themselves to the jurisdiction of the Arbitral Tribunal and cannot challenge the Arbitral Tribunal's decision. Counsel relied on the decision in *Safaricom Limited v Ocean View Beach Hotel Limited 2 others* [2010] eKLR, for the position that it is not the function of a national court to rule on the jurisdiction of an Arbitral Tribunal except by way of appeal under section 17(6) of the Arbitration Act. Further reliance was placed on *Kamau v Joyroom Heights Limited 2 others* [2024] KEELC478(KLR).

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43. On res judicata, Mr. Wanyama argued that the doctrine of res judicata doctrine of res judicata is applicable in this matter because the issue regarding the 1st respondent's appointment was conclusively determined in *Nairobi ELC Misc. Application E003 of 2024* and *Nairobi ELC Misc. Application No. E115 of*

*2024.* The petition seeks to re-litigate a matter that was conclusively determined and is now res judicata.

44. Learned counsel relied on *Accredo Ag & 3 others v Steffano Uccelli & another* [2019] KECA 385 (KLR) for the position that the doctrine of res judicata applies to constitutional litigation as well. Furter reliance was placed on *Okiya Omtatah Okoiti & another v Attorney General and Another* [2014] eKLR.

45. Learned counsel maintained that arbitral awards are final and binding on parties under section 32A of the Arbitration Act. learned counsel cited the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR for the position that courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at

ORIGINAL

an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice.

46. Mr. Wanyama argued that the principle of finality in arbitration does not permit the petitioners to file a constitutional petition to challenge an arbitral award despite the fact that they had already unsuccessfully sought to challenge the arbitral award on appeal.

*Determination*

47. I have considered the pleadings, arguments made on behalf of the parties and the decisions relied on. The main issue for determination is whether the petition is res judicata and, depending on the answer to this issue, whether the petition should be allowed.

*Res judicata*

ORIGINAL

48. The respondents argued that the petition is res judicata because the issues raised therein were determined in other proceedings before the ELC and the Court of Appeal. According to the respondents, parties having submitted themselves to the jurisdiction of the Arbitral Tribunal, the petition is an abuse of the Court process. The petitioners, on their part, denied that the petition is res judicata. The petitioners argued that the petition revolves around the legality of the arbitral process in light of the 1st respondent's qualifications and appointment as the arbitrator. They maintained that the 1st respondent is not an advocate authorized to practice law in Kenya and, therefore, could not be appointed as an arbitrator since the arbitration clause was clear on who could be appointed as an arbitrator.

49. Section 7 of the Civil Procedure Act provides:

*No court shall try any suit or issue in which the matter directly 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 issue in which such issue has been subsequently raised, and has been heard and finally determined by such court.*

50. Res judicata, as a legal principle, bars further litigation on issues that have been previously litigated upon between the same parties in a court of competent jurisdiction and the court determined the issue with finality. That is, the doctrine of res judicata protects finality in litigation over similar issues between the same parties in courts of competent jurisdiction.

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51. In *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* (Motion No 42 of 2014) [2016] KESC 6 (KLR), the Supreme Court stated that with regard to res judicata:

> *[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights….the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.*

52. The Supreme Court again had occasion to deal with the issue of res judicata in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR). At para



ORIGINAL

57, of the decision, the Supreme Court cited the words of Wigam V-C in *Henderson v Henderson* (1843) 67 ER 313 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 the 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 matters which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases,_not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to*



ORIGINAL

*every point which properly belonged to the subject litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.*

The Supreme Court then stated:

*[58] [W]henever the issue of res judicata is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.*



ORIGINAL

53. The above decision affirms the position that for the plea of res judicata to succeed, issues in the previous case and those in the new suit should be similar; parties in the two cases be the same or litigating under the same title and issues in the former suit should have been finally determined by a court of competent jurisdiction. In making that determination, the court dealing with the plea of res judicata should look at the pleadings and prayers sought in the two suits, the parties in the suits, issues raised and the decision of the court in the previous suit to ascertain whether the matter was before a court of competent jurisdiction and the issues had been determined with finality.

54. The facts in this petition are largely undisputed. The sale agreement contained an arbitration clause requiring disputes to be resolved amicably and, if

ORIGINAL

not, through arbitration placing the matter within the ambit of the Arbitration Act and Rules. The arbitration clause provided the manner of appointing arbitrators (and their qualifications). Clause 20.2 provided that if a dispute was parties would strive to resolve the dispute amicably. If successful, Clause 20.3 provided that it would be referred to a ingle arbitrator appointed by parties. If parties failed to agree on such appointment, to two arbitrators appointed by either party. The arbitrators so nominated should be an architect or an advocate of not less that 10 years standing.

55. A dispute was declared and an arbitrator appointed. The arbitral tribunal conducted arbitral proceedings and issued an arbitral award. Following the issuance of the arbitral award, two applications were filed before the Environment and Land Court. One application was by the 1st and 2nd petitioners to

ORIGINAL

set aside the arbitral award and the other application was by the 2nd respondent for recognition and enforcement of the arbitral award as a judgment and decree of the court. Both sides agree that the application for setting aside the arbitral award was dismissed while the application for recognition and enforcement of the arbitral award was allowed.

56. The 1st and 2nd petitioners were dissatisfied and filed an application in the Court of Appeal for leave to appeal against the decision dismissing the application to set aside the arbitral award. The Court of Appeal dismissed that application, ending the petitioners' desire to pursue the matter beyond that point. The facts further show that costs for the applications were taxed and paid or execution was pending.

