Kusienya v Wekesa & 12 others (Civil Appeal 157 of 2018)
[2024] KECA 41 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 41 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 157 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

THOMAS MUTERE KUSIENYA ..... APPELLANT

AND

JAMIN JUMA WEKESA ..... 1ST RESPONDENT

PATRICK MANYANDIO WEKESA ..... 2ND RESPONDENT

KEPHER KHAMALA WEKESA ..... 3RD RESPONDENT

CHARLES WECHENJE ..... 4TH RESPONDENT

FREDRICK MULONGO WEKESA ..... 5TH RESPONDENT

FREDRICK KENYATTA WEKESA ..... 6TH RESPONDENT

GEOFFREY KHISA WEKESA ..... 7TH RESPONDENT

PHANICE OMULEYI ..... 8TH RESPONDENT

JUDITH MWACHI ..... 9TH RESPONDENT

CLEOPHAS MADEGWA ..... 10TH RESPONDENT

JUMA WALUBENGO ..... 11TH RESPONDENT

AGGREY ICHITWA ..... 12TH RESPONDENT

FRANCIS WEKESA ..... 13TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Kakamega (Matheka, J.) dated 26th September, 2018 in ELC CASE NO. 65 OF 2013)

JUDGMENT

1. The appellant brought a claim before the Environment and Land Court (ELC) sitting at Kakamega seeking the following orders against the respondents herein:

    a. This honourable court does order and or declare that the plaintiff is the rightful owner of land parcels L.R. No. Kakamega/ Lugari/2079, 2076 and 2361 and is entitled to exclusive, peaceful, quiet and unimpeded possession and use thereof and to issue an order that the defendants, their relatives, agents, servants, employees and or any other person claiming through them be evicted from the said parcel of land and all the structures, if any, erected on the suit land be demolished forthwith.

    b. This honourable court be pleased to issue a permanent injunction perpetually restraining the defendants either by themselves or through their relatives, employees, servants and or agents or any other person claiming under them from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on and or in any other manner dealing with land parcels L.R. No. Kakamega/ Lugari/2079, 2076 and 2361 or interfering with the plaintiff's peaceful and exclusive ownership, possession and or use thereof.

    c. Costs of this suit and interest thereon.

    d. Any other or further reliefs deemed fit and just.

2. In his plaint dated 26th February, 2013, the appellant averred that he was the registered proprietor of land parcel L.R. No. Kakamega/ Lugari/2079 measuring approximately 12.1 hectares, whose boundaries were clearly delineated on the ground. He averred that he was enjoying exclusive, peaceful and quite possession and use of the said parcel of land until February, 2013 when the respondents illegally, wrongfully, forcefully and without any colour of right, consent or authority, trespassed onto it and started ploughing and working on it.

3. The appellant averred that he had requested and pleaded with the respondents to stop their said actions and vacate the land parcel in vain; and his attempts to seek intervention of the local provincial administration bore no fruits as the respondents remained adamant and refused and/or failed to vacate the same and continued in such refusal, which necessitated the suit. He further averred that the respondents had threatened and intended to continue or remain in occupation of the said land parcel and/or trespass thereon.

4. Along with his plaint, the appellant also filed a notice of motion application dated 26th February, 2013, wherein he sought both a temporary order of injunction and an order of injunction against the respondents restraining them from alienating, selling or offering for sale, laying claim to, trespassing onto, utilizing, developing, carrying out any works on and/or in any other manner dealing with the land parcel L.R. No. Kakamega/ Lugari/2079, and/or interfering with the appellant's exclusive, quiet and peaceful possession and occupation thereof, pending the hearing and determination of the suit. The appellant also prayed for costs of the application.

5. The respondents opposed the appellant's notice of motion application vide a replying affidavit of the 1st respondent herein, Jamin Juma Wekesa, dated 3rd June, 2013. Among other things, the 1st respondent deposed that the appellant had been less than candid with the court about the history of the dispute; that the instant dispute was first initiated by their parents, Wekesa Sinino Alfunzi and Marko Kusienya Sinino (both deceased) before the Lugari Land Disputes Tribunal and a decision was

made thereof giving Marko Kusienya Sinino (the appellant's father) only 7 acres out of land parcel L.R. No. Kakamega/ Lugari/101; that thereafter an application was made for adoption of the award but the same was dismissed through some mischief; that after the dismissal of the said application, the appellant's father subdivided the property and made numerous transfers i.e. land parcels Kakamega/ Lugari/2075-2080; that the suit property is part of the said subdivisions.

