



REPUBLIC OF KENYA



**Mbaru & 12 others v Mombasa County Government & 20 others (Civil Appeal
E020 of 2021) [2024] KECA 192 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 192 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E020 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

CHAI MBARU 1ST APPELLANT
STEPHEN BAYA MWANYULE 2ND APPELLANT
ABDULRAZAK MOHAMED SHARIFF 3RD APPELLANT
JANE NERI GACHAU 4TH APPELLANT
LUCY WANGECI WOKABI 5TH APPELLANT
MUTUA MUTIA 6TH APPELLANT
CHARLES MWAURA 7TH APPELLANT
AHMED OMAR 8TH APPELLANT
SAKINA BAHLOUL MURSAL 9TH APPELLANT
NORBERT ABWOGA 10TH APPELLANT
MARY MUMBUA KAVYU 11TH APPELLANT
EDWARD KIHURO 12TH APPELLANT
SAIL ALI BIDU 13TH APPELLANT

AND

MOMBASA COUNTY GOVERNMENT 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
MORRIS REMINGTON MAE 3RD RESPONDENT
KHALIFA MOHAMED 4TH RESPONDENT
RUKIYA OMAR RENO 5TH RESPONDENT



BUXTON POINT APARTMENTS LIMITED	6 TH RESPONDENT
BADI KOMBO HASSAN	7 TH RESPONDENT
MARIAM OMAR HASSAN	8 TH RESPONDENT
KHALID FAKIH HAJI	9 TH RESPONDENT
MWINYI MWINYIKOMBO MWINYI	10 TH RESPONDENT
MWATIA HARUN KONGO	11 TH RESPONDENT
JANET NDAGO EKUMBO	12 TH RESPONDENT
PATRICK MELVILLE MUNENE NYAGAH	13 TH RESPONDENT
EMMACULATE NZOMO	14 TH RESPONDENT
HAMISI MOHAMED SALIM	15 TH RESPONDENT
MOHAMED JUMA MASAI	16 TH RESPONDENT
STEPHEN OCHIENG ODINGO	17 TH RESPONDENT
BEATRICE MBODZE GAMBO	18 TH RESPONDENT
MWANABATULI KHAIFA ABUBAKAR	19 TH RESPONDENT
KHAMIS ALI KHAMIS	20 TH RESPONDENT
FATMA ALI KHAMIS	21 ST RESPONDENT

(Being an Appeal from the Judgment of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 3rd March 2021 in Mombasa ELC Petition No.28 of 2020)

JUDGMENT

1. The genesis of this dispute was a proposed project by the 1st respondent, Mombasa County Government, dubbed “Urban Renewal and Redevelopment of Old Estates within Mombasa County” (the project). The project was aimed at rehabilitating 10 housing estate within Mombasa, one of them being Buxton Estate (the Estate) which is situate on a portion measuring 14 acres in the approximate within Plot Nos. Mombasa/Block XVII/625, Mombasa/Block XVII/985 and Mombasa/Block XVII/981. It was proposed that 520 Flats within the said Estate be demolished and, in their place, 1500 new residences be constructed.
2. Dissatisfied with that decision, the appellants, who claimed to be residents of the Estate, filed Mombasa ELC Constitutional Petition No. 28 of 2018 against the 1st respondent, contending that the decision would translate into a number of illegalities and violations of some of the appellants’ fundamental rights; that a comprehensive feasibility study and Environmental Impact Assessment was not carried out to establish any adverse effects on the people in the Estate; that the tender award of the Project was done without their participation contrary to Article 174 of *the Constitution*; and that the 1st respondent was under an obligation to comply with international instruments on the right to housing and human dignity.



