



**M’Iburi & another v Attorney General & 3 others (Civil Appeal  
29 of 2020) [2025] KECA 1008 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 1008 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 29 OF 2020**

**S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA**

**APRIL 4, 2025**

**BETWEEN**

**NAITORE M’IBURI ..... 1<sup>ST</sup> APPELLANT**

**MARY NGUGI NKANATA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL BANK OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**SEBASTIAN KAARIA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Environment and Land Court  
at Meru (Mbugua, J.) delivered on 30th April 2020 in ELC Petition No. 8 of 2018)*

**JUDGMENT**

1. This appeal arises from the ruling and order of the Environment and Land Court (ELC) at Meru (Mbugua, J.) delivered on 30<sup>th</sup> April 2020 in Petition No. 8 of 2020.
2. A brief background of the matter is that the appellants filed suit against the 1<sup>st</sup> to 3<sup>rd</sup> respondents in a petition dated 26<sup>th</sup> July 2018 and sought numerous injunctive and declaratory reliefs, and in the alternative, damages for violation of their fundamental rights as well as compensation for illegal disposal of land parcel LR. No. Nkuene/Taita/2X2 (referred herein as the suit land). The 4<sup>th</sup> respondent was an interested party.
3. The petition was supported by the grounds set out therein and in the supporting affidavit of the 1<sup>st</sup> appellant sworn on even date, and a further affidavit sworn by the 2<sup>nd</sup> appellant on 2<sup>nd</sup> November 2018. It was their case that the 1<sup>st</sup> appellant was the registered owner of the suit land measuring 0.89



- Ha. That on 29<sup>th</sup> June 1992 the 2<sup>nd</sup> appellant, the 1<sup>st</sup> petitioner's daughter, was advanced an overdraft facility of Kshs.150,000/- by the 3<sup>rd</sup> respondent and a charge created over the suit land, through a deed of guarantee dated 29<sup>th</sup> June 1992. With the aim of settling the loan, the appellants converted the overdraft account, opened by the 2<sup>nd</sup> appellant to a term loan. The 2<sup>nd</sup> respondent remitted all the monthly payments as and when due and within one (1) year she was able to repay the outstanding loan. Thereafter, they followed the 3<sup>rd</sup> respondent for discharge and release of the title to the suit land with no positive outcome.
4. The 3<sup>rd</sup> respondent advanced a further loan of Kshs.300,000/- to the 2<sup>nd</sup> appellant but did not place a further charge on the suit property. The 1<sup>st</sup> appellant claimed that the 3<sup>rd</sup> respondent secretly, fraudulently, and without her consent charged the suit property under a deed of guarantee dated 4<sup>th</sup> March 1997 to secure the further charge of Kshs.300,000/- thus creating an encumbrance over the suit property, yet the deed stipulated that the recoverable amount was not to exceed Kshs.900,000/-.
  5. Later the 3<sup>rd</sup> respondent filed a suit HCCC No. 68 of 1997 against the 2<sup>nd</sup> appellant claiming that the amount advanced had risen to Kshs.811,883.35 being the amount due and owing from the 2<sup>nd</sup> appellant to the 3<sup>rd</sup> respondent in respect of overdrafts and other financial accommodations granted to the 2<sup>nd</sup> appellant on diverse dates. Judgment was entered against the 2<sup>nd</sup> appellant and it was ordered that the suit land be auctioned. The 2<sup>nd</sup> appellant filed an application for stay of execution which was dismissed.
  6. As a consequence of the said judgment, the 3<sup>rd</sup> respondent advertised for the sale of the suit land through public auction which was to take place on 29<sup>th</sup> August 2000 but there was an intervention by the District Commissioner Meru Central. As of 15<sup>th</sup> January 2001, the outstanding amount had escalated to Kshs.1,880,510.80/-.
  7. The 1<sup>st</sup> appellant's position was that she had no knowledge of the further charge over the suit land and could not understand why the 3<sup>rd</sup> respondent could not discharge her title since the initial loan had been paid. She decided to investigate the matter and the results of the investigations were that the bank manager of the 3<sup>rd</sup> respondent was manipulating the account by entering unauthorized debits in collusion with certain advocates. Further, that HCCC No. 68 of 1997 had been secretly instituted by the said manager and the 3<sup>rd</sup> respondent's in-house counsel without the knowledge of the appellants.
  8. Two investigations were conducted on 18<sup>th</sup> August 2001 and 14<sup>th</sup> March 2002 and they both showed the existence of only one charge, the one advanced to the 2<sup>nd</sup> appellant of Ksh.150,000/- but no further charge on the title of the suit property. It was revealed that the further charge of Kshs.300,000/- was not obtained through proper procedures and that it lacked consent from the Land Control Board and receipt to show payment of stamp duty.
  9. On 18<sup>th</sup> February 2002, the 3<sup>rd</sup> respondent's agent sold the suit land to the 4<sup>th</sup> respondent as the highest bidder for Kshs.800,000/- and the cautions placed by James Kirimi and a further one placed by the 2<sup>nd</sup> appellant on 13<sup>th</sup> March 2020 were removed without informing the cautioners. The title was then issued to the 4<sup>th</sup> respondent.
  10. On the same day, the 4<sup>th</sup> respondent wrote to the appellant requiring vacant possession of the suit land failure to which he would seek legal redress. Meanwhile, on 14<sup>th</sup> March 2002, the appellants conducted an inspection of the suit land to ascertain its value, which they estimated to be Kshs.8,650,000/-. This prompted the appellants to file HCCC 43 of 2002, and on 21<sup>st</sup> March 2002 were granted an order of temporary injunction over the suit land pending the hearing and determination of the suit.



