Keino & 2 others (Jointly Sued as the Trustees of the National Olympic Committee - Kenya) v Gitau & 8 others (Environment and Land Case Civil Suit E249 of 2021) [2024] KEELC 48 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEELC 48 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT E249 OF 2021

OA ANGOTE, J

JANUARY 18, 2024

BETWEEN

KIPCHEGO KEINO ..... 1ST PLAINTIFF

TOM O'MWOMBO ..... 2ND PLAINTIFF

FRIDAH SHIROYA ..... 3RD PLAINTIFF

JOINTLY SUED AS THE TRUSTEES OF THE NATIONAL OLYMPIC COMMITTEE - KENYA

AND

MARION GITAU ..... 1ST DEFENDANT

AGNES KAGIRA ..... 2ND DEFENDANT

BEATRICE KANYURU ..... 3RD DEFENDANT

ROLAND KIOGORA ..... 4TH DEFENDANT

WANJIRU KIONGA ..... 5TH DEFENDANT

SLYVIA MUTHONI ..... 6TH DEFENDANT

LISA MWAKAZI ..... 7TH DEFENDANT

CHIEF LAND REGISTRAR ..... 8TH DEFENDANT

NATIONAL LAND COMMISSION ..... 9TH DEFENDANT

RULING

Background

1. This Ruling is with respect of two applications dated the July 5, 2021 and March 10, 2022.

Application of 5th July, 2021

2. The Plaintiff/Applicant filed a Notice of Motion application dated July 5, 2021 brought pursuant to the provisions of Section 3A of the *Civil Procedure Act*, Order 40 Rule 1(a) and (b), Rule 2(1), Rule 4(1) and Rule 10, and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following reliefs;

    i. That the Honourable Court be pleased to issue an order of temporary injunction restraining the 1st -7th Defendants/Respondents whether by themselves, their servants, agents, employees or whomsoever from entering, from trespassing into, from sub-dividing, from disposing, from selling, from transferring, from leasing out, from charging, from constructing thereon, from surveying, from beaconing L.R No 209/15290, IR 189592 from gifting, from using it for joint venture and/or in any manner from having any dealings with the suit property L.R No 209/15290, I.R 189592 above and/or from asserting their impugned title to L.R 209/14309 over the Plaintiff/Applicants' suit property pending the hearing and determination of this suit and/or until further orders of the Court.

    ii. The costs of the Application be in the cause.

3. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Francis Mutuku, the Secretary General of the Plaintiff of an even date. He deponed that the Plaintiff was allocated the un surveyed commercial plot in Langata pursuant to which a grant Number I.R N0.85089 for a term of 99 years was issued on December 1, 1998; that the Plaintiff accepted the allotment, paid for it on December 7, 2000 and that its grant was registered on December 13, 2000 for a period of 99 years with effect from the December 1, 1998.

4. According to the Plaintiff, the land was legally and regularly surveyed and the Director of Surveys issued it with Deed Plans No.250992-993; that on June 8, 1999, the 1st -7th Defendants applied to the Ministry of Lands and Settlement for allocation of a parcel of land situate in the Langata Area of Nairobi being a residential plot and were on July 1, 1999 purportedly allotted an un surveyed commercial plot in Langata.

5. The Plaintiff's Secretary General deposed that the Plaintiff paid for the allotment on 18th and December 21, 2000; that prior to the 1st -7th Defendants' application, the Plaintiff had obtained a letter of allotment of property L.R No 209/1415 [now L.R No 209/15290] Langata Nairobi and that once an allotment was issued, the property was no longer available for allocation.

6. According to Mr Mutuku, in the year 2003, part of L.R No 209/14151, I.R 85089-Langata was discovered to be encroaching on the proposed Trans Africa Road Reserve (Southern Bypass); that a re-survey was conducted after which the Plaintiff surrendered the original grant I.R 85089 to the Commissioner of Lands for issuance of a new title and that the new title could not be immediately.

