



**BONIFACE KACHINA NOMURWA:.....: 3<sup>RD</sup> RESPONDENTS**

**ERNEST SHIYUKA OMURWA:.....: 4<sup>TH</sup> RESPONDENTS**

**JULIUS INGWESI OMURWA:.....: 5<sup>TH</sup> RESPONDENTS**

**DISMAS BOYI OMURWA:.....: 6<sup>TH</sup> RESPONDENTS**

**CHARLES MAKOKHA MURWA:.....: 7<sup>TH</sup> RESPONDENTS**

**JAMES AMANYA MURWA:.....: 8<sup>TH</sup> RESPONDENTS**

### **JUDGEMENT**

The petition is dated 24<sup>th</sup> November 2016 in which the petitioner had sought in paragraph 37 of his petition for orders that, the applicant seeks fair administrative justice in this matter and a restoration of his fundamental rights to own property and the right to be protected for the same and also such damages as the honourable court may deem fit to give. The brief background of the case are as follows;

1. The dispute herein commenced in the year 2004 before the Matungu Land Disputes Tribunal constituted under the then Land Disputes Tribunal Act No. 18 of 1990 (now repealed). The 4<sup>th</sup> respondent and his siblings were the claimants against the petitioner and another. The dispute concerned the piece of land N/Wanga/Kholera/588. The petitioner participated fully in the said proceedings.
2. The said tribunal rendered its decision dated 6<sup>th</sup> September 2004 which was filed in court as Kakamega RMC Award No. 73 of 2004.
3. The said award was adopted as judgment of court on 5<sup>th</sup> May 2006.
4. The petitioner did not challenge the said decision of the tribunal either through the appellate procedure provided under the said Land Disputes Tribunals Act No. 18 of 1990 or by judicial review.
5. The land N/Wanga/Kholera/588 was restored to the name of the 4<sup>th</sup> to 8<sup>th</sup> respondents' deceased father necessitating succession proceedings. The succession proceedings were undertaken in Kakamega High Court succession Cause No. 572 of 2008 wherein the petitioner raised objection which he failed to prosecute. The grant was confirmed and the said land vested into the names of the 4<sup>th</sup> to 8<sup>th</sup> respondents in specific shares.
6. The petitioner then returned to the lower court in the said Kakamega RMC Award No. 73 of 2004 in 2016 with an application for review and for injunction which application was on 19<sup>th</sup> September 2016 dismissed with costs.
7. The petitioner has then filed this petition before this court for hearing and determination.

The petitioner submitted that, the Land Disputes Tribunal which was created by an act of parliament namely, the Land Disputes Tribunal Act No. 18 of 1990 did not have legal authority to review and much less revoke titles relating to registered land. Section 3 of the Land Disputes Tribunal has marginal notes "Limitation of Jurisdiction" and it states as follows;

*"Subject to this Act, all cases of civil nature involving a dispute as to;*

*(a) The division, or determination of boundaries to land including land held in common.*

(b) *A claim to occupy or work land or*

(c) *Trespass to land shall be heard and determined by a tribunal under this petition.*”

The proceedings giving rise to the instant petition originated from the Matungu Land Disputes Tribunal established under the Land Disputes Tribunal Act and the Mumias Division Land area of the town Kakamega District. Under sections 7 of the Act, the award, decision and or decision of the Matungu land disputes Tribunal was forwarded to the Kakamega Chief Magistrates Court under award No. 73 of 2004 whose parties were Ernest Shiyukah Omurwa & Others vs. Bruno Murunga & Tom Ojwang.