11. On or about 22<sup>nd</sup> May 2003, during the pendency of the suit, the appellants, through their advocate wrote to the OCS Nkubu police station seeking assistance from him due to threats of forceful eviction by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The appellants claimed that on 21<sup>st</sup> July 2004, their counsel, in collusion with the 3<sup>rd</sup> respondent withdrew their case [HCCC 43 of 2002] without consulting them. The appellants averred that the actions by the 3<sup>rd</sup> respondent were illegal and in gross violation of their constitutional rights as they caused them to lose ownership of the suit land to the 4<sup>th</sup> respondent who was the new registered proprietor. It was the appellants' case that unless the court granted the reliefs sought, the appellants would be greatly prejudiced and their fundamental rights violated.
12. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their joint response to the petition through an affidavit sworn on 12<sup>th</sup> October 2018 by Paul Chelanga, Manager in charge of Credit Remedial at the 3<sup>rd</sup> respondent's bank's Credit Collection Remedial and Recovery Department; and a second affidavit sworn on 17<sup>th</sup> September 2018 by the 4<sup>th</sup> respondent. The 3<sup>rd</sup> respondent also filed a further affidavit sworn on 6<sup>th</sup> May 2019 in response to the appellants' further affidavit. Their response was that the petition was misguided as there was no violation of the appellants' rights under *the Constitution*. Furthermore, the reliefs sought by the appellants were incapable of being granted, and they therefore prayed that the petition be struck out.
13. In his replying affidavit, the 4<sup>th</sup> respondent raised a preliminary objection on points of law, that the court lacked jurisdiction to entertain the matter as the issues raised therein were ventilated with the attendant judgment, decree and final orders being issued in Meru HCCC No. 68 of 1997 and Meru HCCC No. 43 of 2002; that the appellants lost any legal ability to initiate recovery or redemption proceedings over suit land by dint of provisions of sections 7 and 17 of Limitation of Action Act; the 4<sup>th</sup> respondent was a purchaser for valuable consideration of the suit land in a public auction pursuant to the chargor's exercise of its statutory power of sale and acquired an indefeasible title to the suit property; and that there was no constitutional moment in the entire petition and it should be dismissed in limine pursuant to provisions of Article 162(2)(b) and 165 (3) (a) & 6 of *the Constitution*.
14. The 3<sup>rd</sup> respondent also filed a preliminary objection dated 3<sup>rd</sup> May 2019 and challenged the appellants' petition on the grounds: First, that the honorable court lacked jurisdiction for the reason the petition was time-barred pursuant to provisions of sections 7 and 17 of the *Limitation of Actions Act* Cap 22 Laws of Kenya; Second, the petition was res judicata in light of the outcome in the form of judgment and/or rulings and/or decree(s) in Meru HCC No. 68 of 1997 and Meru HCC No. 43 of 2002. Third, the appellants' case was vexatious and otherwise an abuse of the process of the Court and ought to be struck out forthwith.
15. The preliminary objection was canvassed by way of written submissions.
16. Mbugua, J. considered three issues raised in the petition. In the ruling dated 30<sup>th</sup> April 2020, on the issue of whether the appellants' constitutional rights had been violated, the learned trial Judge found that the dispute between the parties was on ownership of the suit land, which was to be dealt with by ordinary courts and not in a constitutional petition and therefore the appellants could not claim that they had rights which needed to be protected via their petition.
17. On the issue of the appellants' petition being time-barred, the Judge found that the petition was stale and statute -barred, having been brought 22 years down the line.
18. On the issue that the appellants' petition was res judicata, the Judge found that the appellants were challenging the decision in HCCC No. 68 of 1997. For that reason, the learned judge held that the court could not sit on appeal in respect of the judgment and ruling delivered by the court having horizontal jurisdiction with it. The learned judge also found that the appellants were privy to the