7. It is the Plaintiff's case that in 20023/2004, the Plaintiff was engaged in discussions with the Ministry of Lands and Settlement for the surrender of a portion of the said parcel of land measuring approximately 0.33 of a Hectare (0.81 of an acre) and that during the process of surrendering and re-surveying of

the suit property, the grant registered as IR 85089/1 was lost upon which a provisional certificate was issued by the Registrar of Titles.

8. It was deponed that the Plaintiff was thereafter issued with a title IR 189592 pursuant to a sub-division of I.R 85089/1, L.R 209/15290 (Original number 209/14151/2) as delineated on Land Survey Plan Number numbers 250992 and 250993 on September 21, 2017 and that the aforesaid Deed Plans issued by the Director of Surveys have never been recalled or cancelled.

9. According to the Plaintiff's Secretary General, the Plaintiff has nothing to do with Deed Plan Nos 231566 and 231567, the subject of the Commissioner of Lands letter dated 9th October, 2000, nor Deed Plans 233068, L.R 209/143209, the subject of complaints by the 1st-7th Defendants to various authorities.

10. According to Mr Mutuku, the Plaintiff's title is for all that parcel of land situate in the City of Nairobi measuring 2.275 Ha being L.R 209/14151, while the 1st -7th Defendants were purportedly allocated all that parcel of land situate in Nairobi being 1.897Ha or thereabouts being L.R 209/14309 and that the two properties do not have the same measurements.

11. It was deponed that in the event they are the same, then the subsequent allocation to the 1st -7th Defendants was illegal and irregular; that there being two certificates of title, it follows that when there are two equities, the first in time must prevail and that the title held by the 1st -7th Defendants is fictitious.

12. Mr Mutuku deponed that the title issued after the surrender of the southern bypass was never the subject of NLC's determination and was therefore not declared fraudulent; that the NLC has no power to revoke a title; that the 1st -7th Defendants' involvement of the DCI is an attempt to sanitize their illegal title and that the 1st-7th Defendants are dropping names and creating a false narrative that L.R 209/14309 was regularly allocated to them and further that the Plaintiff's title had been affected by the Ndung'u Land Commission.

13. In response, the 1st-7th Defendants, through Marion Gitau, filed a Replying Affidavit in which she deponed that the subject dispute has been heard and conclusively determined by various judicial and quasi-judicial bodies including the National Land Commission which vide its' decision dated 28th April, 2017 found that L.R 209/15920 held by the Plaintiff was illegal and fraudulent and called for its revocation.

14. According to the Defendants, the proceedings in ELC 120 of 2008- Marion Gitau & 6 Others versus The Attorney General and The Registered Trustees National Olympics Committee were similarly disposed off by the Court on 13th May, 2021 where the Defendants (Plaintiffs therein) were allowed to withdraw the suit and that the parties and the subject matter herein are the same as in JR 32 of 2018- Republic versus National Lands Commission and 2 others which seeks a review of the determination by NLC.

15. Ms Gitau further deponed that the issues surrounding the suit property have equally been addressed by multiple quasi- judicial authorities such as the Commissioner of Lands who cancelled the Deed plans 232566 and 231567 by the Plaintiff and that the Ndung'u Land Commission report provides that L.R 209/14151 and L.R 209/14309 were among numerous parcels earmarked for revocation and surrender to the Government.

16. It is the Defendants' case that the Directorate of Criminal Investigations, investigations revealed that the title by the Plaintiff is fraudulent and that the Director of Surveys found that the Deed Plans

231566 and 231567 in favour of the Plaintiff were fraudulently processed and the cadastral maps used by the Plaintiff were for Mavoko and not Langata where the suit property is situated.

17. According to Ms Gitau, on the June 8, 1999, she, initially together with the 2nd Defendant and later on with the inclusion of the 3rd -7th Defendants, applied to the Minister of Lands and Settlement for allocation of property situated in the Langata Area being un surveyed Government Land and that after due diligence, they were issued with a letter of allocation for the said parcel of land on July 1, 1999.

18. It is the Defendants' case that the property was thereafter surveyed and a Deed Plan No 233068 for the parcel was issued; that the land was given registration L.R No 209/14309; that upon the completion of the necessary pre-requisites, they paid Kshs 965,000/- being the total payments required by the Ministry of Lands and that after completion of the processes, the Commissioner of Lands, through the Registrar of Lands, prepared the certificate of title ready for sealing and final signature by the Commissioner of Lands.