The third to eighth respondents were listed as applicants/claimants to the suit land herein being title No. North Wangi/Kholera/588. The property comprised in the title had been charged to M/s. Kenya Commercial Bank Ltd, to secure a loan of Ksh. 15,000/= advanced to one Bruno Murunga. The obligant failed to repay the loan and the security comprised in the title was sold in a public auction. It was purchased by Ojwang Khachina alias Sylvester Ojwang Khachina. The successful bidder in the auction was a brother of the first registered owner. Sylvester Ojwang Khachina died and was succeeded by his son, the current petitioner. The petitioner was registered as proprietor by transmission on 22<sup>nd</sup> April 1998 and issued with a title deed to confirm ownership. By the time the Land Disputes Tribunal began its proceedings, the land was registered under the petitioner. The typed proceedings and award were forwarded to Kakamega Chief Magistrate’s Court as Kakamega CMCC award No. 73 of 2004. The award restored the suit land to the original owner, the late Omurwa Khachina. The deceased father of 3<sup>rd</sup> to 8<sup>th</sup> respondents Omurwa Khachina ceased being the owner of the property comprised in the suit land on 6<sup>th</sup> January 1978 when it was transferred to Ojwang Khachina for a consideration of Ksh. 17,000/= by the chargee M/s. Kenya Commercial Bank Ltd, who exercised their statutory power of sale donated by The Registered Land Act Cap 300 Laws of Kenya, (Now Repealed).

To reverse this legal process, the 3<sup>rd</sup> to 8<sup>th</sup> respondents would have to apply for grant of letters of administration either in full or ad litem to plead on behalf of the estate of the deceased. That was the holding in the case of **Troustic Union International & another vs. Jane Mbeyu & another, Nairobi court of Appeal No. 145 of 1990** that was not done and it would render any proceedings such as those that were initiated by them before the Land Disputes Tribunal and adopted by the Chief Magistrate’s Court in Kakamega CMCC award No. 73 of 2004 a nullity for having been commenced and conducted by people who did not possess capacity or locus standi to plead. The extract of the register also establishes that by the time the proceedings were commenced, the property had changed hands legally twice first after sale by the chargees in 1978 and by transmission to the petitioner on 2<sup>nd</sup> April 1998. The title held by the petitioner was issued on 22<sup>nd</sup> April 1998.

The Land Disputes Tribunal at Matungu which recommended that the petitioners land title be retransferred back to the original owner acted on the information that the transfer by the charges M/s. Kenya Commercial Bank Ltd was fraudulent. If that be the case, the Land Disputes Tribunal did not have the requisite jurisdiction and skill to make such a finding. This was the preserve of the Court of Law. They relied on the decision of **Abiero vs. Thabiti Finance Company Ltd** and another **Nairobi HCCC No. 1025 of 2000 [2001] KLR 496-509**.

The Land Dispute Tribunal could not try and find fraud. It behoved the 3<sup>rd</sup> to 8<sup>th</sup> respondents to file a claim in the properly constituted court i.e. the High Court and present their allegations there. The foregoing decision also underscores that once title to land has changed hands in a sale that is complete. It cannot be recalled or cancelled unless by order of court. What happened to the petitioners land No. North Wangi/Kholera/588 violated the constitution article 40, the procedure that prescribes a fully blown trial before a competent court with proper parties before it. That negated the petitioner right to a fair trial and resulted in an infringement of his right to own property. It resulted in deprivation albeit unlawfully. When the petitioner became aware of what the 3<sup>rd</sup> to 8<sup>th</sup> respondents had done to him using the land disputes tribunal he applied to review the illegal orders and all its consequences.

The Court of Appeal in the decision of **Asman Maloba Wepukhulu vs. Francis Biketi Kisumu C.A.**

**NO. 157 OF 2001** which held that the land disputes tribunal could only handle matters related to land which it had jurisdiction on and not more. It could not deal with titled land such as that held by the petitioner. The High Courts of Kenya sitting in Busia in Civil appeal No. 3 of 2010 between **Dennis Okwara vs. John Mabonga Muqaha (2014) eKLR** cited with approval the decision of **Asman Maloba Wepukhulu vs. Francis W. Biketi** in its holding No. 3 and stated that a claim of ownership was clearly outside the powers granted to the tribunal under section 3 (1) of The Land Disputes Tribunal Act. In a case similar to the petitioners in Kisii ELC No. 91 of 2011 **Republic vs. Chairman Musocho Land disputes Tribunal & 2 others** found the tribunal acted in excess of its jurisdiction.

The procedure of this special court is set out under section 19 which has a heading “procedure and powers of the court” 19 (1) states that in any proceedings to which this Act applies, the court shall act expeditiously, without under regard to technicalities of procedure and shall not be strictly bound by rules of evidence; Provided that the court may inform itself on any matter as it thinks just and may take into account opinion evidence and such facts as it consider relevant and material.

