



Haji & 4 others (Suing for and on Behalf of One Hundred and Sixty Residents of Plot Number 232/XVII) v SBS Properties (2016) Limited & 3 others; National Land Commission & another (Interested Parties) (Constitutional Petition 03 of 2022) [2024] KEELC 544 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 03 OF 2022**

**LL NAIKUNI, J
JANUARY 31, 2024**

BETWEEN

**ABDILLAHI FARAH HAJI 1ST APPLICANT
KIBIBI YUNUS BASHIR 2ND APPLICANT
MOHAMED JUMA RAJAB 3RD APPLICANT
ARIF KHAMIS GARWAN 4TH APPLICANT
ASHUR SALIM ASHUR 5TH APPLICANT
SUING FOR AND ON BEHALF OF ONE HUNDRED AND SIXTY RESIDENTS
OF PLOT NUMBER 232/XVII**

AND

**SBS PROPERTIES (2016) LIMITED 1ST RESPONDENT
SEIF SAID, LAILA MOHAMED SEIF, SEIF BIN (SUED FOR AND ON BEHALF
OF THE ESTATE OF SAID BIN SALIM) 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
HONORABLE ATTORNEY GENERAL 4TH RESPONDENT**

AND

**NATIONAL LAND COMMISSION INTERESTED PARTY
COUNTY OF GOVERNMENT OF MOMBASA INTERESTED PARTY**



RULING

I. Introduction

1. By a Notice of Motion application dated 22nd July, 2023, the 1st and 2nd Applicants/Respondents, SBS Properties (2016) Limited and Seif Said, Laila Mohamed Seif, Seif Bin (Sued for and on behalf of the Estate of Said Bin Salim) for the determination by the Honourable Court. The application was brought under the provision of Order 2 Rule 15(1) (b) (c) & (d) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#); Sections 1A, 1B, 3A & 7 of the [Civil Procedure Act](#), Cap. 21; and the order by the Honourable Court dated 6th July 2023.
2. Upon service of the application as evident of the presence of the Advocate for the Petitioner in court on 4th April, 2022 where the direction were made on the disposal of this application and despite of the further directions made by this Honourable Court on 6th July 2022 by consent to have all the parties file their responses and submissions to the striking out application, none of the Respondents neither filed nor served any replies as expected by law. In the premises, the application seeking for striking out of the application is unopposed.

II. The Applicants' Case

3. The Applicants sought for the following orders:
 - a. That the Honourable Court be pleased to strike out the Petition and application both dated 10th February 2022 on grounds that they offend the doctrine of Res Judicata under Section 7 of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya;
 - b. That the Petitioner bears the costs of the application herein.
4. The application was supported by a 10 Paragraphed Supporting Affidavit sworn by Mr. Donald Obinju Advocate and dated on 22nd July, 2023. He averred that: -
 - a. By dint of an application dated 9th April 2022, the Applicants moved this Honourable court by way of certificate of urgency for orders 'inter - alia' that the Petition filed herein be struck out for offending the "doctrine of sub judice" under the provision of Section 6 of the [Civil Procedure Act](#), Cap. 21. On 9th March 2023, this Honourable court delivered its ruling to the said application and allowed the said application. The Honourable court further made orders inter-alia that the present Petition be stayed pending the determination of ELC Constitutional Petition Number 155 of 2015 and directed that file in ELC Constitutional Petition Number 155 of 2015 be placed before the court.
 - b. On 6th July 2023, this Honourable court after considering and perusing the court's Judgement in ELC Constitutional Petition Number 155 of 2015 made its ruling and directed that parties were at liberty to file an application to strike out the said impugned Petition herein on grounds that it offended "the doctrine of Res Judicata". The Honourable court further issued directions on filing the said application, exchanging responses and submissions and directed that the matter be mentioned on 2nd October 2023 to take a ruling date.
 - c. A succinct look at the contents of Paragraphs 1 to 55 of this Petition if compared and read together with the pleadings in ELC Constitutional Petition Number 155 of 2015, the grim reality that was that the Petition herein showed its face that the issues herein were similar to the



issues raised in ELC Constitutional Petition Number 155 of 2015. The Petitioner had only clothed it as a Petition by including and referencing other properties owned by the 1st and 2nd Respondent as a means of “forum shopping” in various courts.