outcome in the said case [no. 68 of 1997], which gave rise to the auction of the suit land and of case no 43 of 2002, which was withdrawn and held that the bottom line of the matter was that the appellants were required to bring forth all the issues they had including the issues raised in the petition in the previous suits, which they did not. The Judge found that the appellants were trying to have a second bite of the cherry, which could not be allowed. The learned trial Judge agreed with the 3<sup>rd</sup> respondent, that the appellants were forbidden from litigating in installments. The Judge concluded that the matter was res judicata on account of the previous cases heard and determined in regard to similar issues touching on the suit land.

19. In conclusion therefore, the learned judge found that the preliminary objection filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents were merited and struck out the appellants' petition with costs.
20. Aggrieved and dissatisfied with the said ruling, the appellants preferred an appeal to this Court as evinced in their notice of appeal dated 4<sup>th</sup> May 2020, and lodged at the High Court registry at Meru on 9<sup>th</sup> July 2020. In their memorandum of appeal dated 1<sup>st</sup> December 2020, the appellants fault the learned judge on the following grounds.
  1. That the learned judge in determining the preliminary objection erred in law by ignoring and misapplying the legal principles in the locus classicus decision in Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distribution Ltd (1969) EA 696.
  2. That the learned judge erred in law in failing to appreciate the nature and substance of the suit before her, failing to appreciate the substance of Article 22(1) and 258(1) that every person has a right to institute court proceedings, claiming that *the Constitution* and or a right or fundamental freedom had been violated and or contravened, and holding that the petition was filed did not raise constitutional or implead violation or fundamental rights under *the Constitution* when the petition plainly and expressly pleaded and raised grievances and violations of fundament rights under *the constitution*.
  3. That the learned judge erred in law in failing to question the validity of the decision to remove the cautions in the absence of the cautioners and the net effect of said irregularity to the subsequent public auction and transfer of the property.
  4. That the learned judge erred in law in failing to uphold the rules of evidence by failing to appreciate that the proprietorship of the 4<sup>th</sup> respondent to the suit property was thus conferred by fraud, irregularity, illegality, and procedurally and the same was viable for impeachment under section 26(1) (a &b) of the *Land Registration Act*, No. 3 of 2012 Laws of Kenya.
  5. That the learned judge erred in law in misconceiving and misapplying the statutory principle at sections 7 and 17 of the *Limitation of Actions Act* in arriving at a decision that the petition was statute barred in blatant disregard of the supremacy of *the Constitution* and of pertinence Article 22 and 258 of *the Constitution*. Further and in any event, to the extent that demonstrably the 4<sup>th</sup> respondent's proprietorship of the property was acquired b fraud, irregularity, illegally and procedurally, by dint of the exception of section 26(1) of *Limitation of Actions Act*, time could not begin to run until 2015, HCCC No. 43 of 2002; Naitore M'iburi & Mary Ngugi Nkatha vs. National Bank of Kenya Limited – Meru Branch & Sebastian Kaaria, was filed within the set timelines but the appellants only knew of the impugned withdrawal in the year 2015.
  6. That the learned judge erred in law in ignoring and misapplying the statutory principle at section 7 of the *Civil Procedure Act* in arriving at the decision that the petition was res judicata as a result of the decision in HCCC No. 68 of 1997; National Bank of Kenya Limited vs.