19. Ms Gitau deponed that sometime in the year 2000, her together with the other Defendants discovered that some unknown individuals were attempting to unlawfully obtain a title to their property; that they lodged a complaint with the Commissioner of Lands and that it was discovered that illegal Deed Plans numbers 232566 and 231567 were in the process of being issued for the suit property and the same were recalled and cancelled.

20. It was deposed on behalf of the Defendants that despite the foregoing, a re-survey of the suit property was instituted leading to Deed Plans 250992 and 250993 being issued for titles L.R 209/15290 and 209/1451/1 that the titles were falsified and that further investigations revealed that the Plaintiff was purportedly allotted the same property which it had caused to be surveyed and irregularly given L.R 209/14150 and L.R 209/14151 which the Plaintiff received two titles in respect thereof.

21. It was deponed that as a result of the foregoing, they filed ELC 128 of 2008 after having withdrawn High Court Case No 1370 of 2005; that ELC 128 of 2008 failed to take off on account of various adjournments instigated by the Plaintiff's Counsel and that as a result of the foregoing and on the advice of their Counsel, they lodged a complaint before the NLC to make a determination regarding the irregular acquisition of their property L.R 209/14309 and its illegal alteration into L.R 209/15290.

22. Ms Gitau deponed that after they lodged the complaint before the NLC, they revealed to the Commission the pendency of ELC 128 of 2008; that an application to have the Commission dismiss the complaint on account of the pending ELC suit by the Plaintiff was dismissed; that while the matters were pending before the ELC and the NLC, the Plaintiff went ahead and processed titles L.R 209/14150 and 14151, now amalgamated to form L.R No 209/15290 issued on September 21, 2017 and that a prohibition order was issued by the ELC in 128 of 2008 and registered against the title.

23. It was deponed that after the determination by the NLC, the Registrar of Titles issued to the Defendants title L.R 209/14309; that the Plaintiff challenged NLC's decision in JR 32 of 2018; that whereas the Plaintiff claims that the NLC's decision was in contempt of the Court's orders in ELC 128 of 2008, the Court's decision to dismiss the application for stay of proceedings in ELC 128 of 2008 was not extracted and served on them or NLC.

24. It was deponed that the NLC acted within its mandate as set out under Section 14 of the NLC Act; that both the ELC and the NLC have jurisdiction to determine the legality of grants of dispositions of public land and that the Plaintiff's actions regarding the suit property arise from criminal actions of forgery, illegal occupation, fraud and theft and they are not deserving of any orders.

25. The Plaintiff, through its Secretary General, filed a Supplementary Affidavit in which he deposed that the allegation that the matter has been heard and determined by Courts of competent jurisdiction is

a falsehood; that the decision by the NLC was made after the expiry of its mandate and in contempt of Court orders and that further, the Plaintiff was not given an opportunity to present its case on the same and no evidence has been given in that respect.

26. It was deposed that in any event, it is not feasible that a determination can be made in 2017 in respect of a complaint amended in 2018 or that there can be two determinations being on April 28, 2017 and March 20, 2018 as alleged by the Defendant and that the decision by the NLC is the subject of litigation in JR 32 of 2018.

27. It was submitted that JR Case No. 32 of 2018 will deal with the issues of process while the present litigation will deal with the merits of the ownership of the suit land in the usual way; that the Plaintiff has already litigated with Golf Range Limited over the same property in ELC 125 of 2017 and that the judgement in the aforesaid case constitutes the status quo to be preserved in the matter

Application dated March 10, 2022

28. Vide the application of March 10, 2022 brought pursuant to the provisions of Order 2 Rule 15 and Order 51 Rule 1 of the *Civil Procedure Rules*, the 1st -7th Defendants seek the following reliefs;

    i. The Plaint and the Notice of Motion Application both dated July 5, 2021 herein be struck out with costs for being scandalous, frivolous, vexatious and/or otherwise being an abuse of the process of the Court.

    ii. Pursuant to Prayer (a) above, the suit be dismissed.

    iii. Costs of the Application be provided for.

29. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Marion Gitau, the 1st Defendant on behalf of the 1st -7th Defendants.

30. The 1st Defendant deponed that the matters agitated by the Plaintiff in its pleadings have been dealt with, adjudged and determined with finality in other proceedings before Courts and Tribunals and are consequently res judicata and that the matters include the decision of the National Land Commission of April 28, 2017 which revoked the grant for L.R No 209/15920 and a new grant was issued pursuant thereto to the 1st -7th Defendant.

31. It was deposed that the other matter is ELC case number 120 of 2008 Marion Gitau & 6 Others versus The Attorney General and The Registered Trustees National Olympics Committee which was similarly disposed of by the Court on May 13, 2021 permitting the Plaintiffs to withdraw and/or discontinue the entire suit.

32. According to the deponent, the subject matter and parties are the same as in ELC Miscellaneous Application (JR) No. 32 of 2018, *Republic versus National Lands Commission and 2 others* seeking for review of the determination by the NLC; that these proceedings in their entirety are a manifestation of the gross illegalities perpetrated by the Plaintiff with respect to the suit property, including fraudulently re-surveying the property, falsifying deed plans, and creating fraudulent titles and that the properties LR Nos. 209/14150 and 209/14151 were among the numerous parcels of lands earmarked for revocation and surrender back to the government by the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2003. (The Ndung'u Commission Report).

33. It was deponed that vide the letter dated February 5, 2020, the Directorate of Criminal Investigations (DCI), after conducting investigations concluded that an irregular certificate of title was prepared and issued to the Plaintiff on account of an allotment letter dated December 4, 1998 under correspondence

file No 185945 and that the said file 185945 was opened in 1997 for a plot within Eldoret Municipality owned by a Mr. Ngeny.

34. It was further deposed by the 1st Defendant that the Deed Plan in favour of the Plaintiff was declared fraudulent by the Commissioner of lands vide a letter Ref 212392/7 dated October 9, 2000 and approved the by survey plan number F/R 382/146 in favour of Marion Gitau and Beatrice Kanyuru and that the cadastral map used by the Plaintiff, (CR/34/42/5) has been established to be for Mavoko and not Langata where the subject land is situated.

35. In response to the application, the Plaintiff filed Grounds of Opposition in which it asserted that the claims that the Plaintiffs' suit is res judicata has no basis as the suit- ELC No.120 of 2008 *Marion Gitau & 6 others v Trustees National Olympic Committee- Kenya & Another* was withdrawn on May 13, 2021 by the 1st- 7th Defendants and that the Plaintiff is in possession of the suit property having recently litigated over the same with Golf Range Limited(Carnivore Restaurant) in Milimani ELC No.125 of 2017(08) *Golf Range Limited v National Olympic Committee-Kenya* and been awarded judgement.

36. The Plaintiff also filed a Replying Affidavit sworn by Francis Mutuku, its Secretary General on an even date in which he deposed that the Plaintiff has not been heard by any Court or Tribunal of competent jurisdiction and no evidence of the same has been adduced and that the Plaintiff was allotted the suit property and held a title to the said property until the 1st -7th Defendants, in contempt of Court orders and behind the Plaintiffs' back approached the 9th Defendant herein and were heard ex-parte.

37. The Plaintiff's advocates filed submissions in respect of the two applications which I have considered. The Defendants did not file submissions.

Analysis and Determination

38. Having considered the motions, affidavits and submissions herein, the issues that arise for determination are;

    i. Whether the Plaint and the Motion dated July 5, 2021 should be struck out?

    ii. Whether the Applicant is entitled to the temporary injunctive orders sought?

39. The law with respect to striking out of pleadings is found in Order 2 Rule 15 of the Civil Procedure Rules which provides as follows;

> " 15.
>
> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> a) it discloses no reasonable cause of action or defence in law; or
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> b) it is scandalous, frivolous or vexatious; or
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> c) it may prejudice, embarrass or delay the fair trial of the action; or
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> 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."

40. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu* [2009] eKLR restated these principles as follows;

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
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> > " The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."
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> We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said:-
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> > " The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."
>
> We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

41. The Defendants' case for the striking out of the Plaint and application is founded on two major arguments, to wit, the Plaint is statute barred by virtue of Section 18 of the *Limitation of Actions Act* and that the same is res judicata and subsequently constitutes an abuse of Court process.

42. According to the Defendants, the suit is statute barred on account of Section 18 of the Limitations of Actions Act. They assert that the letters of allotment issued in respect of the suit property having been issued to them on July 1, 1999, their interests which forms the substratum of the suit was established on the aforesaid date and the same has long been constrained by the *Limitation of Actions Act*.

43. Considering the aforesaid argument, two things immediately stand out. To begin with, the Defendants assertion as laid out above appears to be self-defeating. It suggests that their interest in the suit property has been extinguished by virtue of the Limitations of Actions Act.

44. Second, Section 18 of the *Limitation of Actions Act* is concerned with equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale. The interests in issue herein are not equitable interests but legal interest in the suit property which the opposing parties lay claim to.

45. Nonetheless, mere reliance on the wrong provision of the law does not invalidate the entire argument. In the circumstances, the Court opines that the relevant section of the *Limitation of Actions Act* is Section 7 which provides:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

46. Indeed, the aforesaid section makes it clear that a claim founded on recovery of land should be filed within a period of 12 years. However, this section does not stand in isolation. The Plaintiffs claim is founded on allegations of fraud and as such Section 26 of the same Act also comes into play. It provides thus:

> " Where, in the case of an action for which a period of limitation is prescribed, either—
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> (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
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> (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
>
> Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-
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> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
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> (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."

47. So, when did the cause of action arise for purposes of limitation? Ordinarily, the claim having been founded on fraud, time would start running upon discovery of the fraud. However, the circumstances herein are unique and extremely convoluted.

48. The dispute herein is with respect to the suit property which both parties lay claim to. Each party alleges to have been allotted the property by the Government of Kenya which allocation subsequently resulted in the issuance of title to each of the parties. The Plaintiff has title to the suit property issued in the year 2017 while the Defendants' title was issued in their names in the year 2019.

49. The above notwithstanding, from the pleadings by the Plaintiff, it does not appear that the Plaintiff has lost possession of the suit property to warrant "recovery" as envisaged by Section 7. Even if the Court were to find that the Plaintiff lost possession, this can only have been in 2019 when the Defendants were issued with their title. However, this too would be subject to the Courts' determination on whether or not the two properties are the same.

50. In the circumstances, and considering the highly disputed nature of the case, the Court opines that the issue of limitation is one that can only be determined upon trial.

51. The plea of res judicata is anchored on Section 7 of the *Civil Procedure Act*, which provides that 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.

52. The Supreme Court in the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) affirming the sentiments set out by the Court of Appeal in *Nicholas Njeru vs Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR) set out the elements to be demonstrated in a plea for res judicata thus;

> "a) There is a former Judgment or order which was final;
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> b) The Judgment or order was on merit;
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> c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
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> d) There must be between the first and the second action identical parties, subject matter and cause of action.

53. Discussing the essence of this principle, the Supreme Court posited as follows:

> "The learned authors of Mulla, *Code of Civil Procedure*, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."57.The essence of the res judicata doctrine is further explicated by Wigram, 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 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 the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].58.Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues 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 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. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

(i) the matter in issue is identical in both suits;

(ii) the parties in the suit are the same;

(iii) sameness of the title/claim;

(iv) concurrence of jurisdiction; and (v) finality of the previous decision."

54. According to the Defendants, the Plaintiff's purported interest in the suit property has been determined by several judicial, quasi-judicial and investigative bodies. The Defendants make reference to the reports by the DCI, Commissioner of Lands and Departments of Survey.

55. They also make reference to ELC 128 of 2008-*Marion Gitau and 6 Others vs The Attorney General and The Registered Trustees*; ELC Misc Application JR No 32 of 2018-*Republic vs National Land Commission and 2 Others* and the Determination by the NLC on April 28, 2017.

56. Beginning with the reports from the aforesaid agencies, the same are investigative and/or administrative in nature. They are not formal judicial decisions or judgments that result from a court proceeding and cannot be subject to the principles of res judicata.