6. The 1st respondent further deposed that his father then lodged prohibitory orders on the parcels that had been transferred. He also lodged an appeal against the decision declining the adoption of the award by the Lugari Land Disputes Tribunal. After a protracted battle, the appeal was allowed in Kakamega High Court Civil Appeal No. 145 of 2003 in a judgment dated 18th April, 2013. The 1st respondent further deposed in his affidavit that the effect of the High Court judgment was to return the matter to the magistrate's court for the adoption of the Tribunal's award whose effect will be cancellation of all the title deeds derived from Kakamega/ Lugari/101 including the suit property herein.

7. In essence, the 1st respondent's entire case was based on the defence that the appellant's suit was *res judicata* and sub judice and, therefore, incompetent, mischievous and incurably defective.

8. Additionally, both the appellant and 1st, 2nd and 3rd respondents filed their written submissions to the notice of motion application dated 5th November, 2013, and 25th November, 2013, respectively.

9. The notice of motion application was heard by G. Dulu, J. who granted some interlocutory orders aimed at preserving the substratum of the case during its pendency. Thus, in his ruling dated 3rd April, 2014, the learned Judge gave the following orders:

    1. Both the applicant and the respondents are restrained from alienating, selling or offering for sale land parcel L.R. No. Kakamega/ Lugari/2070 pending the hearing and determination of the suit.

    2. In view of the nature of this case, I order that costs of the application be in the cause.

10. Thereafter, the appellant filed a notice of motion application dated 9th June, 2014, seeking to amend his plaint and add ten (10) other defendants/respondents, as shown on the face of this appeal as being the 4th to 13th defendants/respondents. Initially, there were only three (3) defendants/respondents being the 1st to 3rd defendants/respondents. The appellant also sought to have the ruling and order issued on 3rd April, 2014, reviewed; and for costs of the application. In this regard, the record of appeal at page 137 shows that on 23rd October, 2014, the court (E.C. Mwita, J.) allowed the application by consent of parties as prayed and the ruling dated 3rd April, 2014, was reviewed to the effect that the parcel number reads Kakamega/ Lugari/2079 instead of Kakamega/ Lugari/2070.

11. Thereafter, the record also shows that the appellant made an application dated 20th November, 2017, seeking an interlocutory judgment against all the respondents for failure to file a defence within the stipulated period, despite having been served with summons to enter appearance, plaint and attendant pleadings.

12. The record of appeal shows that there were court proceedings on 17th May, 2018 (see record of appeal at page 143) during which Mr. Kiveu, counsel for the 1st, 2nd and 3rd respondents at the time, informed the court that there was a judgment in which the award in Kakamega CMC Misc. Award No. 106 of 2000 was adopted and it cancelled all the other titles. As such, counsel urged the court that Kakamega CMC Misc. Application No. 106 of 2000 be heard to disposition first. The court dismissed the application but indulged the respondents by giving them a final adjournment. During those proceedings, Mr. Simiyu, in objecting to the application for an adjournment, informed the court that the respondents had not filed a defence.

13. The case came up again on 26th June, 2018. Again Mr. Kiveu, counsel for the 1st, 2nd and 3rd respondents, sought for an adjournment on the grounds that: Kakamega CMC Misc. Application No. 106 of 2000 was coming up for mention, and other respondents wanted to come on record but needed to make a formal application. In the meantime, the 9th, 10th and 11th respondents appeared in person. Mr. Simiyu, counsel for the appellant at the time, objected the adjournment sought. The court agreed with Mr. Simiyu that the final adjournment had been granted on 17th May, 2018 and that the matter had to proceed for hearing.

14. Consequently, the matter proceeded and oral evidence was given by the appellant and his witness, James Wafula Nyongesa. Both were cross-examined by counsel for the respondents, Mr. Kiveu, after which the appellant closed his case. Thereafter, Mr. Kiveu prayed for an adjournment on the grounds that it was his first time being involved in the matter and he did not have the required documents of the case. Again, Mr. Simiyu, objected to the adjournment sought on the ground that there was no regular defence on record. The court allowed the respondents a final adjournment and set the hearing of the defense for 23rd July, 2018.