3. The Petition was initially filed in the High Court at Mombasa in the Constitutional and Human Rights Division, but was transferred to the Environment and Land Court on the ground that the issues raised fell within the jurisdiction of that court.
4. According to the appellants, they were residents of the flats in Buxton Estate (the Estate); that the flats in the Estate were leased out to them and to other tenants at a highly rebated monthly rent, of Kshs. 3,662/= for a two bedroom house and Kshs. 2,810/= for a one bedroom house; that the said units have always been meant to be occupied by persons of low income; that the Estate was built by the Kenyan Government in partnership with the then Municipal Council of Mombasa to provide decent and affordable housing for the less fortunate members of the society who are from poor backgrounds; that the 1st respondent, the County Government of Mombasa, is one of the organs in the Government of Kenya and, since it was collecting rents from the appellants and other tenants of the Estate, it followed that the houses were on Government land; and that, therefore, the Estate was developed on public land and, consequently, the said land was subject to the control of the 3rd respondent, the National Land Commission (the NLC).
5. On the other hand, it was contended by the appellants that the 2nd respondent is a private investor in partnership with the 1st respondent, whose role is to undertake the construction of the new houses; that the tender for the said project was floated by the 1st respondent sometime in June 2019 via BID NO. CGM/PRO/T/002/2019 whereby the 2nd respondent was the only party that took part in the said bid; and that the tender was subsequently awarded to it.
6. According to the appellants, the arrangement between the 1st and the 2nd respondents meant that the said 14 acres of public land would have been alienated by the 1st respondent without the approval of the NLC in favour of a joint venture business arrangement that would be for the benefit of the 1st and the 2nd respondents; that the existing tenants in the said flats at the Estate would lose their secure accommodation upon demolition of the houses occupied by them since the houses to be erected thereon would be sold to any willing buyer at commercial rates thereby locking them out due to their disadvantaged economic status; and that the 2nd respondent, a private entity, would make profits by using public land, which would have been alienated by the 1st respondent without involving the NLC.
7. According to the appellants, the said decision would constitute a number of illegalities and violation of some of their fundamental rights, as well as violation of a number of constitutional principles. Expounding on the said illegalities and violations, the appellants contended that, since the Estate stands on public land, and the powers to manage and alienate public land is vested in the NLC by virtue of Article 67 (2) (a) of *the Constitution* and section 5(2) (a) of the *National Land Commission Act*, the usurpation of the powers of the NLC by a county government in alienating such land violated Articles 10, 47 and 67 of *the Constitution*; that although demolition of the existing flats in the Estate and the intended construction of some 1500 units would create a lot of disturbances that would have a huge social, political and economic implications, the appellants did not participate in the deliberations that led to the decision; that the 1st respondent unlawfully used the Public Private Partnership Act to confer a benefit over the use of the said public land on the 2nd respondent; that no Environmental Impact Assessment was carried out and, therefore, the issue of sustainability of the said project was not analysed in violation of the Environmental Management and Coordination Act (EMCA); that the 1st respondent failed to carry out a comprehensive feasibility study and Environmental Impact Assessment (EIA) to establish the adverse effects that the said project is likely to visit on the people of the Estate; and that the 1st respondent, in violation of Article 35 of *the Constitution*, failed or neglected to supply the appellants with necessary documents with regard to the said project even though in Mombasa High Court Petition No. 39 of 2016, the 1st respondent was ordered to do so.



8. It was further contended that the relocation compensation offered by the 1st respondent on an ex-parte basis in the sum of Kshs. 300,000/= for a period of two years pending completion of the said project was, in the circumstances, way below the market rental rates in the neighbourhood, which was Kshs 576,000/- for a period of two years; that, considering their low income status, they would not be in a position to buy the houses at the commercial rate at which they would be sold at, and that this would contravene the principle of sustainable development; and that, consequently, they would be rendered homeless in violation of their fundamental rights to human dignity and the rights to reasonable housing guaranteed under Articles 28 and 43 of *the Constitution*. According to the appellants, despite raising their concerns with the 1st respondent, the same were never addressed, and that no meaningful public participation was conducted in violation of Article 174 of *the Constitution*.
9. In support of their case, the appellants relied on Article 11(1) of the International Convention on Economic, Social and Cultural rights (ICESCR), Articles 9(1) and 17(1) of the International Convention on Civil and Political Rights (ICCPR) and Articles 1, 7, 8, 12, 21 and 25 of the Universal Declaration of Human Rights (UDHR) to which Kenya is party, in so far as the right to housing and human dignity is concerned.
10. It was averred that, since in Mombasa High Court Petition No. 39 of 2016 and in the Court of Appeal Civil Appeal No. 46 of 2017 it was held that the appellants were entitled to information which right had been violated, the petition ought not to be defeated by the plea of res judicata.
11. The appellants sought the following orders:
 - a. a declaration that the 1st respondent acted in violation of Articles 10, 47, 43 and 67 of *the Constitution*, 2010 in the manner in which it has vested public land on the 2nd respondent;
 - b. a declaration that the 2nd respondent has no capacity to deal with any portion of the said 14 acres of land where Buxton Estate stands;
 - c. a declaration that the appellants have a fundamental right to quietly and peacefully continue occupying the flats in Buxton Estate, and that the 1st and 2nd respondents had no power to interfere with the appellants' quiet and peaceful occupation thereof;
 - d. such orders and directions as the court deem fit to meet the end of justice; and
 - e. that costs of the petition be provided for.
12. In response to the petition, the 1st respondent filed a replying affidavit sworn by Jimmy Waliaula, its County Attorney on 27th October, 2020. He averred that the matters raised in the petition were res judicata having been directly and substantially in issue in Mombasa High Court Petition No. 39 of 2016 - Legal Advice Centre & 3 Others v County Government of Mombasa and 4 others [2016] eKLR - with the parties litigating under the same title on behalf of the residents; that the issues herein were raised, heard, and finally determined by a judgment delivered on 23rd December 2016 with the suit being dismissed for failing to demonstrate any constitutional violation and/or alleged breaches of statutory provisions; that a subsequent appeal to this Court, being Mombasa Civil Appeal No. 46 of 2017 - Legal Advice Centre and 3 others v County Government of Mombasa & 4 others – the Court, by its judgment delivered on 5th July 2018, upheld all the findings of the High Court; that, notwithstanding that dismissal, on 2nd February 2017 a similar constitutional petition was lodged, being, Mombasa High Court Petition No. 6 of 2017 - Peter Obhunga Wakoyo and 87 Others v County Government of Mombasa and 3 others which, by a ruling delivered on 4th August 2020, was struck out on account of being res judicata; that the petition does not disclose any colourable claim for a constitutional violation capable of engaging the constitutional jurisdiction of the court; and that