57. As regards ELC 128 of 2008, whereas the parties therein and the subject matter were similar to the present case, the evidence adduced before the Court indicates that the same was withdrawn on May 13, 2021. Having been withdrawn, it is apparent that the same was not "determined" by the Court and as such, the plea of res judicata cannot lie.

58. As regards ELC JR 32 of 2018, whereas it is alleged that the subject matters and the parties are the same, it has not been stated nor shown that the proceedings therein have been concluded. Further, the present matter is a suit instituted vide a Plaint pursuant to the provisions of the Civil Procedure Rules.

59. Judicial Review proceedings are instituted by way of Judicial Review Applications as set out in Section 53 of the *Civil Procedure Rules* and as governed by the *Law Reform Act*.

60. Proceedings under judicial review are concerned with determining the legality or otherwise of a decision, action, or inaction by a public authority or other governmental body. Subsequently, a Court exercising judicial review jurisdiction cannot be said to be a Court of competent Jurisdiction to determine matters of a civil nature such as the ownership of land which is the dispute herein. The plea fails in this respect.

61. The Defendants have also referred the Court to the determination by the National Land Commission dated April 28, 2017. At the tribunal, the Defendants instituted a complaint as against the Plaintiff. The parties therein were the Plaintiff and Defendants herein. The NLC, the 9th Defendant herein, was the tribunal seized of the dispute. The 8th Defendant was not before the NLC.

62. It was the Defendants' case before the Commission that they were allocated the suit property initially registered as L.R 209/14309; that as the certificate of title was being readied for sealing and final signature, they discovered that the Plaintiff had obtained a parallel letter of allotment and re-surveyed the same to include a section of the by-pass creating L.R No 14151.

63. The Commission found that the Defendants were the first and bona fide allotees of L.R 209/15290(originally surveyed as L.R 209/14309) and as such, the property was not available for alienation to another person. The Commission rendered its determination on the April 28, 2017 thus;

    i. The grant for L.R No 209/15290 held by the Trustees of NOCK is illegal and fraudulent and is hereby revoked.

    ii. A new grant should be prepared in the names of Marion Gitau & Others

    iii. The Chief Land Registrar is directed to implement this decision

64. In the present case, the Plaintiff essentially asserts that its title L.R 209/15290 is valid and the title L.R 209/14309 issued to the Defendants is invalid.

65. Considering the foregoing narration vis the parameters for res judicata, it is apparent that the parties herein and the subject matter before the NLC and this Court are substantially the same, being the propriety and ownership of L.R 209/15290 and L.R 209/14309. It is also apparent that a determination has been made with respect to the properties the subject of this suit

66. It is noted that the Plaintiffs have gone to great lengths to submit on the deficiencies of the determination by the NLC while the Defendants have undertaken to defend the same. However, that is not an issue before this Court as this Court is not sitting on Appeal of the NLC's determination. Indeed, the question of the propriety of NLC's determination is before the Court in JR 32 of 2018. The decision not having been set aside, it remains a competent decision.

67. This being so, it follows that any attempts by this Court to determine the issue of ownership of the suit property will result in a re-determination of the questions already answered by the NLC. What then will become of the decision by the Commission and especially if it is upheld as valid by the judicial review court?

68. It is apparent from the foregoing that any attempt by this Court to hear the matter, the same issues having been heard and determined by the National Land Commission, will run contra to the principles of res judicata. The suit as such constitutes an abuse of process.

69. Considering that there is an existing decision of the National Land Commission in respect of the suit properties, which decision has been challenged by the Plaintiff in a separate suit, I find that this suit is not sustainable, and is for striking out. That being so, the court will not delve into the issue of whether the Plaintiff is entitled to injunctive orders or not.

70. For those reasons, the Court makes the following final determination;

    i. The application dated February 10, 2022 is found to be merited.

    ii. The Plaintiff's suit and application dated July 5, 2021 be and are hereby struck out.

    iii. The Plaintiff shall bear the costs of the two applications and the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Defendants

Mrs Kiget holding brief for Mr. Arusei for Plaintiff