15. The 1st to 7th respondents filed their defence and a witness statement by the 1st respondent both dated 23rd July, 2018. There appears to be little contestation that this defence was filed long after the appellant had applied for an interlocutory judgment; and without the leave of the court. Crucially, the defence was filed after the close of the plaintiff's case.

16. On that same day i.e. 23rd July, 2018, when the matter came up for defence hearing, Mr. Kiveu, counsel for the 1st, 2nd, 3rd and 7th respondents at the time was absent; while Ms. Mukolwe, a new counsel appointed to act for the 10th respondent, prayed for an adjournment on the ground that she had just been instructed; whereas the 8th to 13th respondents were absent even though they had been served. Again, Mr. Simiyu, counsel for the appellant at the time, objected to the application for adjournment and the court agreed with him. The application for adjournment was rejected. Following this rejection, the defence was forced to close its case before calling any witnesses.

17. The case was scheduled for mention to confirm that the parties had filed their written submissions. The mention was on 31st July, 2018. Both the appellant and the 1st, 2nd and 3rd respondents had, through their respective advocates, filed their written submissions dated 31st July, 2018 on even date. On that day, Mr. Simiyu, counsel for the appellant, appeared in court and confirmed that he had filed his submissions. Judgment was slated for 26th September, 2018.

18. Upon consideration of the matter, the Environment and Land Court (N.A. Matheka, J.) in its judgment dated 26th September, 2018, noted that the respondents brought the cases in Lugari Land Dispute Tribunal Case No. 9 of 2000, Kakamega CMC Misc. Award No. 106 of 2000 and Kakamega High Court Civil Appeal No. 145 of 2003, to the attention of the court because land parcel Kakamega/ Lugari/2079, 2076 and 2361 were subdivisions of land parcel Kakamega/ Lugari/101, which was the suit property in the initial battle between the fathers of the present day parties (Wekesa and Kusienya). The court also noted that the award in Lugari Land Disputes Tribunal was adopted by the court in Misc. Award No. 106 of 2000, giving the 1st defendant's/respondent's father 63 out of 80 acres that formed part of the original land parcel Kakamega/ Lugari/101. In this regard, the court made the following observation:

> " There is a grave danger if the court allows the plaintiff suit when there is already judgment by a court of law over the suit property that is awaiting conclusion. In the replying affidavit dated 3rd June, 2013 which is part of the court record, they have shown that the land parcels herein were originally sub divided by the plaintiff's father on [sic] Marko Kusienya before

he died and the defendants' father had lodged prohibitory orders even on the suit properties herein before the plaintiff undertook succession of Marko Kusienya Sinino. Therefore, even the process leading to the registration of the plaintiff to the suit properties is tainted by illegalities, irregularities and fraud. The fact that the defendant did not adduce evidence per se does not mean that the plaintiff is precluded from proving his case. He ought to prove his case nevertheless on a balance of probabilities. For the foregoing reasons they urge court to find and hold that:-

a. That the present suit is both sub-judice and/or res-judicata.

b. That the present suit is frivolous, vexatious and or abuse of the due process of this court.

c. Condemn the plaintiff to pay the costs of this suit.

This court has considered the evidence and the submissions herein. The defendants submitted that this matter is both sub-judice and/or res- judicata the following cases;

1. Kakamega Misc. Award No. 106 of 2000.

2. Kakamega HCCA No. 145 of 2003.

3. Lugari Land Dispute Tribunal No. 9 of 2000.

In my opinion this court needs to determine this preliminary issue before going into the merits and the demerits of this case.

Section 6 and 7 of the *Civil Procedure Act* Cap 21 provides as follows:

.....