- there were statutory mechanisms for the ventilation of alleged statutory violations relied upon by the appellants.
13. The 1st respondent denied being an organ of the Government of Kenya as alleged by the appellants. It contended that it is an independent devolved government established under Article 176 of *the Constitution* and section 6 of the County Government Act, 2012 with authority to acquire, purchase or lease land; that it is the registered owner as lessee of Plot Nos. MI/XVII/625, MI/XVII/981, and MI/XVII/985, on which the Estate is located; that the said land does not come within the ambit of the NLC as alleged by the appellants; that the joint venture is properly and legally undertaken under the Public Private Partnership Act; and that the subject properties are private property as ordained by Article 64 (b) of *the Constitution* as read together with section 25 of the *Land Registration Act*, 2012.
 14. It was the 1st respondent's case that the Estate was constructed solely by the 1st respondent, and was not a joint project with the National Government as alleged; that, further, the 1st respondent constructed various other estates on its properties within Mombasa County on which, as is the case of Buxton Estate, it sub-let those housing units to residents of Mombasa County at heavily subsidized rents; and that there is an acute dearth of affordable housing in Mombasa County while those available are not just inadequate but, in some cases, in a dilapidated state.
 15. In order to ameliorate this crisis, the 1st respondent contended that, in consultation with various affected interested parties, it was in the process of undertaking a programme of urban regeneration, tapping on the skills and resources of the private sector to not only increase the housing and related amenities available within the County, but also to redress and avoid potential urban blight. To achieve that objective, the 1st respondent, through the project, targets the upgrading of 10 of the County's Estates, including Buxton Estate, which had been erected in the 1970s and were in a deplorable condition; that the project entails demolition of old and run-down buildings, construction of up to date housing, and putting in place proper infrastructure, which would raise the living standards of residents therein, as well as open up new economic opportunities; that, in line with the Kenya Affordable Housing Programme: Development Framework Guidelines, 2018, the 1st respondent sought private sector funding by inviting partners and financiers with capacity and expertise to undertake the project to completion; that, due to the magnitude and cost implication of the said project, the 1st respondent invited the general public to bid for the tender vide a newspaper advertisement published on 3rd February 2016 pursuant to section 33 of the *Urban Areas and Cities Act* No. 13 of 2011 and section 6 of the County Government Act, 2012 to carry out the project as a joint venture; that the 1st respondent, through a competitive tendering process, awarded the tender CGM/PRO/T/002/2019-2020 to the 2nd respondent to construct 1500 houses in Buxton Estate; and that, on 15th January 2020, the 1st and 2nd respondents entered into a joint venture agreement detailing the implementation of the project.
 16. The 1st respondent averred that the project was being undertaken jointly with the 2nd respondent in compliance with the relevant statute law, and that they had, or were in the process of, obtaining all relevant approvals, permissions and/or licenses required from all the relevant authorities; that the appellants' complaints, such as the alleged violation of EMCA, were improperly raised, as the court lacked jurisdiction to entertain such complaints in constitutional petitions; and that, further, such claims are premature as well as factually and legally baseless.
 17. It was further averred that, following consultations with the residents, the 1st respondent made arrangements to provide alternative accommodation for the existing tenants from the date of demolition of the Estate until the date of completion of the project; that the 1st respondent offered to compensate each tenant in the sum of Kshs. 300,000/= for relocation during the two-year period



- within which the project would be undertaken, which sum is adequate compensation; that there was no breach of Article 174 of *the Constitution* on the principles of devolution; that the 1st respondent conducted adequate public participation by consulting the appellants and availed to them the designs, scope and scale of the project; and that it conducted public discussions and participation on various dates in which the turnout and attendance was overwhelming with all participants accorded the opportunity to make their contributions on the implementation of the project.
18. The 1st respondent denied violation of the international instruments referred to by the appellants and asked that the petition be dismissed with costs.
 19. On its part, the 2nd respondent, Buxton Point Apartments Limited, a contractor engaged by the 1st respondent in the project, opposed the petition by filing a “Response to Petition”. According to it, the 1st respondent is a state organ as defined under Article 260 of *the Constitution*, and a body corporate established under *the Constitution*, thus capable of holding the said parcel of land as its private property for the remainder of the term of its Lease; that, by virtue of Article 67(2) (a) of *the Constitution*, the NLC has no business of whatever nature to intermeddle in any matters concerning private land; and that the appellants’ allegation pegged on the land being public is rendered otiose and of no legal consequence, and with the ultimate result that the petition itself cannot stand.
 20. The 2nd respondent’s case was that Buxton Estate property are all held on leasehold tenure by the 1st respondent; that as at the time of the proceedings, that lease was still in force and unexpired; and that the subject properties were therefore private property as ordained by Article 64(b) of *the Constitution*.
 21. In the 2nd respondent’s view, if the appellants were not supplied with any information on the project as was ordered in Petition No. 39 of 2016, the correct forum in which to enforce such orders was vide the procedures set out in the *Access to Information Act*, No. 31 of 2016, which is a derivative of Article 35 of *the Constitution*, and which establishes a robust mechanism that ought to be exhausted before filing a petition. It was also the 2nd respondent’s contention that the issue of Environmental Impact Assessment was exhaustively dealt with in Petition No. 39 of 2016; and that, in any case, EMCA exhaustively provides how complaints and other disputes relating to the environment are to be resolved; and that there is the National Environment Tribunal (NET), tasked with resolving such disputes. It is thus contended that the appellants were not properly before the Court to complain about the National Environmental Management Authority (NEMA) licences relating to the subject project.
 22. On the question relating to the tender, the 2nd respondent averred that matters relating to tenders are dealt with at an appropriately created forum in enactments provided and made by Parliament, and that the appellants gave no explanation for skipping these fora.
 23. Regarding the alleged violation of international Human Rights Instruments, the 2nd respondent stated that the appellants failed to demonstrate the particular provisions that were allegedly infringed, or that such infringement is not been catered for by the Municipal or other written laws.
 24. It was the 2nd respondent’s case that, since Buxton Estate stands on private land, there is no basis and or foundation upon which any of the appellants, or any other tenant in the Estate, can claim entitlement to any fund to enable his/her relocation, or any compensation of whatever nature in the manner that the appellants postulated in their petition. According to it, the relocation and or compensation plan was put in place purely on humanitarian grounds, and explained that the relocation sum to be paid to each tenant was Kshs. 240,000/= at the rate of monthly rent of Kshs. 20,000/=; that at that rate, the tenants could access reasonable accommodation for a period of 12 months, being the estimated period of the project; that there was also a sum of Kshs. 60,000/= which was to be paid for each tenant