The court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by principles of natural justice. On the basis of the Environment and land Court Act No. 19 of 2011 the petition presented by the petition is competent and well founded. The provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are the grand norm or basic law on petitions on enforcement of the Bill of Rights and Fundamental Freedoms. The instant petition is filed pursuant to the provisions of Article 22, which is headed,

*“Enforcement of Bill of Rights” sub article (i) states, “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened”.*

This petition was presented in 2016 and alleges violation of fundamental freedom to own property as envisaged by Article 40 of the constitution, which declares;

*“(1) Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property;*

*(a) Of any description and*

*(b) In any part of Kenya”*

The right was extinguished in a process that the petitioner believes was undertaken by instruments of state and state officers who acted without jurisdiction and in a clear departure from the national values and principles of governance envisaged by Article 10 of the Constitution. The courts failed to consider the jurisdictional issues raised in the application for review as a result of which the petitioner lost his land. The Kakamega Land Registrar who works under the chief Land Registrar, failed to verify the legality of the court order that cancelled the petitioners title and restored the same to the name of the first registered owner and father of the 3<sup>rd</sup> to 8<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents ignored the provisions of the Land Registration Act, Cap 300 (now repealed) and particularly Section 143 which empowered courts and not land disputes tribunals to order rectification of titles held by proprietors in certain circumstances.

From the afore going and the provisions of the constitution and the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules 2013 indicate that **Nairobi HC Misc. No. 4 of 1979 Anarita Karimi Njeru vs Republic (1979) eKLR** is no longer good law. They submit that the court should not place any reliance on it but should apply its mind in line with the current law and jurisprudence.

On the issue of res judicata they submitted that, Kakamega Civil Award No. 73 of 2004 was commenced by a flawed process and by a tribunal which acted in excess of its jurisdiction. To that extent, the issues of cancellation of title held by a registered proprietor have never been decided by a court competent to try them. The land disputes tribunal and the chief magistrate’s court proceeded irregularly and without

jurisdiction to entertain title property. From the documents submitted by the 3<sup>rd</sup> -8<sup>th</sup> respondents, they went to the succession court in 2008 and listed title No. North Wanga/Kholera 588 as the only asset of the deceased. That is what the succession court dealt with. The court was exercising its jurisdiction as donated by the Succession Act – Cap 160 laws of Kenya. Section 3 defines a court for purposes of succession thus:

*“A court means a court having jurisdiction under this Act in the matter in question.”*

Section 47 of the same Act states;

*“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders as may be expedient”.*

Clearly the High Court in the circumstances was constituted to deal with matters related to a given estate. Estate is defined under section 3 to mean “means free property of a deceased person.” It was not exercising its original and unlimited jurisdiction in all civil and criminal matters as donated by section 60 of the Repealed constitution which went further to recognize and state .....” and such other jurisdiction and powers as may be conferred by this constitution and any other law” Section 60 (1) Kenya Constitution 1992 (1987).

The High Court never considered the propriety of how the 3<sup>rd</sup> – 8<sup>th</sup> respondents retrieved the suit land from the petitioner. It could not do so in its formation and constitution under the Succession Act. Again the issues being raised by the petitioner are not part of any decree or order which has been placed before the court. They are not res judicata by any legal standards.

The petitioner urged the court to quash the unlawful decision of the Matungu Land Disputes Tribunal as adopted by the Kakamega Chief Magistrate’s Court vide award No. 73 of 2004 and implemented by the Chief Land Registrar through the Kakamega District Land Registrar on 6<sup>th</sup> October 2006 or on other date thereafter.

In submissions, the 1<sup>st</sup> and 2<sup>nd</sup> respondents namely the Honourable Attorney General and the Chief Land Registrar by notice of preliminary objection dated 17<sup>th</sup> July 2017 the Honourable Attorney General invoked the authority of **Anarita Karimi Njeru vs. The Republic (1976) I KLR 1272** whose ratio decidendi is, “where the high court held that if a person seeking redress from the high court on a matter which involves a reference to the constitution, it is important, if only to ensure justice is done to his case, that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.