On perusal of the files in the above cases, I find that land parcel Kakamega/ Lugari/2079 were subdivisions of land parcel Kakamega/ Lugari/101 which were the suit properties in the initial battle between the fathers of the present day parties hereby Wekesa Sinoino Alfunzi and Marko Kusienya Sinino. The award in Lugari Land Disputes Tribunal which was adopted by the court in Misc. Award No. 106 of 2000 giving the 1st defendant's father 63 out of 80 acres that formed part of the original land parcel Kakamega/ Lugari/101. The application in that matter is coming up on the 19th September 2018. Kakamega HCCA No. 145 of 2003 the appeal was allowed in favour of the Appellants/defendants herein to pursue their application in the Misc. Application case in the judgement dated 18th April 2013. The plaintiff in this case confirmed that he was the administrator of the estate of one Mark Kusienya Sinino who was his father and the respondent in Kakamega HCCA No. 145 of 2003 (having carried out succession vide Kakamega High Court Succession Cause No. 553 of 2009). The plaintiff then files this case on the 26th February 2013 knowing very well of the existence of the other cases namely Kakamega Misc. Award No. 106 of 2000, Kakamega HCCA No. 145 of 2003 and Lugari Land Dispute Tribunal No. 9 of 2000, touching on the same subject matter and the same parties. For those reasons, this case is *res judicata* and *sub judice* and this court lacks jurisdiction it cannot go into the merits of this case. I therefore strike out this case with costs to the defendants."

19. Aggrieved by the decision of the Environment and Land Court, the appellant filed a Notice of Appeal dated 1st October, 2018 and a Memorandum of Appeal dated 14th December, 2018, in which he raised five (5) grounds of appeal. These are that the learned judge erred:

1. In law and fact in holding that the plaintiff's suit was res judicata or sub judice when the same was not and in the absence of a defense or evidence tendered by the respondent to prove such allegations.

2. In law and fact by acting on or concurring with mere allegations contained in the respondents' submissions in the absence of any material placed before her procedurally or at all.

3. In law and fact by failing to allow the appellant's claim and grant the reliefs sought when the appellant had proved his case on a balance of probabilities as he had established ownership of the suit parcels of land and the fact that the respondents were trespassers thereon.

4. By holding that she lacked jurisdiction to entertain and or determine the appellant's case when the issue had not been raised at a preliminary or any stage and after hearing the case to conclusion and her verdict was based on hearsay, speculation and conjecture.

5. By failing to identify the issues for determination and failed to determine them critically, wholly, properly and independently and her decision was bad in law, flawed, biased, indefensible and erroneous and has occasioned a serious miscarriage of justice.

20. Consequently, the appellants prayed that the appeal be allowed; judgment and/or decree of the learned judge be set aside, discharged and or vacated and the plaintiff's claim be allowed and the reliefs sought in the plaint be granted; and, the respondents be condemned to pay the costs of the appeal and those of the Environment and Land Court.

21. During the virtual hearing of the appeal, learned counsel, Ms. Aligula held brief for Mr. Akwala for the appellant and learned counsel, Mr. Kiveu, appeared for the respondents. Both parties filed written submissions and relied entirely on them.

22. The appellant condensed his grounds of appeal into three. Firstly, combining grounds 1, 2 and 4, the appellant lead argument was that the learned Judge erred by finding that suit was *res judicata* and *sub judice* yet the issue had not been preliminarily raised by the respondents and, especially, when the issue had not been pleaded in a defence since there was no regular defence on record. It was irregular, the appellant argued, for the learned Judge to entertain the pleas of res judicata and sub judice when they were only raised in the final submissions of the respondents. Differently put, the appellant argued that there was no material on record to permit the learned Judge to make the conclusions that the suit before her was both *res judicata* and *sub judice*.

23. Secondly, the appellant argued that he was entitled to a favourable verdict because he produced the title deed of the suit property which is in his name and the same was not challenged by any of the respondents since they did not adduce any evidence on defence. Thus, the appellant argued, section 25 of the *Land Registration Act* protects him. To buttress this point, the appellant contended that he also produced documents showing the succession process that resulted in him obtaining the title to the suit property; none of which was challenged by the respondents.

24. Thirdly, the appellant argued that the learned judge erred by forming her own issues for determination, and proceeded to support them with her own facts, evidence and the law, and delivered a judgment thereon in favour of the respondents rather than adhering to the issues arising from the parties' pleading and evidence. The appellant argued that the learned judge determined issues that were never raised during trial, failed to deal with all issues of law and fact raised by the appellant, and disregarded the appellant's submissions. In addition, that the learned Judge relied on the respondents' pleadings which were filed out of time, without leave of court and after the closure of the appellant's case, and which ought to have been disregarded and expunged from the record.