- as deposit towards the purchase of the subject houses when complete; and that the payment of the deposit for each tenant automatically guaranteed them allocation of a house in the completed project.
25. The 2nd respondent also urged that the petition be dismissed with costs.
 26. While the 3rd respondent, the National Land Commission, did not respond to the petition, the 4th to 21st respondent, also claiming to be residents of the Estate, opposed the petition. They relied on two replying affidavits sworn by Janet Ndago Ekumbo and Khalifa Mohamed, the Chairperson of Buxton Estate Welfare Group (the Group), a self-help group registered under the Ministry of Gender, Children & Social Development. Apart from reiterating the averments by the 1st and 2nd respondents, the deponents stated that the 1st respondent first engaged the tenants at the initial stages with adequate notices of the meetings given; that those who were interested attended the meetings and their concerns addressed, and an agreement reached; that the 2nd respondent is only a development partner and is not registered as the owner of the project land; and that the project was intended to benefit the tenants and residents of Mombasa.
 27. After hearing the petition, the learned Judge (Munyao, J.) rendered his decision on 3rd March 2021 and found that the court was vested with jurisdiction to determine the issues raised in the petition; that the petition was *res judicata* as it touched on the overall design of the project and whether the appellants needed to move out of their residence, issues that had been canvassed in previous litigation; that the doctrine of *res judicata* would not be overridden by the doctrine of *e ex turpi causa non oritur actio* relied upon by the appellants and, in any case, the said doctrine would properly be available to the respondents; that the only issue that may have not arisen in previous litigation was as to the manner in which the appellants were being asked to vacate the premises; that, however, there was no violation of the appellants' constitutional rights since the tenancy agreement between the appellants and the 1st respondent did not oblige the 1st respondents to give the appellants alternative accommodation in the event that the 1st respondents needed its premises; and that the court was not persuaded that the 1st and 2nd respondents violated any international instruments. In the end, the learned Judge dismissed the petition with costs to the 1st and 2nd respondents.
 28. It was that decision that aggrieved the appellants herein and provoked this appeal in which the appellants contend that the learned Judge failed to determine whether the suit properties were public land or not; that the learned Judge failed to determine whether the 1st respondent as a lessee of the suit properties from the Government of Kenya had the powers and capacity in law to alienate the said properties to the 2nd respondent without involving the 3rd respondent; that the learned Judge erred in holding that Mombasa ELC Petition No.28 of 2020 - Justus Chai Mbaru & 11 Others v Mombasa County Government - was rendered *res judicata* by reason of the judgments delivered in Mombasa High Court Petition No.39 of 2016 - Legal Advice Center & 3 Others v County Government of Mombasa & 4 Others and Mombasa High Court Pet.No.6 of 2017 - Peter Obunga Wakoyo & 87 Others v County Government of Mombasa & 3 Others; that the learned Judge erred in holding that the application of the doctrine of *e ex turpi causa non oritur actio* was subservient to the doctrine of *res judicata*; that the learned Judge failed to apply the liberal principles of law, including international treaties with regard to the procedure and practice of eviction of a large group of people; that the trial court was dismissive on each and every application made by the appellants while showing favour with regard to all applications made by the 1st respondent; that the learned Judge erred in awarding unwarranted costs; and that the decision was wholly against the weight of the evidence, law and justice. The appellants urged this Court to allow their appeal with costs, set aside the impugned decision and grant the prayers sought in the petition. In the alternative, they prayed that the suit be heard afresh by another Judge of the Environment and Land Court other than Munyao Sila, J.