The petition does not disclose with reasonable certainty the provisions of the constitution which are alleged to have been contravened by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in that the petitioner has not appropriately phrased the alleged contravention of the fundamental rights and freedoms of the petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The actions of the respondents through the Kakamega Chief Magistrates Court in adopting the Matungu Land dispute Tribunal vide its decision dated 6<sup>th</sup> September, 2004 and adopted by the court on 5<sup>th</sup> May 2006 in which the suit property NORTH WANGA/KHOLERA/588 was given to the 3<sup>rd</sup>-8<sup>th</sup> respondents was done within the law and with jurisdiction hence did not in any way breach the rights of the petitioner under the constitution or any written law.

That under the Land dispute Tribunal Act, the tribunal had the capacity to handle and determine all matters relating to land. Section 8 of the Act gave the petitioner the right to appeal if they were satisfied with the tribunal findings and in which the petitioner did not appeal. The magistrate’s court had no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a land dispute tribunal ward filed in court as section 7(2) Land Dispute Tribunal Act, 1980 only compelled the magistrates to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.

Section 3 of the Land Dispute Tribunal Act did not limit the jurisdiction of the tribunal to lands outside the regime of registered land. The Land Disputes Tribunal got its jurisdiction in matters relating to land registered under the Registered Land Act by virtue of Section 159 of the Registered Land Act which stated as follows:-

*“Civil suits and proceedings relating to title to, or the possession of, land, or to the title to lease or charge, being an interest which is registered or registereable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the resident magistrate’s court, or, where the dispute comes within the provisions of section 3 (1) of the Land dispute Tribunal Act, in accordance with that Act.”*

In **Khamoni J in Republic v. Chairman land dispute Tribunal Kirinyaga District & another exparte Kariuki [2005] eKLR** it was stated as follows;

*“The legislature, and definitely, framers of the Land disputes Tribunal Act, knew the Act was intended to give land disputes tribunals jurisdiction to adjudicate over all land in Kenya, including land registered under the Registered Land Act.”*

The 3<sup>rd</sup> to 8<sup>th</sup> respondents in their submissions, produced the proceedings from the High Court of Kenya, Kakamega Succession Cause No. 572 of 2008 which dealt with an objection by the current petitioner which was not heard and determined on merit. The court gave the petitioner herein time of 90 days to invalidate the title sought to be inherited by the respondents when he did not, the court went ahead and distributed the suit land between the 3<sup>rd</sup>-8<sup>th</sup> respondents. The respondents also placed reliance on the proceedings before the Chief Magistrate’s court at Kakamega in award No. 73 of 2004 culminating in the ruling of 19<sup>th</sup> September 2016. They contend the matter is res judicata.

It is the view of the 4<sup>th</sup> to 8<sup>th</sup> respondents that this petition is yet another attack on the said decision of the Land Disputes Tribunal. |the 4<sup>th</sup> to 8<sup>th</sup> respondents have resisted the same on grounds inter alia of res judicata, the non-retroactivity of the Constitution of Kenya 2010, laches and the failure by the petitioner to clearly demonstrate any of his right that was threatened and/or violated.

The 3<sup>rd</sup> to 8<sup>th</sup> respondents submitted that, decision of the tribunal, the subject hereof, was made in 2004. It was adopted as judgment of court in 2006. The same stands to date. There existed a regime of law including the constitution of the time that permitted the processes through which the dispute moved. The acts the petitioner complains of fall before the promulgation of the current constitution. The constitution of Kenya 2010 was promulgated on 27<sup>th</sup> August 2010 which then became its commencement date. The effect of articles 263 and 264 of the said constitution of Kenya 2010 is not retrospective in this case. It cannot invalidate, except by express provision, that which was legal during the currency of the former constitution.