25. Opposing the appeal, the respondents insisted that the learned Judge was right to rule that the suit was res judicata. They cited section 7 of the *Civil Procedure Act* and the decision of this Court in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR. They contended that there have been various suits between the deceased fathers of the present-day parties, which included the judgment dated 18th April, 2013, in Kakamega High Court Civil Appeal No. 145 of 2003, which the court had a chance to peruse. In this regard the respondents contended that the ripple effect of hearing the case and making a decision would have resulted in the court issuing orders that could have been contrary to those previously issued by courts of competent jurisdiction; thereby, courting a risk of having different orders concerning the same properties.

26. The respondents further argued that the appellant was not entitled to a favourable judgment because he did not prove that they had trespassed onto the suit property. They argued that it was the appellant who had the burden of proof under section 107 of the *Evidence Act*.

27. This is a first appeal. The standard of review is de novo: we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* (1968) EA 123). In addition, this Court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).

28. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, the issues presented in this appeal can be condensed into two substantive ones:

    a. First, whether there was sufficient material before the ELC to warrant the determination by the learned Judge that the suit before the ELC was *sub judice* and/or *res judicata*.

    b. Second, whether the appellant was entitled to a favourable verdict owing to the fact that there was no defence on record; and the respondents did not adduce any evidence in opposition to the appellant's case or in favour of their case.

29. We will reverse the issues and start with the second issue we have framed. The appellant's argument is two-fold: that there was no regular defence on record; and that only the appellant (and his witness) testified. The effect of these two facts, the appellant insists, is that the learned Judge had no option but to make a finding that he had established his case on a balance of probabilities and was, therefore, entitled to the reliefs sought.

30. Although counsel for the respondents attempted to argue before us that there was a defence on record because what the respondents filed on 23rd of July, 2018 was never formally struck out by the court, we have no hesitation in agreeing with the appellant that there was no regular defence on record. The truth is that the appellant had requested for an interlocutory judgment subsequent to which the trial commenced and the appellant and his witness testified. However, while true that there was no regular defence, as a matter of law, an interlocutory judgment cannot be issued in land matters by dint of Order 10 rules 4, 6, 9 and 10 of the *Civil Procedure Rules*. – see, for example, *Peter Karanja Kamani v Isaac Mwangi Kimani*(2018) eKLR. In essence, the hearing was for formal proof only.

31. However, the appellant is wrong in asserting that a matter that is set down for formal proof in the absence of a defence and where the defence offers no rebuttal witnesses, must result in a favourable verdict for the plaintiff. A plaintiff always bears the burden of proof, as stipulated in section 107 of

the *Evidence Act*, and must discharge that burden by bringing legally admissible evidence to persuade the fact finder that they are entitled to the conclusions and reliefs sought. In the present case, the fact that there was no defence on record; and that no witnesses were called to challenge the appellant's narrative does not mean that the learned Judge was obligated to automatically reach a verdict in favour of the appellant. The learned Judge was obligated to consider the quality of the evidence produced and whether all the facts were established to justify a favourable verdict as well as the law. Lack of a regular defence on record does not automatically lead to a favourable judgment and neither does it disable or bar the court from considering any pertinent matters of law arising from the suit.

32. Turning to the more substantive issue, there are two sub-issues that must be determined. The first question is whether it was open for the learned Judge to make a determination that the suit before her was both *res judicata* and *sub judice* while there was no regular defence on record. Differently put, can the plea of *res judicata* and/or *sub judice* be properly considered by the court if it has not been properly raised in a statement of defence? The second question is whether, on the facts of this case, the suit before the court was, in fact, *res judicata* and/or *sub judice*.

33. Counsel for the appellant seemed to suggest that the plea of *res judicata* and/or *sub judice* must be raised as a preliminary matter or it is deemed waived. At the very least, counsel suggested that the plea must be raised in a statement of defence – otherwise the court would be disentitled to raise it.