Mary Ngugi Nkatha and HCCC No. 43 of 2002; Naitore M’iburi & Mary Ngugi Nkatha vs. National Bank of Kenya Limited – Meru Branch & Sebastian Kaaria, despite clear evidence on lack of finality, and the said suits were never heard and determined on their merits, and in absolute disregard of the reigning and binding ration of the Court of Appeal in Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd (2017) eKLR.

7. That as a result of the fundamental errors above, the learned judge granted a ruling in favor of the respondent, dismissing the petition, and occasioned gross misconduct of justice.”
  1. At the hearing of the appeal before us, learned counsel Mr. Mukuha was present for the appellants, learned counsel Mr. Ali, holding brief for learned counsel Mr. Oburu was present for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, learned counsel Mr. Kimaita was present for the 3<sup>rd</sup> respondent and learned counsel Mr. Opolu was present for the 4<sup>th</sup> respondent. All parties expressed their wish to rely entirely on their respective written submissions. However, we note that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file submissions for reasons expressed by Mr. Ali, that they did not participate in the matter before the superior court. This notwithstanding, Mr. Ali indicated that he fully associated with the submissions by the 4<sup>th</sup> respondent.
22. In the written submissions filed by the appellants dated 27<sup>th</sup> May 2024, in regard to grounds 1 and 7 of the memorandum of appeal, they contended that the learned judge erred in upholding a preliminary objection that did not raise pure points of law and which had contested facts. In regards to res- judicata, it was submitted that it could not be argued and/or canvassed based on a preliminary objection in so far as the court is called upon to undertake due examination and interrogation of the pleadings, proceedings, and judgment in issue unless the adverse party admits the existence of such set of facts, which they, as the adverse party contest. They argued that the issues advanced by the 4<sup>th</sup> respondent that he was a purchaser for valuable consideration, the mode of the said purchase, and/or whether he was a holder of an indefeasible title to the suit property were also issues that could not be addressed through a preliminary objection. The appellants urged, while relying on the case of Oraro vs. Mbaja [2005] eKLR that the assertions thereon bore factual aspects which called for proof and required the production of evidence to test their authentication. It was submitted that the issues raised in the preliminary objections did not meet the threshold of same. They thus submitted that the learned Judge went against the guiding principles in Mukisa Biscuits Manufacturing Company vs. West End Distributors Limited [1969] EA 696.
23. On grounds 2 and 3 the appellants submitted that contrary to the erroneous finding by the superior court, their petition had satisfied the requirements as provided in the case of Anarita Karimi Njeru vs. Republic (No. 1) [1979] 1 KLR 154 and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR ,that there was a link between the aggrieved parties; the appellants, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement, and as such, it was a proper constitutional petition as envisaged in the case law cited in support and Redington (Uganda) Limited vs. Office of the Attorney General & Another [2018] eKLR and affirmed by the Supreme Court in the case of Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR.
24. The appellants urged that they impeached the title held by the 4<sup>th</sup> respondent, and that section 26 of the *Land Registration Act* does not provide grounds upon which the said impeachment could be preferred and therefore submitted that such impeachment of a title could be based on violations of constitutional provisions. The appellants urged that the acquisition of the suit property was a result of constitutional violations, and was therefore illegal.



25. Relying on the case of *Delmonte Kenya Limited vs. County Government of Murang'a & Another* [2019] eKLR the appellants submitted that as long as the petitioners claimed illegalities were committed, and those claims were intertwined with the dominant issues that are premised on a violation of various constitutional rights, then the ELC has jurisdiction to deal with the alleged violations under Article 162(2) of *the Constitution*. Further relying on the case of *CNM vs. WMG* [2018] eKLR, the appellants argued that when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the arguments will be successful; the question is whether the argument forces the court to consider constitutional rights and values. In addition, the appellants submitted that it is not a principle of law that a constitutional petition cannot be filed where there is another remedy that the petitioner could have pursued; a party is also entitled to pursue the remedy that would be most efficacious in addressing the grievances which have been pleaded before the court.
26. On grounds 3 and 4, the appellants submitted that by passing the impugned judgment, the superior court failed to uphold the rules of evidence as there was a blatant disregard and lack of appreciation of the fact that the proprietorship by the 4<sup>th</sup> respondent was challenged and that owing to various constitutional violations, the same was liable for impeachment under section 26(1) (a) & (b) of the *Land Registration Act* and therefore such a conclusive finding of proprietorship could not issue through a preliminary objection and especially one that pleaded factual issues that had been contested by the appellants and which therefore required the calling of evidence before a determination could be made.
27. On ground 5 of the memorandum of appeal, the appellants submitted that sections 7 and 17 of the *Limitation of Actions Act* [LAA] could not bar them from seeking redress for the constitutional violations. In addition, the 4<sup>th</sup> respondent's proprietorship over the suit property having been acquired by fraud, irregularly and illegally, and further HCCC No. 43 of 2002 having been withdrawn clandestinely without their knowledge, then the fraudulent actions by the respondents allowed for the extension of limitation under section 26(1) of the LAA of the alleged limitation envisaged under sections 7 and 17 of the LAA. This notwithstanding and relying on the case of *Kiluwa Limited & Another vs. Commission of Lands & 3 Others* [2015] eKLR the appellants submitted that there are no such statutory periods brought under limitation prescribed for a constitutional petition under Article 22(1) and 258(1) of *the Constitution* and or under any provisions of *the Constitution*.
28. In conclusion, the appellants emphasized that their petition was not bad in law, frivolous, vexatious, and or an abuse of the court process; that it was not barred by the LAA as legislation could not override *the Constitution* and could not, therefore be used to curtail rights provided under *the Constitution*; and that the preliminary objections by the 3<sup>rd</sup> and 4<sup>th</sup> respondents ought to have been found defective. The appellant thus prayed that their appeal be allowed with costs.
29. The 3<sup>rd</sup> respondent in its written submissions dated 21<sup>st</sup> March 2024 and in response to ground 1 of the memorandum of appeal, maintained that its preliminary objection and that filed by the 4<sup>th</sup> respondent were properly before the court as they raised pure points of law and therefore the trial judge's decision on the issues was sound and correct.
30. In response to grounds 2, 3, and 4 the 3<sup>rd</sup> respondent relied on the decision of the Supreme Court in *Samuel Kamamu Macharia & Another vs. Kenya Commercial Bank Limited & Others* [2012] eKLR, in submitting that the trial court lacked jurisdiction to adjudicate and/or entertain the matter and had to down its tools and take no further steps. It argued that the petition was based on grounds of fraud and fraudulent transactions and the conduct of the respondents, which issues ought to be adjudicated before the Environment and Land Court and not a Constitutional Court. For that proposition, he



relied on the cases of Kenya Agricultural and Livestock Research Organization (KALRO) vs. Edison Sonje Taure & 3 Others [2021] eKLR; Gabriel Mutava & 2 Others Vs. Managing Director, Kenya Ports Authority & Another [2016] eKLR; and Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1. In addition, the 3<sup>rd</sup> respondent submitted that the contended issues raised by the appellants had been adjudicated upon in Meru HCCC No. 68 of 1997 and Meru HCCC No. 43 of 2002, and a finding made hence the trial court could not assume jurisdiction as an appellate court.

31. In response to ground 5 as to whether the appellants’ petition was time-barred by dint of sections 7 and 17 of the LAA, the 3<sup>rd</sup> respondent argued that the appellants filed their petition 16 years late without giving any reason for their unreasonable delay. Placing reliance on the cases of James Kanyiita Nderitu vs. Attorney General & Another [2019] eKLR; East Africa Court of Justice Appeal No. 2 of 2012; Attorney General of Uganda & Another vs. Omar Awadh & 6 Others [2013] eKLR; and Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR the 3<sup>rd</sup> respondent urged this Court to find that the trial court was properly guided by the said authorities and that it made a sound and correct decision that the appellants’ petition was time-barred.
32. On ground 6, the 3<sup>rd</sup> respondent emphasized that the rationale behind the doctrines of res judicata and estoppel is that if the controversy in issue is finally settled, determined or decided by a competent court, it cannot be re-opened. For that proposition, he relied on the case of E.T. vs. Attorney General & Another [2012] eKLR. In addition, the 3<sup>rd</sup> respondent submitted that the issues in this matter were adjudicated in Meru HCCC No. 68 of 1997 to its logical conclusion and which gave rise to the public auction of the subject matter. The 3<sup>rd</sup> respondent added that the appellants were well informed of the said decision, but they never appealed against it. Furthermore, it was urged, that Meru HCCC No. 43 of 2002 was withdrawn and the appellants did not make any attempt to have the same reinstated.
33. In conclusion, the 3<sup>rd</sup> respondent submitted that the trial court considered all the issues before it, analyzed, applied the law correctly, and directed itself properly, and made a sound and correct decision anchored in law, both statutes and case law. It prayed that this Court dismisses the appeal and upholds and affirms the decision of the superior court. Further, the appellants slept on their rights, and for that reason, equity should not come to their aid.
34. The 4<sup>th</sup> respondent in his written submissions dated 24<sup>th</sup> June 2024, submitted that the appellants never attacked the process leading to the sale and transfer of the suit property by the auctioneers and that the public advertisement followed by public auction was legal and procedurally done and completed, and the transfer of the suit property lawfully effected. The 4<sup>th</sup> respondent submitted that the auction sale was done on 18<sup>th</sup> February 2002, and a certificate of title and memorandum of sale were issued. He maintained that the successful sale by auction was not challenged in any legal proceedings nor set aside by any judgment, decree, or court order.
35. The 4<sup>th</sup> respondent also submitted that it was not disputed by the appellants that they had defaulted in their obligation to repay the loan to the 3<sup>rd</sup> respondent and the suit property was charged to the bank. Further, the appellants had admitted in their pleadings that they had filed various redemptive suits and litigation, to wit, Meru HCCC No. 68 of 1997 and HCCC No. 43 of 2002, which was a suit by the appellants against the 3<sup>rd</sup> and 4<sup>th</sup> respondents over the suit property, and the cases were all properly litigated and concluded.
36. Just like the 3<sup>rd</sup> respondent, the 4<sup>th</sup> respondent emphasized that by dint of sections 7 and 17 of the LAA, the appellants’ claim against the suit property could not be maintained as there was a lapse of 16 years since the sale and acquisition, in a court ordained public auction, by the 3<sup>rd</sup> respondent, in the exercise of its chargor’s statutory power of sale. He contended that the appellants, by their appeal and petition, are attempting to first, lodge an appeal against the High Court’s decision through the



back door 22 years later; and second, to upset the exercise of charges statutory power of sale through a constitutional petition.