29. We heard this appeal on the Court's GoTo Meeting virtual platform on 3rd October 2023 when learned counsel, Mr. Gikandi Ngibuini, appeared for the appellants; learned counsel, Mr. Amoko, appeared for the 1st respondent, the County Government of Mombasa; learned counsel, Ms. Abdalla, appeared for the 2nd respondent, Buxton Point Apartments Limited; and learned counsel, Mr Yusuf Aboubakar, appeared for the 4th to the 21st respondents. There was no appearance for the 3rd respondent, the National Land Commission despite having been duly served. While submissions were filed on behalf of the appellant and the 2nd respondent, no written submissions were filed on behalf of the 1st respondent and the 4th to 21st respondents. Nevertheless, all the parties addressed the Court, with the appellant and the 2nd respondent highlighting their written submissions, while the 1st respondent and the 4th to the 21st respondents addressed the Court orally.
30. On the trial court's finding on the issue of res judicata, it was submitted on behalf of the appellant that the status of the land in dispute was not in issue or otherwise addressed in either of the two previous petitions, and yet the learned Judge failed to make a determination on whether the suit properties were or were not public land. In the appellants' view, this was a crucial issue considering that, if found to be public land, then, by law the project would be unlawful for failure to involve the National Land Commission, which was vested with power to alienate any public land. In support of their submissions that the said ground ought to succeed, the appellants relied on the Supreme Court decision in Attorney General & Another vs. Uasin Gishu Memorial Hospital Limited & Another [2021] eKLR for the holding that there is no excuse for the court's failure to address an issue in dispute, and that failure to do so amounts to failure to fulfil a constitutional mandate, and a denial of the right to be heard. Reliance was also placed on the case of Flannery v Halifax Estate Agencies Ltd (2000) 1 W.L.R, 337 where the court emphasised the need to give reasons for a decision. According to the appellants, failure to determine whether the suit property is government land or not is similar to failing to give reasons contrary to Order 21 rule 4 of the Civil Procedure Rules.
31. It was the appellants' case that, had the trial court not abdicated its responsibility aforesaid, it would have held that the suit property is government land, and would have had no problem in realizing and holding that Article 67 of *the Constitution* mandates that alienation of public land cannot be done without approval of the National Land Commission, which was not done in this case. According to the appellants, that being the case, the trial court in obedience to Article 2(4) of *the Constitution* would have had no alternative than to hold that the alienation in issue was fundamentally flawed having been done contrary to the constitutional and statute law and, therefore, the doctrine of ex turpi causa non oritur actio applied. In this regard, reference was made to Mistry Amor Singh vs. Serwano Wofunira Kulubya [1963] EA 408 to the effect that a court cannot allow a person to hold on to illegally acquired interest. To the appellants, illegality takes priority over res judicata. Accordingly, it was submitted that, with the evidence presented before the trial court, the final holding was clearly against the weight of the evidence and the law.
32. Regarding the award of costs, it was submitted that the petition was an action in public litigation; that the appellants brought the petition not only for their benefit but also for the benefit of hundreds of other residents of public land registered in the respondent as a lessee and trustee of the Government of Kenya for the benefit of less fortunate members of the public residing in Mombasa; that the petition was also for the benefit of future generations who would have stood to benefit from the occupation of houses built on government land; that, in those circumstances, the award of costs against the Appellants was unjustified.



33. While appreciating that the stage at which the development had reached it might not have been possible to grant the reliefs sought, Mr Gikandi urged us, for the purposes of the rule of law, to “send a strong message” in our determination.
34. On behalf of the 1st respondent, learned counsel, Mr. Amoko, submitted that the appellants did not address the issues addressed by the High Court; that the learned Judge properly and sequentially addressed the issues in the judgement; that it has not been contended that the finding on res judicata was incorrect; that there is no authority for submitting that illegality triumphs over res judicata; that the doctrine of ex turpi causa non oritur actio is a private law defence, and cannot found a cause of action; that the learned Judge correctly found that this was not a case of violation of fundamental rights; and that the judgement ought to be upheld and the appeal dismissed with costs.
35. Opposing the appeal, the 2nd respondent relied on the submissions filed on 5th July 2023. At the hearing, learned counsel, Ms. Abdalla, associated herself with the submissions of Mr. Amoko. In the written submissions, the 2nd respondent contended that though the parties in the petition were not the same as in the previous suits, the parties under whom they were claiming were the same since the matter was a public interest matter; that the issues involved in those matters were similar; that the reliefs sought were the same in nature; that the doctrine of ex turpi causa non oritur actio has no correlation with the doctrine of res judicata; that public land cannot have certificate of title to it being issued to private individuals; that the suit land was not “public land” as defined in Article 62 of *the Constitution*; that, since the suit land is private land as defined in Article 64 of *the Constitution*, the NLC had no mandate over its alienation; and that the award of costs is in the discretion of the court and, in the circumstances of the case, the 2nd respondent was entitled to costs.
36. In addition, learned counsel, Ms. Abdalla, submitted that the appeal had been overtaken by events since the subject matter had been developed and the units transferred to third parties. We were urged to dismiss the appeal with costs.
37. Submitting on behalf of the 4th to the 21st respondents, learned counsel, Mr. Aboubakar, urged that the petition was res judicata as it raised the same issues determined in the earlier petitions, save for one issue; that, out of all tenants, only 13 came to court while his clients, 18 in number, opposed the petition; that there were no cogent reasons to set aside the judgement; and that the appeal should be dismissed with costs.
38. We have carefully considered the issues raised before us on appeal. In our view, the following main issues fall for determination:
1. whether the finding by the learned Judge that the petition before him was res judicata was proper;
 2. whether the learned Judge dealt with the issue of the status of the suit land and, if not, whether failure to do so occasioned failure of justice;
 3. whether the learned Judge was right in awarding costs of the petition;
 4. whether the reliefs sought are still tenable; and
 5. what orders ought to be made on costs.
39. In determining these issues, we are alive to our duty as a first appellate court. As held by this Court in *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123, we are enjoined to reconsider the evidence, evaluate it and draw our own conclusion of facts and law. We would only depart from the factual findings by the trial court if they were not based on evidence on record, or



where the said Court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* [1986] KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* [1968] EA 93.