34. In most cases, the position taken by counsel for the appellant is the correct one. There are certain procedural postures that a litigant can take from which a trial court is entitled to draw an inference that the plea of *res judicata* has been waived. However, *res judicata* and *sub judice* are statutory defences and while it is good practice for them to be raised at the earliest possible opportunity and it is often costly and risky for a litigant not to do so, it is not always fatal that they be so raised preliminarily. Indeed, being statutory defences prescribed for purposes of ensuring the integrity of the legal system, there are instances where a trial court is entitled to raise the defences sua sponte as long as the court has legitimately and reliably come across information giving rise to the conclusion that a matter before it is *res judicata* or *sub judice*.

35. The doctrine of *res judicata* is designed to answer the crucial question of what impact a previously rendered adjudication has in subsequent disputes. This is a question of both practical and systemic importance.[1] The policy objective of the doctrine of *res judicata* in decreeing finality is found in the elegant Latin phrase, interest *reipublicae Ut sit finis litium*, which translates to "it is in the interest of the State that there be an end to litigation." Its modality in decreeing preclusion lies in the Latin phrase, *res judicata pro veritate accipitur*, which translates as "a matter adjudged is taken as the truth."

36. Indeed, the importance of the doctrine of *res judicata* to all legal systems is so widely acknowledged to the extent that it is considered part of the customary international law. So, as early as 1873, an author concluded, without controversy, that "the doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations." (see 2 A.C. Freeman, *A Treatise of the Law of Judgments* § 627, at 1321 (Edward W. Tuttle ed., 5th ed. 1925) (1873).

37. It is true that res judicata is, generally, not a self-executing bar to subsequent litigation meaning that litigants should normally raise it in defence. As one US Court has said, See, *e.g.*, *Arizona v California*, 530 U.S. 392, 412-13 (2000):

> " [T]rial courts must be cautious about raising a preclusion bar sua sponte, thereby eroding the principle of party presentation so basic to our system of adjudication.". See, also, *Carbonell v. La. Dep't of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985).

38. However, it is widely acknowledged that the court has the power to raise the pleas of *res judicata* and *sub judice* on its own, in certain circumstances even though it only does so sparingly. As another US court (*Plaut v Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995)) remarked regarding the doctrine of *res judicata*:

> " What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of res judicata are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of *res judicata* need not always be accepted that trial courts may in appropriate cases raise the *res judicata* bar on their own motion."

39. In the present case, the trial court first became aware of the potential for the *res judicata* and *sub judice* bars being applicable, not from any sources extraneous of the litigation, but through an affidavit that had been filed by the respondents in response to an application in the suit. That affidavit was unrebutted by the appellant as to the facts regarding the earlier disputes between the parties and was relied on by the judge who was hearing the matter at the time in making a ruling on the interlocutory application which had been sought. Indeed, the previous judge (Dulu, J.) indicated in his ruling that he had perused the files in those other cases. Similarly, in the last paragraph of the impugned judgment, the learned Judge categorically states that she perused the previous files related to the case and found that the present case was, indeed, both *res judicata* and *sub judice*. In the circumstances, we are of the firm view that it was not an error at all for the learned Judge to consider the *res judicata* and *sub judice* bars. Indeed, it would have been dereliction of her judicial duty for her to adorn a veil of ignorance and proceed as though she was unaware of the previous disputes.

40. Since we have answered in the affirmative the question whether the learned Judge was entitled to consider the *res judicata* and *sub judice* bars even in the absence of a regular defence on record, the final question we must answer is whether, on the facts of the case, the *res judicata* and *sub judice* bars precluded the court from considering the case on its merits.

41. As aforesaid, there was an application for interlocutory injunction filed and determined in the case. The application was brought by the appellant and opposed by the 1st to 3rd respondents. The latter filed a replying affidavit deposed by the 1st respondent in opposition. Dulu, J., who had heard and determined the application stated in his ruling on record that he had perused the decisions of Lugari Land Disputes Tribunal Case No. 9 of 2000 dated 25th April, 2000; Kakamega Chief Magistrate's Court Misc. Application Case No. 106 of 2000 dated 15th October, 2003, and Kakamega High Court Civil Appeal No. 145 of 2003 dated 18th April, 2013.

42. These decisions are annexed to the replying affidavit of the 1st respondent in opposition to the application for interlocutory injunction. They tell the somewhat torturous legal history of the present case concerning land parcel L.R. No. Kakamega/ Lugari/2079, which is the main suit property herein.