The 4<sup>th</sup> to 8<sup>th</sup> respondents submitted that it would not be proper to apply the Constitution of Kenya 2010 to this case that was heard and concluded before its promulgation and, secondly, that the matter raised by the petition is res judicata. They relied on the following authorities;

**Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others (Supreme Court Appli. No. 2 of 2011)** one of the contentions was whether the applicants had purported to invoke the jurisdiction of the Supreme Court in respect of a decision made by the Court of Appeal on 31<sup>st</sup> July 2008 over two years before the effective date and three years before the Supreme Court was established. The Supreme Court citing the South African case of **Du Plessis & Others vs. De Clerk & Another (1997) 1 ICLR 637** held that a constitutional provision could not be invoked in respect of matters which occurred before the commencement of the Constitution. Indeed, the Supreme Court formulated one of the issues for determination thus:-

*“Whether the Supreme Court has jurisdiction to entertain appeals from cases that were determined*

*and finalised by the Court of Appeal before the promulgation of the Constitution of Kenya 2010”.*

Further citing Halsbury’s Laws of England 4<sup>th</sup> edition volume 44 page 570 which provides inter alia that a retroactive law is not unconstitutional unless it divests vested rights, the court observed that a constitution may and does embody retrospective provisions but in interpreting the same to determine whether it permits retroactive provisions the court must pay due regard to the language and must not import retroactivity where the words used do not contain even a whiff of retroactivity. The Supreme Court warned itself that if it were to re-open cases concluded by the Court of Appeal, the effect would be to trigger floodgates of monumental propositions in private legal relations of the citizens.

The Supreme Court thus reinforced the principle that in interpreting the constitution, the court must pay close attention to the language of the constitution. If the language is forward looking and does not contain a whiff of retrospectivity, the court ought not import it into the language of the constitution.

**Duncan Otieno Waga v. Attorney General [2012] e KLR** in this case, the acts complained of fell before the promulgation of the constitution. The court held that the effect of articles 263 and 264 of the constitution is not retrospective. The constitution cannot invalidate, except by express provision, that which was legal during the currency of the former constitution. The constitution is only prospective and the acts occurring prior to the constitution are, unless otherwise stated by the constitution itself, to be judged by the existing legal regime, that is, the former constitution. The provisions of the 6<sup>th</sup> schedule do not entitle the court to apply the constitution retrospectively.

**E.T. VS. Attorney General & Another [2012] e KLR** in this case, the petitioner hiding under the provisions of the Constitution of Kenya 2010 sought to bring a fresh a paternity dispute that had been settled prior to the promulgation of the said constitution.

**Richard Kariuki vs. Leonard Kariuki & another (Nbi Misc. Appl. No. 7 of 2006)** held that res judicata applied in cases of enforcement of fundamental rights and freedoms under the constitution and that the constitution could not be used to re-open closed matters except where expressly provided.

This court has carefully considered submissions from the petitioner and the applicants and the issues to be determined are as follows;

1. Whether or not there is a competent petition before the court.
2. Whether or not the issues raised in the petition are res judicata to the award in No. Kakamega CMCC No. 73 of 2004 and the Kakamega HC Succession Cause No. 572 of 2008.
3. Whether or not the title held by the petitioner upto 2006 was legally revoked.
4. Whether or not the petitioner deserves the relief of restoration of his title to L.R. No. North Wangwa/Kholera/588 measuring 4.2 hectares.
5. Who should bear costs of this petition.

On the issue of competence of this petition, the constitutional threshold is set out in the case of **Anarita Karimi Njeru v. The Republic (1976) I KLR 1272** whose ratio descidendi is,

*“where the high court held that if a person seeking redress from the high court on a matter which involves a reference to the constitution, it is important, if only to ensure justice is done to his case, that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”.*

The petitioner has not prayed for any specific order quashing the decision of the Kakamega Chief Magistrate’s adopting the Matungu Land disputes Tribunal decision as illustrated in paragraph 33 of the petition. That the petition has filed does not raise any justifiable constitutional violations of the

fundamental rights and freedoms of the petitioner by the respondents since the Honourable Court sitting in Succession Cause No. 572 of 2008 at Kakamega High Court shared out the said suit land after hearing all the concerned parties before issuing its ruling. That the petitioner herein although filed objection proceedings did not participate in the said proceedings even after the honourable court gave him an opportunity to present it and argue his objection to the suit land being subdivided among the 3<sup>rd</sup> -8<sup>th</sup> respondents. That if the petitioner herein was not satisfied with the ruling of the court in Kakamega High Court Succession No. 572 of 2008 he had the chance of appealing the same other than filing this instant petition. The court disagrees with the petitioner that the above mentioned authority is bad law.

On the issue of res judicata, Section 7 of the Civil Procedure Act Cap 21 provides as follows:-

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

It is clear that under section 7 of the Civil Procedure Act, the principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy raised. The court refers to the case of **Pop In Kenya Ltd & 3 Others vs. Habib Bank A.G. Zurich C.A. NO. 80 of 1988** where it was held quoting with approval the case of **Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581**.

*“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 litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because of 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 point 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 of litigation and which the parties exercising reasonable diligence might have brought forward.*

In the case of **Henderson vs. Henderson (1843) 3 Hare 100 to 115** the same holding was reached that;

*“Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.”*

This doctrine has been held to apply in cases of enforcement of fundamental rights and freedoms under the constitution as shown by precedent cited earlier by the 3<sup>rd</sup> to 8<sup>th</sup> respondents of **Richard Kariuki vs. Leonard Kariuki & another (Nbi Misc. Appl. No. 7 of 2006)**.

The dispute herein commenced in the year 2004 before the Matungu Land Disputes Tribunal constituted under the then Land Disputes Tribunal Act No. 18 of 1990 (now repealed). The 4<sup>th</sup> respondent and his siblings were the claimants against the petitioner and another. The dispute concerned the piece of land N/Wanga/Kholera/588. The petitioner participated fully in the said proceedings. The said tribunal rendered its decision dated 6<sup>th</sup> September 2004 which was filed in court as Kakamega CMCC Award No. 73 of 2004. The said award was adopted as judgment of court on 5<sup>th</sup> May 2006. The petitioner did not challenge the said decision of the tribunal either through the appellate procedure provided under the said Land Disputes Tribunals Act No. 18 of 1990 or by judicial review. The land N/Wanga/Kholera/588 was restored to the name of the 4<sup>th</sup> to 8<sup>th</sup> respondents' deceased father necessitating succession proceedings. The succession proceedings were undertaken in Kakamega High Court Succession Cause No. 572 of 2008 wherein the petitioner raised an objection which he failed to prosecute. The grant was confirmed

and the said land vested into the names of the 4<sup>th</sup> to 8<sup>th</sup> respondents in specific shares. The petitioner then returned to the lower court in the said Kakamega CMCC Award No. 73 of 2004 in 2016 with an application for review and for injunction which application was on 19<sup>th</sup> September 2016 dismissed with costs. The petitioner then filed this petition before this court for hearing and determination and did not appeal the decision from Kakamega High Court succession Cause No. 572 of 2008 which had competent jurisdiction to entertain his objection. He also did not challenge the decision of the tribunal or its adoption by the court as a judgment decision by appeal or through judicial review which judgment remains in place to date. The plea of res-judicata applies 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 of litigation and which the parties exercising reasonable diligence might have brought forward (in the instant case the objection raised by the petitioner in the Kakamega High Court succession Cause No. 572 of 2008). In that case, the court gave the petitioner herein time of 90 days to invalidate the title sought to be inherited by the respondents when he did not, the court went ahead and distributed the suit land between the 3<sup>rd</sup>-8<sup>th</sup> respondents. Indeed Judge S. J. Chitembwe on the 19<sup>th</sup> March 2013, ruled as follows;

*“The objector is given 90 (ninety days) to take whatever action he would wish to take in respect to the title deed issued to the petitioner’s father and the proceedings before the Land Disputes Tribunal”.*

For these reasons the court finds that, the petitioner is debarred by application of the doctrine of res judicata. It seeks to circumvent the law which then required the petitioner to challenge the decision by appeal or through judicial review. The petitioner did not take advantage of the said avenues of redress then available to him and he not be allowed to use the constitution as a cover up to re-open a closed matter. The doctrine of res judicata requires that there should be an end to litigation in that where a court of competent jurisdiction has rendered a conclusive decision on a matter, parties should not be allowed to litigate over the same issues again. Res judicata helps avoid conflicting decisions over the same issues and gives finality to judicial decisions.

The court finds that, the petitioner herein cannot not be granted the relief sought as he has failed to prove that there were constitutional violations of his rights. The court finds the petition unmerited and dismisses the same with costs to the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24<sup>TH</sup> DAY OF JANUARY 2018.**

**N.A. MATHEKA**

**JUDGE**