40. Regarding the issue as to whether the petition from which this appeal arises was *res judicata*, it is not in dispute that, prior to the institution of the proceedings culminating in the impugned judgment, there were previous suits filed in the High Court in respect of Buxton Estate, namely: Mombasa High Court Petition No. 39 of 2016 (Petition No. 39 of 2016) and Mombasa High Court Petition No. 6 of 2017 (Petition No. 6 of 2017). The former petition was commenced on 5th August 2016 by Legal Advice Centre, Haki Yetu St. Patricks, Transparency International, and Jack Maina. The pleadings in that petition averred that the 1st respondent's project dubbed the Urban Renewal and Redevelopment of Old Estates Project which sought to demolish and reconstruct ten (10) housing estates within Mombasa County, including Buxton Estate, was being implemented without compliance with crucial legislation, including *the Constitution*; that the same was being undertaken without public participation; that it would violate the rights of the tenants therein to housing pursuant to Articles 28 and 43(1) of *the Constitution*; that the respondent failed to provide relevant information and also failed to provide clear development outcome and cost implications to the residents; that there was failure to comply with sections 58 and 59 of the EMCA i.e to conduct an Environmental Impact Assessment prior to the project initiation; that the project contravened Article 7 of the Universal Declaration of Human Rights (UDHR); that the respondent totally failed to follow the legal processes in the Public Private Partnership Act; that there was no competitive bidding, and the contract lacked transparency; and that the proposed sale of the units was synonymous with the privatization of urban housing. The petitioners in that petition sought, inter alia, a declaration that the undertaking of the project by the 1st respondent herein, through a joint venture partnership violated the right to public housing; that the project violated the provisions of EMCA; that the project violates the Public Private Partnership Act; and that there should issue a permanent injunction restraining the 1st respondent in this appeal from implementing the project through joint venture partnership.
41. Upon hearing that petition, the High Court, in declining to grant the reliefs sought, found that there was adequate public participation; that the right to access information would be tied to the continuous nature of public participation, and that supply of documents may themselves be the tools to facilitate such participation; that there was no demonstration as to how the project, which intended to increase the provision of modern housing units ten-fold, was likely to threaten anybody's rights under *the Constitution*; and that there are specialized institutions created under statute law with clear mandates, and are best equipped to ensure that the relevant statute law were complied with.
42. This judgment provoked Mombasa Civil Appeal No. 46 of 2017 [2018] eKLR, which this Court found to be unmerited and dismissed.
43. On the other hand, Mombasa High Court, Petition No. 6 of 2017 was filed on 2nd February 2017 by 87 persons claiming to be residents of Khadija Estate, one of the estates that is subject to the Mombasa Urban Renewal and Redevelopment of Old Estates Project. It sought to restrain the 1st respondent herein from evicting the petitioners from their houses. Their case was hinged on the alleged violation of their right to human dignity, the right to property, the right to accessible and adequate housing, and the right to fair administrative action. A preliminary objection was raised that the petition was *res judicata* in view of Petition No. 39 of 2016, which objection was upheld by the court.
44. Section 7 of the *Civil Procedure Act* provides as hereunder:

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.

45. This Court has had occasion to deal with the application of the doctrine of res judicata in several cases. Notable among them is *The Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others* [2017] eKLR where it expressed itself as hereunder:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

46. The learned Judges in the preceding decision were fully aware and applied their minds to these elements when, applying this Court’s decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR when they rendered the elements as:

- “(a) the former judgment or order must be final;
- b. the judgment or order must be on merits;
 - c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. there must be between the first and the second action identity of parties, of subject matter and cause of action.”

47. We need not overemphasise the fact that the rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

48. There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, it was stated;

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation



does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go”

49. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit. That much was stated by this Court in *Ngugi v. Kinyanjui & 3 Others* [1989] KLR 146 when it held (at p147) that;

“Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue.”

50. In his book, *Res Judicata, Estoppel, and Foreign Judgments*, Peter R. Barnett states at page 9 that:-

“The doctrine finds expression and justification in two fundamental principles; one public- that it is in the interest of the state that there be an end to litigation, and the other private- that no person should be proceeded against twice for the same cause. Even so, the main object of the doctrine of res judicata is the avoidance of repetitious and wasteful litigation”.

51. In this case, it is clear that most of the matters the subject of the instant litigation were heard and determined in Petition No. 39 of 2016. The learned Judge identified the pertinent issues in his judgement in the following terms:

“94. My view of the dispute before me is that it cannot raise issues regarding the wholesome concept of the project, for that was an issue that was raised and determined in previous litigation. In this regard, the issue of whether the project violates the right to housing has already been determined, with the concept of the project being given the green light and having been held not to violate the right of any person to housing. The question whether there was public participation before the project was rolled out has also been determined. So too the issue of access to information. On whether the project violated EMCA, the *Public Private Partnerships Act*, the *Privatization Act*, or the Public Procurement & Disposal Act, the parties were advised to seek remedy within those statutes and follow the dispute resolution mechanisms provided in the said statutes.

95. I do not think that there can be any question, that the issue of whether or not the Mombasa Urban Renewal and Redevelopment of Old Estates is a project that should proceed or be stopped, has already been determined in the previous two suits in the High Court. Buxton Estate, which this petition relates, was one of the Estates that was the subject of Petition No. 39 of 2016. There has already been finding that there was adequate public participation and that the project as envisaged does not violate the right to housing. It follows that the requirement for the tenants to give vacant possession of the premises that they occupy has already been found not to violate their right to housing. There has also been finding that in so far as there is alleged violation of statutory provisions, then the avenue is to commence proceedings following the dispute resolution mechanism provided in the subject statutes alleged to have been



violated. I am afraid that these are issues that I cannot re-open afresh, for if I do so, then I will be contravening the principle of res judicata.”

52. Regarding the issues revolving around award of the tender, the learned Judge expressed himself as follows:

“One may argue that at the time that the litigation in Petition No. 39 of 2016 was made, the award of the tender for Buxton Estate, to the 2nd interested party had not been made and thus a decision on the constitutionality of the tender has not been subjected to previous litigation. That may be so, but the parties were advised to proceed to the dispute resolution mechanism provided by statute. The issues that have been raised regarding the tender award to the 2nd interested party, in my view, are issues that can very well be raised within the mechanisms provided for in the Public Procurement and Disposal Act, or the *Public Private Partnerships Act*, or the *Privatization Act*, or other applicable statutes. The issue regarding EIA was already decided and I cannot reopen it. The parties were already advised to follow the mechanism provided for in EMCA.”

53. On our part, we have interrogated the issues raised in Petition No. 39 of 2016 and in the petition giving rise to this appeal and we have no reason to disagree with the foregoing findings of the learned Judge. We also agree that some of the issues raised herein touching on failure to adhere to statutory provisions, such as EMCA ought to have been ventilated before the forums that have been statutorily put in place for their determination.

We therefore have no reason to disagree with those findings.

54. The next issue is whether the parties in this and the previous suit were the same, or whether they are between parties under whom they or any of them claim or are litigating. As already stated, Petition No. 39 of 2016 was brought by Legal Advice Centre, Haki Yetu St. Patricks, Transparency International and Jack Maina. While it is clear that those are not the parties in these proceedings, that was clearly a public interest litigation. In upholding the preliminary objection in Mombasa High Court, Petition No. 6 of 2017, which, as in this case was brought by persons claiming to be residents of Khadija Estate, one of the estates that is subject to the Mombasa Urban Renewal and Redevelopment of Old Estates Project, the learned Judge found that it did not matter that the parties before the court were different, for they were litigating under the same title as those in the previous litigation. We respectfully agree. The appellants in this case have expressly stated that the case was a public interest litigation. Such litigation are usually in rem proceedings. We are persuaded by the South African decision in *Nicholas Francois Martemns & Others v South African National Parks* Case No. 0117, in which the court expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement in rem. A judgement in rem invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement in personam which only imposes personal liability on the defendant.”



55. Unless that position is upheld, public interest litigation would never come to an end until the last citizen in the Republic has been heard. We therefore agree with the holding by the learned Judge when he expressed the view that:

“...the principle of *res judicata* would still apply, irrespective of whether the parties are different, so long as the issues are the same. This would especially apply where the issue is one affecting the general public so that any person is capable of filing action. If one person files action and fails, with the issue being addressed and dismissed, another person cannot now re-litigate the issue, claiming that he was not a party in the previous suit. This is what is indeed captured in explanation (6) of Section 7 of the *Civil Procedure Act*... The previous two suits were certainly public interest litigation suits. The orders that were sought in those suits were not orders that were restricted to the parties therein, but were orders that were going to affect the general populace of tenants and residents within Mombasa County. The petitioners herein were certainly among those to be affected by any orders issued in those suits and they must thus be deemed as claiming under the persons that litigated before. Indeed, if the litigants in Petition No. 39 of 2016 had succeeded, then this litigation would have been completely unnecessary, for the petitioners would have obtained, within the parameters of the previous litigation, the very orders that they seek in this suit. This is irrespective of the manner in which the orders in this suit are couched or drafted. The net effect of the orders sought in the previous suit and in this suit, in so far as the overall project is concerned, is the same.”

56. There is no question about the competency of the courts that decided the previous suits, or whether they were finally determined. At least Petition No. 39 of 2026 was determined on its merits. We therefore agree with the learned Judge that, as regards the above-mentioned issues, the same were caught up by the doctrine of *res judicata*.

57. On the other hand, it was, argued that, since illegality was pleaded, the doctrine of *ex turpi causa non oritur actio* ought to have been invoked in order to evade the rigours of *res judicata*. The Privy Council, while dealing with the doctrine of *ex turpi causa non oritur actio* in *Mistry Amar Singh vs. Serwano Wofunita Kulubya* [1963] EA 408, stated that:

“This old and well known legal maxim is founded in good sense, and expresses a clear and well recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.”