37. Relying on the Supreme Court's decision in *Communication Commission of Kenya & 5 Others* (supra), the 4<sup>th</sup> respondent submitted that the superior court correctly found that the appellants' petition was res judicata and nothing raised in it was a constitutional issue. He further added that the common law doctrine of issue estoppel is applicable in this matter. In conclusion therefore, the 4<sup>th</sup> respondent consequently pleaded that the entire appeal be dismissed for lack of merit and costs be awarded to him.
38. This appeal arises from a ruling on a Preliminary Objection raised by the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the appellants' constitutional petition filed before the ELC. We have considered this appeal, the affidavits, and submissions by counsel to the parties, as well as the cases relied on and the law applicable. Being a first appellate Court, we have analyzed and evaluated afresh the arguments of the parties for and against the petition, in line with our mandate as was well set out in the case of *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR where the Court pronounced that the primary role of the Court in a first appeal is:
- “...to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
39. Having considered this appeal we find that what falls for our determination is:
- i. whether the learned Judge erred to find that the appellants' petition was res judicata; and,
  - ii. whether she erred to find that the petition was barred by limitation pursuant to sections 7 and 17 of the LAA
40. The preliminary objections by the 3<sup>rd</sup> and 4<sup>th</sup> respondents raised similar issues. In regard to the suit being res judicata, it was their submissions that several suits had been filed in relation to the same issues raised in the petition and that these issues had been ventilated fully. The 3<sup>rd</sup> respondent urged that it filed a suit HCCC No. 68 of 1997 against the 2<sup>nd</sup> appellant, claiming that the amount advanced had risen to Kshs.811,883.35 being the amount due and owing from the 2<sup>nd</sup> appellant to the 3<sup>rd</sup> respondent in respect of overdrafts and other financial accommodations granted to the 2<sup>nd</sup> appellant on diverse dates. Judgment was entered against the 2<sup>nd</sup> appellant, and it was ordered that the suit land be auctioned. The other suit was filed by the appellants, HCCC No. 43 of 2002, in which an order was issued on 21<sup>st</sup> March 2002 granting temporary injunctive orders over the suit land until the matter was heard and determined. They argued that the issues raised in the petition were ventilated with the attendant judgment, decree, and final orders being issued in Meru HCCC No. 68 of 1997 and Meru HCCC No. 43 of 2002.
41. The learned Judge, in her ruling, found that the appellants were challenging the decision in HCCC No. 68 of 1997 and for that reason, the learned judge held that the court could not sit on appeal in respect of the judgment and ruling delivered by the court having horizontal jurisdiction with it. The learned judge also found that the appellants were privy to the outcome in the said case [No. 68 of 1997] which gave rise to the auction of the suit land and of case No 43 of 2002, which was withdrawn and held that the bottom line of the matter was that the appellants were required to bring forth all the issues they had, including the issues raised in the petition in the previous suits, which they did not. The Judge found that the appellants were trying to have a second bite of the cherry, which could not be allowed. The learned trial Judge agreed with the 3<sup>rd</sup> respondent, that the appellants' were forbidden



from litigating in installments. The Judge concluded that the matter was res judicata on account of the previous cases heard and determined in regard to similar issues touching on the suit land.

42. We have considered this issue. We note that the petition rotated around the suit land, Parcel No. Nkuene/Taita/2X2, and the charge of the suit land to the 3<sup>rd</sup> respondent to secure loans/overdraft/credit extended to the 2<sup>nd</sup> appellant. Part of the facts relied upon by the appellants was that the 3<sup>rd</sup> and 4<sup>th</sup> respondents arbitrarily deprived them of the proprietorship and interest over the suit property.
43. The suit, HCCC No. 68 of 1997 was filed by the 3<sup>rd</sup> respondent against the 2<sup>nd</sup> appellant claiming, that the amount advanced had risen to Kshs.811,883.35 being the amount due and owing from the 2<sup>nd</sup> appellant to the 3<sup>rd</sup> respondent in respect of overdrafts and other financial accommodations granted on diverse dates. Judgment was entered against the 2<sup>nd</sup> appellant, and it was ordered that the suit land be auctioned.
44. The suit, HCCC No. 43 of 2002 was filed after by the appellants in protest, to challenge the sale of the suit property sold on the 18<sup>th</sup> February 2002, and after they discovered that the value of the suit property was over 8 Million. The appellants obtained an order issued on 21<sup>st</sup> March 2002 granting them temporary injunctive orders over the suit land until the matter was heard and determined. The appellants later claimed that the suit was withdrawn by their advocate in conspiracy with the 3<sup>rd</sup> respondent.
45. The learned Judge of the ELC found as follows:

“ As rightly submitted by the 3<sup>rd</sup> respondent, the petitioners were privy to the outcome in case no.68 of 1997 which gave rise to the auction of the suit land, while their case no 43 of 2002 was withdrawn. The bottom line of this matter is that the petitioners were required to bring forth all the issues they are now raising in the previous suits. They didn’t and they now want to have a second bite of the cherry. As rightly put by the 3<sup>rd</sup> respondent, they are forbidden from litigating in instalments. I therefore find that this matter is res-judicata.”
46. The substantive law on res judicata is found in section 7 of the [Civil Procedure Act](#) Cap 21 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.”
47. A matter is res judicata, if it is 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. That is what section 7 of the LAA provides. In addition, a matter will be considered res judicata if it raises issues related to those in a previous suit between the same parties, and which could have been resolved in such other previous suit, but which the party(ies) failed to raise.
48. We have examined the issues raised between the parties in the two cases, HCCC No. 68 of 1997; National Bank of Kenya Limited vs. Mary Ngugi Nkatha and HCCC No. 43 of 2002;



Naitore M'iburi & Mary Ngugi Nkatha vs. National Bank of Kenya Limited – Meru Branch & Sebastian Kaaria. As we noted herein above, the subject matter of the two cases is the suit property. The two cases raised issues regarding the true amount owed by the appellants to the 3<sup>rd</sup> respondent, and impropriety on the part of the 3<sup>rd</sup> respondent in the handling of the loan account. They also revolved around the propriety of the sale of the suit property. The violations they raised in the petition could have been raised in the previous suits, including claiming the damages for the violations suffered. Looking at what the appellants sought in the petition, it is clear that the issues raised are similar to those in these two suits. We agree that the issues raised in the petition were not constitutional in nature.

49. The two cases were determined on merits and no appeal was proffered. As the learned Judge observed, the introduction of the 1<sup>st</sup> and 2<sup>nd</sup> respondents into the petition cannot circumvent the doctrine of res judicata, as the subject matter and the issues were similar and related to those urged in the petition, and should have been raised within these suits, or at least one of them. We agree with the learned judge that in the circumstances, the petitioners are prohibited from litigating the same or similar issues in the petition.

50. We identify with the High Court statement in the case of Njangu vs. Wambugu & Another Nairobi HCCC No.2340 of 1991 (unreported), where it held that:

QUOTE B

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

51. In regard to whether the suit was barred by limitation, the appellants were seeking injunctive and declaratory reliefs and alternatively, damages for various constitutional violations of fundamental rights as well as compensation for illegal disposal of the suit land. The petition was an attempt by the appellants to recover the suit property and or get compensation for the damages they had suffered, when the suit property was auctioned and transferred to the 4<sup>th</sup> respondent.

52. Section 7 of the LAA provides:

“

“7. Actions to recover land.

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.”

53. Section 17 of the LAA provides:

“17. Title extinguished at end of limitation period. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

54. The petition was filed in 2018. We see from the record that the suit property was sold by auction on 18<sup>th</sup> February 2002, and registered in the name of the 4<sup>th</sup> respondent on 14<sup>th</sup> March 2002. The petition was filed more than 12 years after the cause of action accrued to the appellants. We agree with the learned Judge of the ELC that the suit property was time- barred.



55. The result of this appeal is that the same has no merit and is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF APRIL, 2025.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