57. The facts as can be deciphered from the record, are clear that the issues regarding the legality of the

ORIGINAL

arbitral proceedings were determined in the application seeking to set aside the arbitral award which was however dismissed. That dismissal cleared the way for allowing the application for recognition, adoption and enforcement of the arbitral award.

58. I have read the record and, in particular, the ruling dated 30th October 2024 in Misc. Application No. E003 OF 2024- Elite Westlands Limited & another v William Kanyua Kiama. This was on the application that had been filed under section 35 of the Arbitration Act, seeking to set aside the arbitral award. One of the issues raised in that application as a basis for challenging the arbitral award, was that the arbitrator was not properly appointed. The application again raised the issue that the arbitral award was in conflict with public policy.

ORIGINAL

59. The ELC considered the application and the documents filed and stated:

> *[16]…A perusal of the documents filed by the applicant reveals that they filed a statement of defence…as a response to the statement of claim. Nowhere in the said pleadings did the applicants question the validity of the arbitrator or the arbitration proceedings on the basis that they were not given proper notice of appointment <u>or that the arbitrator was not competent</u>. The issues relating to the notice of appointment of the arbitrator are factual ones which ought to have been raised in liminine, before the arbitral body. As it were, the records indicate that the applicants wholly submitted themselves to the jurisdiction of the arbitral body and the validity of the arbitral proceedings were not made a subject of contest before that body.* (Underlining supplied)



ORIGINAL

The court found no merit and dismissed the application with costs.

60. The petitioners were aggrieved and filed an application before the Court of Appeal seeking leave to appeal against the ruling dismissing their application. The Court of Appeal heard the application but dismissed it in its ruling dated 30th May 2025. In doing so, the Court of Appeal stated:

*[21] When the applicants sought before the superior court that the arbitral award be set aside, they were complaining, among other things, that the arbitrator was not properly appointed as they were not given proper notice of his appointment, and therefore that award was not valid. The superior court found that the issue had not been taken up before the arbitrator and there was no evidence that they had not given any evidence regarding the*



ORIGINAL

*appointment or lack of notice. It has not been shown to us that the court was wrong on the evidence before it.*

61. The Court then stated:

*[24] In the claim that the award was against public policy, we listened carefully to senior counsel in relation to the point. He did not indicate to us how his client came to this conclusion. There is no specific provision of the Constitution or statute that was shown to have been infringed. This, to us, was a straight forward and simple arbitration whose resolution solely depended on the arbitrator dealing with the facts as presented before him, to decide whether or not, given the agreement the parties had signed, the applicants had validly rescinded the contract, and then deal with the consequences. We cannot find that, on the face of things, that there are substantial or any*

ORIGINAL

*grounds on which the arbitral award can be impeached.*

62. The decision of the ELC found, as a matter of fact, that the applicants (now the petitioners before this court) did not raise the issue of the validity of the arbitrator's appointment or even the jurisdiction of the arbitrator to preside over the arbitral proceedings, an issue the Court of Appeal agreed with.

63. Indeed, as the respondents correctly argued, section 17 of the Arbitration Act provided that the arbitral tribunal may rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement. The section 17 also provides that a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the

ORIGINAL

statement of defence. The simple and plain fact from this section is that the issue of jurisdiction should be raised with the arbitral tribunal which must make a determination on it. The petitioners did not do so and therefore cannot not be raised before any other court or even in this court as a constitutional issue.

64. Considering the facts of this petition, the words of Wigam V-C become relevant that in *"litigation,...the court requires parties to the 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 matters which ought to have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case." ((Henderson v Henderson)* (supra).



ORIGINAL

65. Wigam VC was clear that 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 judgment, but to every point which properly belonged to the subject litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.

66. The Environment and Land Court held that the issue of appointment of the Arbitrator was not raised with the arbitral tribunal for determination. The Court of Appeal agreed with that position. That issue, or even the issue of jurisdiction, cannot be raised before this court having not been raised before the arbitrator from whose determination, there is a right to test the correctness of such determination before the High Court under section 17 (6).



ORIGINAL

67. The matter cannot even be raised as a constitutional question because in its ruling, the Court of Appeal found and was emphatic that "*There is no specific provision of the Constitution or statute that was shown to have been infringed.*" And that "*We cannot find that, on the face of things, that there are substantial or any grounds on which the arbitral award can be impeached.*"

The above position in my view, conclusively determined the issues that were in the proceedings before the ELC and the Court of Appeal which are the same issues raised before this court albeit christened as a constitutional petition.

68. As the Supreme Court emphasized in *Kenya Commercial Bank Ltd & another v Muiri Cofee Estate Ltd & 3 others* (supra):

ORIGINAL

> *[54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.*

I agree with the respondents that the petition is res judicata and amounts to an abuse of the court process.

*Conclusion*

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69. Having considered the petition, responses, arguments by parties and the decisions relied on, this Court comes to the inescapable conclusion that the issues raised in the petition were determined by the Environment and Land Court in Misc. Application No. E003 of 2024 and the Court of Appeal in Civil Application No. E666 of 2024, rendering the petition res judicata. The petitioners could not raise the same issues as constitutional quests since the doctrine of res judicata applies to matters of all categories, including issues of constitutional rights.

70. Consequently, and for the above reasons, the petition is declined and is hereby dismissed with costs to the respondents.

**Dated and signed at Nairobi this 12th Day of February 2026**

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**E C MWITA**

**JUDGE**

**Delivered and countersigned this 17th Day of February 2026**

**L N MUGAMBI**

**JUDGE**

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