58. However, it is contended in this case that the doctrine aforesaid supersedes the doctrine of *res judicata*. Notably, no authority was cited before us to back this robust submission, and we are unaware of such



authority. That said, we are aware of the holding in the case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789, which was cited in the *Maina Kiai* case (*supra*), that:

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.” [Underlining ours].

59. The appellants contended that the learned Judge did not address himself to the status of the suit land whether it was public or private land. However, in its decision, the learned Judge expressed himself in paragraph 97 and 98 thus:

“97. The issue that the project as envisaged will lead to a disposal of public land without involvement of the NLC is an issue that was in the previous petition, but even if it were not, the complaint is that the disposal of public land is being done without following the law. In that event, recourse should be within the Public Procurement and Disposal Act, or the statutes that I have mentioned earlier, which touch on disposal of public property. The avenue was not to file this petition.

98. I am aware that elaborate submissions were on whether the land in issue is private or public, but I need not, within this petition, make any finding on that. It is because the project, as a whole touching on the 10 estates, has already been given the go-ahead in Petition No. 39 of 2016, and I cannot now stop it, based on the question whether the land is public and not private. That is why I say that this is not argument that I can entertain in these proceedings, for if I do so, then I will be violating the *res judicata* principle. In any case, if the petitioners are saying that this is not the mode of disposing public land, then the Public Procurement and Disposal Act, or the *Public Private Partnerships Act*, mechanism is available to them as has been held before.”

60. It is therefore not true that the learned Judge did not address himself to the issue. He clearly did. In his view, the matter ought to have been addressed in Petition No. 39 of 2016. Explanatory note 4 to section 7 of the *Civil Procedure Act* provides that:

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

61. The law as restated in *Gurbachan Singh Kalsi v Yowani Ekori* [1958] EA 450 is that:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a 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 judgement, 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.”

62. In the same vein, in *Apondi v Canuald Metal Packaging* [2005] 1 EA 12, Waki, J.A. expressed himself as follows:

“A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.”

63. Taking to mind the rival submissions and the afore-cited authorities, we cannot fault the learned Judge for finding that he could not revisit a matter that ought to have been ventilated in previous proceedings.

64. As regards the procedure followed by the 1st respondent, apart from being res judicata in its extended meaning, the learned Judge addressed himself at length on the opportunity that was afforded the tenants of Buxton Estate to present their views and how their views were treated by the 1st respondent. In our own evaluation of the evidence, and taking into account the position taken by the 4th to the 21st respondents, we cannot fault the learned Judge for his findings of fact and holding on points of law in this regard.

65. Regarding the alleged violation of international instruments, the learned Judge expressed himself as hereunder:

“I have pored through the submissions of counsel for the petitioners and they have not pointed me to a specific provision of a specific international instrument that is claimed to have been violated. It was alleged that this is a mass eviction that can be equated to a crime against humanity. There is absolutely no substance in this argument. What we are dealing with is a situation where a local Government needs to create additional housing from the limited land resource that it has. There is no crime being committed here, whether in the domestic, or in the international, forum. The petitioners have not convinced me that the respondent or the 2nd interested party has violated any of the international instruments that they have mentioned.”

66. Having carefully examined and re-evaluated the evidence on record as put to us, we fail to see how the 1st respondent can be accused of crimes against humanity. The only thing the 1st respondent did was to provide for the temporary relocation of the tenants occupying its premises for the purposes of providing adequate housing for its inhabitants, but with a view to re-occupation of the new premises by the same tenants upon completion of the construction. To this end, the 1st respondent went as far as making provision for the initial deposits for the new houses on behalf of the tenants. We do not understand how, in those circumstances, the 1st respondent can be accused of violating the rights of the appellants, leave alone committing crimes against humanity.

67. On the issue of costs, the learned Judge appears to have been swayed by the fact that the matters raised had been dealt with earlier. The Supreme Court in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai*



& 4 others [2014] eKLR, while pronouncing itself on the award of costs in public interest litigation expressed itself thus:

“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:

‘[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.’”

68. In the same vein, the Court continued to state:

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and Another v The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

‘In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.’”

69. In conclusion, the Supreme Court held:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

70. At the tail-end of his submissions, Mr. Gikandi appreciated that, taking into consideration the stage at which the development of Buxton Estate had reached, the reliefs sought by the appellants were no longer tenable. However, he urged us to make a determination nonetheless in order to “send a strong message” for the sake of the rule of law. In this regard, we take to mind the holding by the Constitutional Court of South Africa in *Lawyers for Human Rights vs. Minister of Home Affairs*



[2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 18 where the court had this to say:

“It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O’Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.”

71. Having carefully considered the record of appeal, the grounds on which it is anchored, the issues stated for our determination, the rival submissions of the respective counsel, the cited authorities and the law, we come to the inescapable conclusion that the pursuit of this appeal was not only in vain, but also devoid of merit. Accordingly, the appeal is hereby dismissed with costs.

72. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

A.K.MURGOR

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JUDGE OF APPEAL

DR.K.I.LAIBUTA

.....

JUDGE OF APPEAL

G.V.ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