43. A brief summary of the initial dispute before the Lugari Land Disputes Tribunal (hereinafter "Tribunal"), that is, Lugari Land Dispute Tribunal Case No. 9 of 2000, is as follows. Wekesa Sinino Alfunzi (hereinafter "Wekesa"), the claimant in the land dispute involving land parcel L.R. No. Kakamega/ Lugari/101, claimed that he applied for the same in 1964 from Settlement Fund Trustees, and was to pay for it through a soft loan. They were then called special plots. Since he did not have an identity card, he was asked to produce the identity card of either his father or brother. Wekesa, thus produced the identity card of his brother, Marko Kusienya Kusienya, paid an initial instalment of Kshs. 182.00, and thereafter cleared the soft loan of Kshs. 78,000.00 over a period of time. On the other hand, the objector, Marko Kusienya (hereinafter "Kusienya"), claimed that he gave his brother, Wekesa,

his identity card to secure him a plot in Lugari since he had a case at home; but when he concluded the same in 1965 and went to Lugari, he found Wekesa in occupation thereof. Thus, a dispute ensued whereby he wanted Wekesa out of his land. Kusienya told the Tribunal that what he wanted was for Wekesa to give him 15 acres and Wekesa to remain with other 65 acres of the suit land.

44. A witness by the name of Abraham Koroti Nabwani, told the Tribunal that on 15th August, 1985, they went before the chief, Abukuse, who advised Wekesa to agree on how they should divide the suit land; and there was an agreement between Wekesa, Kusienya and the children, that Kusienya be given 1 acre since he had no wife.

45. After perusing the documents from Wekesa and considering the evidence before them, the Tribunal found that Wekesa was the one who took land parcel L.R. No. Kakamega/ Lugari/101, paid its first instalment and loan totaling to Kshs. 78,000.00. In this regard, a resolution was passed that since Wekesa used Kusienya's identity card and/or name, the same did not warrant Kusienya to get any part of the suit land. However, since the chief and elder had already given Kusienya 7 acres of the suit land, the Tribunal resolved that Kusienya should be given 7 acres and the remaining suit land be given to Wekesa, through the Land Board as soon as possible; in an award dated 25th April, 2000.

46. Thereafter, Wekesa moved to the lower court vide application dated 26th May, 2000, to have the award of the Tribunal adopted by the court in Kakamega Chief Magistrate's Court Misc. Award No. 106 of 2000. The award was adopted on 19th September, 2000, and orders issued for Executive Officer of the court to execute all the documents required to facilitate the survey and registration of land parcel L.R. No. Kakamega/ Lugari/101. However, Kusienya filed an application dated 23rd April, 2001, seeking to set aside the orders dated 19th September, 2000. Kusienya's application was allowed on 16th November, 2011, and the adoption orders were set aside. Thus, the award of the Tribunal remained pending adoption by the lower court. Thereafter, the hearing of the application for the adoption of the award of the Tribunal dated 26th May, 2000, was adjourned severally and later dismissed on 18th December, 2002, for want of prosecution. That dismissal triggered an application dated 21st March, 2003, seeking reinstatement of the application for adoption of the award of the Tribunal dated 26th May, 2000. However, in a ruling dated 15th October, 2003, the lower court dismissed the application dated 21st March, 2003, and observed as follows:

> "....The matter had been finalized. The elders award was adopted. The executive was given powers to sign transfer documents. This is now a matter for appeal purposes in the High Court."

47. The above ruling of the lower court triggered an appeal filed on 17th November, 2003, at the High Court vide Kakamega Civil Appeal No. 145 of 2003, between Wekesa (the appellant therein and later substituted by Belinda Waliambila Wekesa) and Kusienya (the respondent therein), wherein one of the grounds was that the learned magistrate failed to take into account that the adoption orders had been set aside, as such, there was no adoption order on record; hence, the reason for the application for reinstatement of application of adoption of the award of the Tribunal dated 26th May, 2000. In this regard, the High Court (B. Thuranira Jaden, J.) agreed with the appellant's counsel that the learned magistrate went off the track and did not address his mind to issues that were before him. Thus, the ramification of the decision of the lower court was that the award of the Tribunal had not yet been adopted, for over 12 years at the time, after the Tribunal made its decision; and this stood in the way of further court processes that could have followed the order of adoption. In the circumstances, in a judgment dated 18th April, 2013, the court quashed the lower court's decision dated 15th October, 2003, and made an order for the hearing of the respondent's application dated 26th May, 2000.