- d. In its judgment, the Court in ELC Constitutional Petition Number 155 of 2015 while acknowledging that the issue at hand concerned the ownership of land and payment of ground rent, went on to find that the Petition was incompetent and that the Petitioners ought to have invoked the jurisdiction of the ordinary Civil Court.
- e. The issues presented before this court by the Petitioner herein are therefore issues that had been ventilated and canvassed by another court of competent Jurisdiction.
- f. Accordingly, this Petition herein violated the doctrine of Constitutional avoidance. Several of the issues raised by the petitioners could have been canvassed by way of the Petitioner’s filing a regular claim in the Environment and Land court.
- g. The Petition and application dated 10th February 2022 herein was therefore unmaintainable and served no purpose so far as the issuance of the court orders sought were concerned.
- h. It was for these reasons that the Petitioner’s Petition and Application both dated 10th February 2022 lacked merit. Therefore it ought to be preemptorily struck out with costs. It was indeed in the interests of justice and in line with the principle that litigation must come to an end that the said Petition be struck out.

III. Submissions

5. On 6th July, 2023 in the presence of all the parties, the Honourable Court directed for canvassing of the application the Notice of Motion dated 22nd July, 2023 by way of written submission. Court granted parties an extension of time to enable them fully comply. Pursuant to that, parties complied and on 2nd October, 2023 it reserved to deliver the ruling on notice accordingly.

A. The written submissions of the 1st Respondent/Applicant

6. The 1st Respondent/Applicant through the Law firm of Messrs. Obinju Rondo & Co. LLP Advocates filed their written submissions dated 29th September, 2023. Mr. Obinju Advocate commenced his submission by stating that the central issue in the Applicants’ the Notice of Motion dated 22nd July 2023 (the “striking out application”) was whether the Petition and application dated 10th February 2022 by the Petitioners/Respondents herein were Res judicata by dint of the court’s judgement in ELC Constitutional Petition No 155 of 2015. If the answer to this question was yes, whether this Honourable Court ought to preemptorily strike out the Petition with costs. The Applicants shall, during these submissions, refer and rely on the supporting affidavit of Donald Obinju Advocate sworn on 22nd July 2023 and its List of Authorities filed together with these submissions. For ease of reference, relevant portions of the ALOA had been highlighted.
7. The Learned Counsel submitted that at the outset, it was important to point out that the Respondent had neither filed nor served the Applicants with any response to the striking out application. This was despite the directions made by this Honourable Court on 6th July 2022 by consent of all parties for filing of responses and submissions to the striking out application. In the premises, the striking out application was unopposed and the factual and legal depositions in Mr. Obinju’s affidavit, sworn in support of the striking out application, were uncontested.



8. The factual basis and grounds surrounding the striking out application are comprehensively set out in Mr. Obinju's supporting affidavit whereby though he did not propose to rehash them here, save to narrate the salient parts thereof:
- a. By dint of an application dated 8th April 2022, the applicants moved this Honourable court by way of certificate of urgency for orders inter-alia that the Petition filed herein be struck out for offending the doctrine of sub judice under Section 6 of the *civil procedure Act*. On 9th March 2023, this Honourable court delivered its ruling to the said application and allowed the said application. The Honourable court further made orders inter-alia that the present petition be stayed pending the determination of ELC Constitutional Petition Number 155 of 2015 and directed that file in ELC Constitutional Petition Number 155 of 2015 be placed before the court.
 - b. On 6th July 2023, this Honourable court after considering and perusing the court's Judgement in ELC Constitutional Petition Number 155 of 2015 made its ruling and directed that parties were at liberty to file an application to strike out the said Petition herein on grounds that it offended the doctrine of res judicata. The Honourable court further issued directions on filing the said application, exchanging responses and submissions and directed that the matter be mentioned on 2nd October 2023 to take a ruling date.
 - c. A succinct look at Paragraphs 1 to 55 of this Petition if compared and read together with the pleadings in ELC Constitutional Petition Number 155 of 2015, the grim reality that was the Petition herein shows its face that the issues herein were similar to the issues raised in ELC Constitutional Petition Number 155 of 2015 the Petitioner had only clothed it as a Petition by including and referencing other properties owned by the 1st and 2nd Respondent as a means of "forum shopping" in various courts.
 - d. In its Judgment, the Court in ELC Constitutional Petition Number 155 of 2015 while acknowledging that the issue at hand concerned the ownership of land and payment of ground rent, went on to find that the Petition was incompetent and that the Petitioners ought to have invoked the jurisdiction of the ordinary Civil Court.
 - e. In applying the dictum of the court in the other Petition, the said Petition violates the doctrine of Constitutional avoidance. Several of the issues raised by the petitioners could had been ably canvassed by way of the Petitioner's filing a regular civil claim in the Environment and Land court.
 - f. The issues presented before this court by the Petitioner herein were therefore issues that had been ventilated and canvassed by the court in the other petition and substantively determined. Indeed, the said Petition was now res judicata.
 - g. Each of these grounds were a sufficient and independent basis upon which, relief should be granted as sought in the striking out application.
9. The Learned Counsel submitted that the said Petition was res judicata. He cited the provision of Section 7 of the *Civil Procedure Act*, Cap. 21. It was clear from a perusal of the issues raised and pleaded in the said Petition if read and compared with the other Petition; that the court (Matheka J) fully applied itself and determined the said issues in its Judgement in ELC Constitutional Petition



Number 155 of 2015. In its judgement, the court observed that the Respondent's had grossly flouted the doctrine of constitutional avoidance and held "inter alia" as follows:-

"The instant case appears to me to be an issue of ownership of land and whether or not ground rent has been paid..."

10. The court in ELC Constitutional Petition Number 155 of 2015, quoted with approval a plethora of cases to demonstrate the doctrine of constitutional avoidance and in particular the case of "[Patrick Mbau Karanja - Versus - Kenyatta University](#) (2012) eKLR" where Lenaola J (as he then was) stated:-

"I should also say as I conclude: in Francis Waithaka – Versus - Kenyatta University Petition No.633 of 2011, this court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this court should not be invoked where other remedies lie..."

11. The Court in the same case stated that:-

"I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165(3)(a) and can be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights."

12. The Learned Counsel averred that Matheka J in the said case of ELC Constitutional Petition Number 155 of 2015, concurred with the views of Lenaola J in the "[Patrick Mbau Karanja case](#) (supra)" and penned off her Judgement by concluding as follows:-

".....In conclusion, this Constitutional Petition is not sustainable and constitutes an abuse of the process of this court and is accordingly struck out with costs to the Respondents."

13. The Learned Counsels associated themselves with the views of the Hon Judge in that this Petition as constituted that it raised similar issues as that in ELC Constitutional Petition Number 155 of 2015. That indeed it ought to have been canvassed in an ordinary civil claim. Therefore, it must meet a similar fate and urge the court to peremptorily strike it out with costs.

14. Additionally, to buttress his arguments, the Learned Counsel relied on the case of:- "[C.K. Bett Traders Limited & 2 others – Versus - Kennedy Mwangi & another](#) [2021] eKLR", the court in considering whether the suit was res judicata quoted with approval the view of the court in "The [Independent Electoral and Boundaries Commission – Versus - Maina Kiai & 5 others](#), [2017] eKLR" wherein the court interpreted the role of the doctrine as:-

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."



15. Ideally, the Counsel opined that litigation must come to an end. The Learned Counsel urged the court to spare the 1st and 2nd Respondents and indeed this court wastage of time and resources from the nuisance that is the Petitioners persistent filing of pleadings in different fora all the while hoping to obtain outcomes favourable to themselves. The Learned Counsel urged the court to sanction this behaviour and bring the present proceedings to an end.
16. The Learned Counsel submitted that the said Petition was an abuse of process. He referred Court to the case of:- "*Gideon Moi – Versus - Samuel Towett Kibowen* [2018] eKLR", the court cited with approval the dictum of the Court of Appeal in "*Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Ltd & 2others* [2009] eKLR" as to what constituted abuse of the court's process to wit:-

"We must therefore determine if, in the circumstances the Originating Summons as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after Mr. Church had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchaser's interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st Respondent and Mr. Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re - enforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In *Beinosi – Versus - Wiyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

... The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is



a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.”

17. In light of the foregoing extract, it came out clearly that the Petitioner had full knowledge that there existed another suit in a court of competent and still went ahead and filed this Petition with the sole intention to circumvent and/or to frustrate the proceedings in ELC Constitutional Petition Number 155 of 2015 by hoping that the court would reach a different outcome in the present case.
18. In conclusion, the upshot was that the Applicants had clearly demonstrated that the said Petition contravened the doctrine of constitutional avoidance, was res judicata and the Learned Counsel accordingly urged the court to strike out the Petition with costs.

IV. Analysis and Determination

19. I have keenly assessed and considered the filed pleadings being mainly the said Notice of Motion application dated 22nd July, 2023, the annexures thereof, the written Submissions in support of the Application, the myriad authorities cited, the provision of the Constitution of Kenya, 2010 and the statutes.
20. For the Honourable Court to arrive at an informed, reasonable and fair decision, the following three (3) issues fall for determination in the application:_
 - a. Whether the Notice of Motion application dated 22nd July, 2023 has any merit to wit the Applicants have made a case to strike out both the Petition and Notice of Motion application dated 10th February, 2022;
 - b. Whether the parties herein are entitled to the reliefs sought; and
 - c. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 22nd July, 2023 has any merit to wit the Applicants have made a case to strike out both the Petition and Notice of Motion application dated 10th February, 2022;

21. Under this Sub – heading, there is only a single issue for the consideration by this Court. Essentially, that is on striking an application and the entire suit as instituted by the Petitioners herein for offending certain provision of the law. The striking out of the suits are governed under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. It does allow a party to apply for the striking out of a suit. The same is drawn as follows:-

Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.



From the myriad of authorities, it is settled law that the power and Jurisdiction of the Court to strike out pleadings is discretionary. It must be exercised judicially and be used sparingly and cautiously. That is the case as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. The leading and still very relevant case on this front was that of “*D.T. Dobia & Company (Kenya) Limited – Versus - Muchina* [1982] KLR 1”. Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

22. Further to that, in the case of:- “*Co - operative Merchant Bank Limited – Versus - George Fredrick Wekesa* (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

23. Additionally, in the case of:- “*Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000)” the same court expressed itself thus:-

“A Plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial.....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

24. The main reason why the applicants have sought for this suit to be struck out is their claim that the suit is res judicata. The doctrine of res judicata is codified at Section 7 of the *Civil Procedure Act* which 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.”

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.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

25. For a suit to be declared res-judicata, the following must be proved;
- (i) The former suit must have been decided.
 - (ii) The competence of a court which decides the former suit must be determined irrespective of any provision as to right of appeal.
 - (iii) The former suit must have been alleged by one party and denied or admitted expressly or impliedly by the other party.
 - (iv) Any matter which might and ought to have made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in the former suit.
 - (v) The parties litigating must be the same.
26. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See “[*John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others* \[2015\] eKLR](#)”. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See “[*Maitihene Malindi Enterprises Limited – Versus - Kaniki Karisa Kaniki & 2 others* \[2018\] eKLR](#)”.
27. Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In case of:- “[*John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others*](#)” the Court of Appeal stated:
- “..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of *Henderson v Henderson* [1843] 67 ER 313: -
- “.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The



plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by 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”

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”

28. It is based on these legal reasoning that the Court holds that the application by the Applicants has merit and ought to be considered as prayed.

Issue No. b). Whether the parties are entitled to the reliefs sought

29. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles to the instant case and assess whether the Applicants are entitled to the reliefs sought. There is no dispute that the Petitioners herein filed ELC Constitutional Petition Number 155 of 2015 against the Respondents herein and that case was heard and determined subsequent to the application dated 8th April, 2022 where this Honourable Court delivered its ruling to the said application and allowed the said application. The Honourable court further made orders inter-alia that the present petition be stayed pending the determination of ELC Constitutional Petition Number 155 of 2015 and directed that file in ELC Constitutional Petition Number 155 of 2015 be placed before the court. On 6th July 2023, this Honourable court after considering and perusing the court's judgement in ELC Constitutional Petition Number 155 of 2015 made its ruling and directed that parties are at liberty to file an application to strike out the said petition herein on grounds that it offends the doctrine of res judicata.
30. The Honourable court further issued directions on filing the said application, exchanging responses and submissions and directed that the matter be mentioned on 2nd October 2023 to take a ruling date. In its judgment, the Court in ELC Constitutional Petition Number 155 of 2015 while acknowledging that the issue at hand concerned the ownership of land and payment of ground rent, went on to find that the Petition was incompetent and that the Petitioners ought to have invoked the jurisdiction of the ordinary Civil Court. In applying the dictum of the court in the other Petition, the said petition violates the doctrine of Constitutional avoidance. Several of the issues raised by the petitioners could have been ably canvassed by way of the Petitioner's filing a regular civil claim in the Environment and Land court.
31. A succinct look at paragraphs 1 to 55 of this Petition if compared and read together with the pleadings in ELC Constitutional Petition Number 155 of 2015, the grim reality that is the Petition herein shows its face that the issues herein are similar to the issues raised in ELC Constitutional Petition Number 155 of 2015. The Petitioner has only clothed it as a Petition by including and referencing other properties owned by the 1st and 2nd Respondent as a means of “forum shopping” in various courts.
32. The doctrine of res judicata as stated in the said Section has been explained in a number of decided cases. In the case of “The Independent Electoral and Boundaries Commission – Versus -Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 (*supra*)”, the Court of Appeal held that:
- “ Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.



- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.” The Court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

- 33. The above provision of the law embodies the common law doctrine of res judicata, which bars a court from hearing a matter that has already been decided before by a competent court. There is no contest that where one has presented a case before a competent court and such court has pronounced itself on the dispute, the litigants ought not to present the same dispute for fresh litigation. That, as I have mentioned is not in controversy.
- 34. As I have previously explained in this ruling, the Petition is “Res judicata” as my sister Lady Justice Nelly Matheka has already determined and made a decision in a similar petition pertaining the same subject matter with the same parties on 26th July, 2022. In view of the extensive holding by the Learned Judge Emukule J. in the case of:- “*Kenya Airways Limited - Versus - Classical Travel and Tours Limited* Nairobi HCCC No.694 of 2003 (unreported)”, and considering grounds for dismissal as envisaged under Order 2 Rule 15(1), it is apparently clear that the instant suit does qualify any of the ground thereof and hence ought to be struck out on these grounds.
- 35. The Applicants have opined that this Petition is an abuse of the cause process. The Learned Counsel for the Applicants submitted that it comes out clearly that the Petitioner had full knowledge that their exists another suit in a court of competent and still went ahead and filed this petition with the sole intention to circumvent and/or to frustrate the proceedings in ELC Constitutional Petition Number 155 of 2015 by hoping that the court would reach a different outcome in the present case.
- 36. The upshot of the foregoing is that this Honourable Court finds that the present Petition is res judicata contrary to the provision of Section 7 of the *Civil procedure Act*, Cap. 21. In saying so, I hold that the issues herein had been pleaded, considered and determined upon by the Judgment delivered by Lady Justice N. Matheka on 26th July, 2022 in ELC Constitutional Petition Number 155 of 2015. For these reasons, therefore, this Petition is accordingly struck out for being an abuse of process of court.



Issue No. b). Who bears the costs of the application?

37. Rule 26(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010* which provides that:-

“The award of costs is at the discretion of the Court.”

38. Costs follow the event, and are also at the discretion of the court. The petition herein is the second one to be filed by the Petitioner, and the 1st and 2nd Applicants/ Respondents have had to defend their respective positions as a result of the averments made, and remedies sought in the said petition.

39. This Honourable Court holds that the 1st and 2nd Respondents are as a result entitled to costs in light of the striking out of this Petition. This Honourable Court accordingly awards the 1st and 2nd Respondents costs of the Petition dated 10th February, 2022 and the Notices of Motion applications dated 10th February, 2022 and 22nd July, 2023 to be paid by the Petitioners jointly.

V. Conclusion and Disposition

40. In view of the above, upon conducting an elaborate analysis to the framed issues herein, Honourable Court finds to make a finding that the 1st and 2nd Respondents herein vide their Notice of Motion application dated 22nd July, 2023 have established a profound legal position. Therefore, I proceed to issue the following orders:-

- a. That the Notice of Motion application dated 22nd July, 2023 by the 1st and 2nd Applicants/ Respondent be and is hereby found to have merit and is allowed in its entirety.
- b. That the Petition and Notice of Motion application dated 10th February, 2022 is found to be “Res Judicata” and is hereby struck out entirely.
- c. That the 1st and 2nd Applicants/ Respondents shall have the costs of the Petition dated 10th February, 2022 and of the Notice of motion application dated 10th February, 2022 and the one dated 22nd July, 2023 to be paid by the Petitioners jointly and severally.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICRO – SOFT VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF JANUARY, 2024.

.....
HON. JUSTICE MR. L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;
- b. No appearance for the Petitioners.
- c. M/s. Oweya Advocate holding Mr. Obinju Advocate for the 1st Respondents.
- d. Mr. Kazungu Advocate for the 2nd Respondents.
- e. Mr. Makuto Advocate for the 3rd & 4th Respondents.



f. Mr. Otieno Advocate for the 2nd Interested Party.

g. No appearance for the 1st Interested Party.