48. Turning back to the said pending adoption of award of the Tribunal in Kakamega CMC Award No. 106 of 2000, the record shows that the respondents filed a notice of motion application in the Chief Magistrate's Court dated 6th March, 2016, (at page 87 of the record of appeal) seeking the following orders:

    1. That pursuant to the adoption of the decision of the Lugari Land Disputes Tribunal on 3rd November, 2014, and give effect to the said adoption, all land parcels derived from land parcel formerly known as land parcel L.R. No. Kakamega/ Lugari/101 be and hereby cancelled viz:

        a) Kakamega/ Lugari/2075, 2076, 2077, 2078, 2079 and 2080.

        b) Any other resultant sub-division from the aforesaid parcels.

    2. That land parcel number Kakamega/ Lugari/101 be reinstated.

    3. That the Executive Officer be empowered to execute all transfer documents to the Land Dispute Tribunal giving 7 acres to the respondent and the remainder to the applicant.

    4. That the respondent be condemned to pay the cost of this application.

49. However, the record does not show the ruling or judgement of the adoption of the said decision of the Lugari Land Disputes Tribunal dated 3rd November, 2014, as stated by the respondents in their said notice of motion application dated 6th March, 2016. Additionally, the 1st to 7th respondents' list of documents does not show the ruling or judgment of the adoption of the said decision of the Lugari Land Disputes Tribunal dated 3rd November, 2014; it only lists their said application dated 6th March, 2016 in CMC Misc. Award No. 106 of 2000. The record shows, however, that there was an application coming up for hearing on 19th September, 2018, to effect the said award.

50. Given this history and background, it is clear that this matter is firstly, sub judice, on the ground that the application for the adoption of the award of the Tribunal in Kakamega CMC Misc. Award No. 106 of 2000, is yet to be heard and determined as was directed by the court in Kakamega High Court Civil Appeal No. 145 of 2003, in its judgment dated 18th April, 2013. In this regard, the High Court stated thus:

> " Sadly, the ramification of the decision complained about is that the award of the tribunal has not yet been adopted about twelve
>
> (12) years after the Land Disputes Tribunal made its decision. This has stood in the way of further court processes that could have followed the order of adoption.
>
> The appellant's prayer is that the decision (dated 15/10/2003) be quashed and an order made for the hearing of the application dated 26/5/2000 inter parties. I allow the appeal..."

51. Drawing from the above holding of the High Court (B. Thuranira Jaden, J.) in Kakamega High Court Civil Appeal No. 145 of 2003, we agree with the learned Judge that the fact that the award of the Tribunal had not yet been adopted and has still not been adopted to date, has stood in the way of further court processes that could have followed the order of adoption. This makes the dispute clearly sub judice, as the matter of the application of adoption of the award of the Tribunal was, and is yet to be heard and determined.

52. It our view, also, that this was also the reason the Environment and Land Court (G. Dulu, J.), in its determination of the interlocutory application, Kakamega Environment and Land Court Case No. 65

of 2013, filed by the appellant, opined, after perusing the judgment in Kakamega High Court Civil Appeal No. 145 of 2003, that the orders to issue would have to partly affect the appellant in order to safeguard the interests of both parties/sides and preserve the subject matter in dispute. Indeed, the court's ruling dated 3rd April, 2014, gave orders to the effect that both the appellant and the respondents were restrained from alienating, selling or offering for sale land parcel L.R. No. Kakamega/Lugari/2079 pending the hearing and determination of the suit. That ruling of 3rd April, 2014, for the reason that the principal prayer the appellant fortifies the view that the present matter is sub judice. This is because among the reliefs the appellant seeks in the present case is for an injunction against the respondents respecting the same suit property. Additionally, the decision of the Tribunal, which to date has not been appealed by any party, and neither has there been an application to review or vary the same, makes the matter *res judicata*.

53. The inevitable conclusion, then, is that the appellant's suit filed at the ELC was both *res judicata* and *sub judice* and it was not an error for the learned Judge to so find.

54. The upshot is that the appeal wholly lacks merit. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR