



Muthee (As the Administrator of the Estate of Karl Jacobs Ruedin-Deceased) & 2 others v Alphonse Mwangemi Munga & 11 others (Suing on Their Behalf and on Behalf of 367 Employees of African Safari Club Limited); Erdemann Property Limited & 3 others (Affected Party) (Civil Appeal 263 of 2022) [2024] KECA 793 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 793 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 263 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JULY 12, 2024**

BETWEEN

**SHELLA NKATHA MUTHEE (AS THE ADMINISTRATOR OF THE ESTATE OF KARL JACOBS RUEDIN-DECEASED) 1ST APPELLANT
HANSPETER RUEDIN 2ND APPELLANT
ROLAND RUEDIN 3RD APPELLANT**

AND

ALPHONCE MWANGEMI MUNGA & 11 OTHERS (SUING ON THEIR BEHALF AND ON BEHALF OF 367 EMPLOYEES OF AFRICAN SAFARI CLUB LIMITED) RESPONDENT

AND

**ERDEMANN PROPERTY LIMITED AFFECTED PARTY
STEPHEN KIMANI KARUU T/A KIRIIYU MERCHANTS AUCTIONEERS AFFECTED PARTY
FRANK NEUGEBAUER AFFECTED PARTY
AFRICAN SAFARI CLUB LIMITED AFFECTED PARTY**

(Being an appeal from the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) delivered on 19th November 2021 in Cause No. 133N of 2008)



JUDGMENT

1. This appeal arises from the ruling of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) delivered on 19th November 2021 in ELRC Cause No. 133N of 2008.
2. On 15th October 2008, the respondent filed a representative suit, being Industrial Cause no. 133 (N) of 2008 (referred to as the primary suit), on behalf of 367 former employees (the Claimants therein) of African Safari Club Limited, the 4th affected party herein (hereinafter referred to as the Company). In that suit, the respondents prayed for a declaration that the dismissal of the said employees from employment was wrongful, malicious, unfair, null and void. It was further prayed that the Claimants: be issued with certificates of service and be paid terminal dues for leave accrued; be paid salary arrears as at the time of termination of their employment; and that they be paid accrued house allowance, gratuity and compensation for termination in lieu of notice and other claims. After hearing the claim, the Industrial Court, in its award delivered on 28th April 2011, found in favour of the Claimants and issued the award which we take the liberty to replicate as hereunder:
 1. Kshs.50,506,075/= being their salary arrears and terminal benefits, six (6) months compensation each, under powers vested in, or conferred upon the Court by Section 15(c) of the *Labour Institutions Act*, No. 12 of 2007, based on their individual wages or salaries at the date of their unfair and wrongful summary dismissal.
 2. Certificate of Service, costs of the claim and interests on all the sums at the prevailing Court rates.
3. Unable to execute the award, the 1st respondent and his colleagues applied at the Industrial Court on 8th September 2011 for orders that the directors of the company, namely Karl J Ruedin (the deceased) and Frank H. Neugebauer (the 3rd affected party) be summoned to court for examination on the identity and location of the assets of the company, and to produce its books of account. It was also prayed that, in default of attendance to court, the directors be made personally liable to the decree holders for the satisfaction of the decree, and that their assets be attached and sold to recover the decretal sum that then stood at Kshs.137,400,025.
4. Subsequently, the respondents filed two Motions dated 8th September 2022 and 14th November 2012 seeking to examine the directors of the judgement debtor, the deceased and the 3rd affected party on the whereabouts of the judgement debtor's assets. They also sought to attach assets of the said directors to recover Kshs 137,400,025. Apart from the two applications, the respondents filed another application dated 22nd November 2023 in which they sought, amongst other orders:

“That this Court a (sic) temporary injunction be and is hereby granted to restrain the directors of the judgement debtor, African Safari Club Limited, namely Frank H. Neugebauer, Renato Bachman and any other director from selling, transferring, charging, disposing and or in any way interfering with the Judgement Debtor's and its directors' properties particularly LR No 1515/1/MN file No CR 13371 of Section No. 1 Mainland North and CR No. 13086, Plot No 64 Watamu, Kilifi District among other properties pending determination of the Notice of Motion dated 20th May, 2013 hereof.



.....
That the applicants be allowed to sell by public auction to recover the entire decretal amount properties known as LR No. 1515/1/MN File No. CR 1337 of Section No. 1 Mainland North and CR No. 13086 Plot No 64 Watamu Kilifi District.”

5. That application was based, inter alia, on the ground that during examination of the directors of the company, one of its directors, Renato Bachman, confirmed that the estate of the company’s deceased director, Karl Jacobs Ruedin, should be sold to pay the decretal amount. When the said application came up before the trial court on 2nd December 2013, Mr Kurauka is indicated to have appeared for the respondents while Ms Lutta held brief for Mr Kabiru for “the named director”. A consent was thereby recorded in the following terms:
- a. Prayer (d) in the Notice of Motion dated 22/11/2013 is hereby confirmed.
 - b. That subject to the search confirming the properties belong to the judgement debtor and/or its Directors, the applicants together with Mr Frank H. Neugebauer be allowed to jointly sell by public auction properties known as LR No. 1515/1/MN File No. CR 1337 of Section No. 1 Mainland North and CR No. 13086 Plot No 64 Watamu Kilifi District to recover the entire decretal amount herein and also the suit amount and costs in HCCC No. 15 of 2012 (Mombasa High Court) – Frank H. Neugebauer versus Karl Jacob Reudin.
 - c. That all the costs incurred herein be recovered from the proceeds of the sale.
- Signed Nderi Nduma
Judge
Henry Kurauka for Claimants – Signed
Kabiru for Frank Neugebauer - Signed
6. For avoidance of doubt, prayer (d) mentioned in the consent sought an order that the Land Registrar, Mombasa, be ordered to produce green cards and official searches in respect of properties known as LR No. 1515/1/MN File No. CR 1337 of Section No. 1 Mainland North and CR No. 13086 Plot No 64 Watamu Kilifi District within fourteen days of service of the order.
7. By an application dated 27th February 2020, the appellants herein sought the following orders:
- a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That the Consent orders recorded by this Court and adopted as orders of the Court on 2.12.2013 be declared to have been obtained by fraud and collusion, have been made in violation of Articles 25(c), 40, 48, 50(1), 159(2)(e) and 160(1) of *the Constitution* of Kenya, to have been made criminally, illegally and unlawfully and to be declared as null and void ab initio and as a result be set aside as a matter of right.
 - f. That all order given and all steps and proceedings of any nature taken consequent upon the orders recorded on 1.12.2013 be set aside as a matter of right.



- g. That the purported auction sale of the suit premises by Stephen Kimani Karuu t/a Kiriuyu Merchants Auctioneers, the 2nd Affected/Interested Party to Erdemann Property Limited, the 1st Affected Party at a fictitious auction sale allegedly held on 8.4.2014 be declared to have been conducted against the terms and conditions of sale approved by the Court, to have been conducted fraudulently, incompetently, criminally and illegally and therefore null and void and be set aside as a matter of right.
- h. That any certificate of sale, vesting order and transfer of the suit premises to the 1st Affected/Interested Party as the purchaser be declared to be incompetent and null and void having been procured fraudulently, unconstitutionally and without jurisdiction and the said consent was entered into without the participation of the deceased, who passed away on 13th March 2013 or his estate; that the respondents and the court were aware of the death of the deceased; that neither the deceased during his lifetime nor his estate was ever found liable under the decree; that, despite knowing that the deceased was survived by the 2nd and 3rd appellants, the respondents did not serve the said appellants; and that the Judge who recorded the consent, not being a High Court Judge, had no jurisdiction to issue orders in respect of Mombasa HCCC No. 15 of 2012 . There were other grounds challenging the manner in which the subsequent sale of the said properties to the 1st affected party by the 2nd affected party was undertaken.
8. In her ruling dated 19th November 2021, which is the subject of this appeal, the learned Judge dismissed the said application and expressed herself as hereunder:

“From the above, it is clear that the substratum in the review Application dated 30th January 2014 in the Industrial Court (Nairobi) Cause Number 133N of 2008, the Court of Appeal (Nairobi) Civil Appeal No. 314 of 2014 and Petition No. 17 at the Environment and Land Court in Mombasa dated 18th December 2017, is the issue of execution of the impugned consent. It is not in dispute that the three suits are between the same parties. It is also not in dispute that the Court of Appeal that determined Civil Appeal No. 314 of 2014 was competent and had jurisdiction to entertain the appeal. The only pending element that must be weighed before determining whether the doctrine should be invoked is the question whether the issue was heard and finally determined. It is not in dispute that the Court of Appeal upheld the decision of the Employment and Labour Court thereby finally determining the issue. As such the instant application offends the principle of res judicata. Having so determined, the Court needs not delve into the remaining issues for determination. The Upshot is that the instant application is dismissed with costs.”

9. The said ruling is challenged on a legion of 41 grounds against the grain of rule 88 of the Court of Appeal Rules, which requires a memorandum of appeal to concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying: (i) the points alleged to have been wrongly decided; and (ii) the nature of the order which it is proposed to ask the Court to make. As will be clear later in this judgement, it is not necessary to reproduce the said grounds of appeal in this judgement. We are not persuaded by the appellants’ submission that the 41 grounds were necessary to enable the Court determine all the issues and avoid a finding that any particular issue was not a ground of appeal. In our view, bare grounds such “the learned Judge erred in law and in fact by dismissing the Notice of Motion application dated 27.2.2020” does not take the appeal any further.
10. We heard the appeal on 5th March 2024 on this Court’s GoTo virtual platform when learned counsel, Mr. Kinyua Kamundi, appeared for the appellants, Mr. Kurauka appeared for the respondents, Mr.



Mwangi Githui appeared for the 1st affected party and Mr. Kabiru appeared for the 3rd affected party. We were informed that the 2nd affected party passed away, and that the appeal against him abated by effluxion of time. Despite due service, the 4th interested party was not represented. Mr. Kinyua, Mr. Kurauka and Mr. Githui relied on their written submissions, which they highlighted briefly while Mr. Kabiru informed the Court that he no longer had instructions in the matter, and had filed an application for leave to cease acting.

11. The appellants, in their written submissions dated 19th February 2024 filed by the firm of F. Kinyua Kamundi Kinyua Muyaa & Co Advocates, contended that the ruling mischaracterised the judgement of this Court in Civil Appeal No. 314 of 2014 by falsely holding that the Court of Appeal had dealt with the fraudulent consent orders and the fraudulent and fictitious sale of the property when it had not; that the 1st appellant filed Mombasa High Court Petition No. 24 of 2014 and obtained conservatory orders, but that the petition was dismissed for want of prosecution and could not be the basis for finding of res judicata in proceedings pending in the Employment and Labour Relations Court; that, out of desperation and informed by the multiple violations by the ELRC, the appellants filed Mombasa ELC petition No. 17 of 2017 against some 27 respondents, including the respondents herein, a Judge, a Deputy Registrar, the advocates who recorded and enforced the fraudulent consent orders and the 1st, 2nd and 3rd affected parties, but that the petition was struck out as against all the respondents on the basis that judicial officers have absolute immunity; that the striking out of the said petition on ground of immunity cannot be the basis for a finding of res judicata in an application for setting aside fraudulent consent orders and fraudulent sale of the suit premises in the Employment and Labour Relations Court; and that, for the purposes of section 7 of the Civil Procedure Act, the High Court and the ELC were not competent courts with regard to the impugned consent orders and auction sale in the ELRC. The appellants cited the decision of the Supreme Court in *Florence Maritime Services Limited v Cabinet Secretary, Transport, Infrastructure & 3 Others* [2021] eKLR to highlight the 4 elements that must be demonstrated in order for the doctrine of res judicata to be successfully invoked.
12. The appellants further submitted that there was no former order which was final on the fraudulent consent orders recorded on 2nd December 2013 and 11th December 2013, and the subsequent auction sale of the suit premises; that there was no judgement or final order in HCCC No. 15 of 2012; that there was no order or ruling by the Court that the deceased or his estate was liable under the decree; that the Notice of Motion application dated 30th January 2014 seeking to set aside the consent orders was dismissed on the grounds that the 1st appellant could not act as an advocate and administratrix in the same course, could not make any application on behalf of the 4th affected party, and on the ground that she had not obtained a full grant; that there was and remains no judgement or order determining that application on its merit; and that the Court of Appeal, in its judgement in Civil Appeal No. 314 of 2014, held that there was no appeal against the consent orders and dismissed that appeal on technicalities of capacity without going into the merits.
13. It was the appellant's view that the learned Judge who recorded the consent had no jurisdiction over the deceased with regard to Mombasa HCCC No. 15 of 2012 not being a Judge of the High Court, and that he did not have the court file for that suit; that the learned Judge had no jurisdiction over the deceased, who was not a party, and whom the learned Judge knew was deceased, and while there was no order requiring the deceased to satisfy the decree; and that the decision on res judicata was founded on the rulings in petitions filed in the High Court and the ELC, both of which had no jurisdiction over the consent orders and sale.
14. In the appellant's submissions, an appeal to this Court, irrespective of its outcome, is not an action within the meaning of section 7 of the Civil Procedure Act as this Court does exercise any original



jurisdiction; that the auction sale of the suit premises in May 2014 was not the subject matter or cause of action in the motion dated 30th January 2014 that had been filed 3 months earlier, and whose ruling was delivered on 11th July 2014 or the appeal against the ruling; that, in the said ruling, the court found that the application had been made on behalf of the Company, and yet the 1st appellant had no capacity; that neither the 2nd and 3rd respondents nor the 1st and 2nd affected parties were parties in the application dated 30th January 2014; and that, while the subject matter and cause of action in the application dated 30th January 2014 was the setting aside of the consent orders recorded on 11th December 2013, the application dated 27th February 2020 was concerned with the setting aside of the consent orders recorded on 2nd December 2014 and the auction of the suit property in May 2014.

15. According to the appellants, the learned Judge failed to analyse the ingredients of a res judicata plea, completely ignored the submissions of the appellants and reached an unreasonable, irrational, biased and bad decision. The learned Judge was faulted for not finding that the Court of Appeal, while dismissing Civil Appeal No. 314 of 2014, held that there was no Notice of Appeal, and that there was no appeal against the consent orders recorded on 11th December 2013. The appellants' further complaint was that the learned Judge refused to determine the application in relation to the sale of the suit property, which had nothing to do with previous suits. We were urged to allow the appeal with costs.
16. On behalf of the respondents, written submissions dated 29th February 2024 were filed by the firm of Kurauka & Co. Advocates. According to the respondents, the appellants have never pursued any appeal against the substantive orders dated 11th December 2013, which facilitated sale of the suit premises in execution of the decree in the ELRC contrary to the decision in Halal & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365, which held that an applicant must lodge a Notice of Appeal as it is only that Notice that gives the Court jurisdiction. The respondents accused the appellants of abusing the court process by filing multiple suits in pursuit of the same cause of action, and submitted that the issues in this appeal were the subject matter in the Court of Appeal Civil Appeal No. 314 of 2014, which was dismissed on 19th May 2016 when the Court observed that the appellants were not entitled to a review; that the subsequent ELC Petition No 17 of 2017 which sought several orders similar to the prayers sought herein was also dismissed and a Notice of Appeal was filed on 30th September 2019; that the 1st appellant filed Mombasa Petition No. 24 of 2014 in respect of the suit premises seeking multiple orders similar to the ones sought before the trial Judge, and that the said petition was dismissed for want of prosecution; and that since the transfer of the suit premises was done several years ago, this Court should not issue orders in vain. The 1st respondent cited the Supreme Court decision in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 to highlight the position that, once the legal rights of parties have been judicially determined, such edicts stand as conclusive statement as to those rights. It was the respondents' case that sale of the suit premises was legally and seamlessly done, and that the lifting of the Company's corporate veil was lawful.
17. We were therefore urged to dismiss the appeal with costs to the respondents.
18. The 1st affected party's submissions dated 3rd March 2024 were filed by the firm of C M Advocates LLP. It was submitted that, against the prism of the background set out in the submissions, the sole question for determination is whether the appellant's application dated 27th February 2020 was res judicata, and whether this appeal is meritorious. Citing section 7 of the *Civil Procedure Act* and this Court's decision in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, the 1st affected party identified the elements that must be conjunctively satisfied in order for the plea of res judicata to be upheld, and contended that the issues raised in the application dated 27th



February 2020 were directly and substantially in issue between the same parties litigating under the same titles, and were heard and determined in the application dated 30th January 2014 filed by the 1st appellant seeking to set aside the consent order issued on 11th December 2013. However, the appellants waited over 7 years to again re-litigate the very same issue that this Court had, with finality, rendered itself on. In this regard, the 1st affected party cited the case of *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR stressing the fact that, to constitute *res judicata*, there must be adjudication that determines the rights of the parties with regard to all or any of the matters in controversy.

19. It was noted that the jurisdictional competence of both the court below and this Court to try the application for review dated 30th January 2014 was not raised by the appellants and that, in any event, the Industrial Court in the primary suit had the requisite jurisdiction to hear and determine the claim before it. Reliance was placed on the decision in the case of *Accredo AG & 3 others v Steffano Uccelli & Another* [2019] eKLR for the proposition that the elements prescribed under section 7 of the *Civil Procedure Act* apply in equal measure to applications; and in the case of *The IEBC v Maina Kiai & 5 others* [2017] eKLR, highlighting the fact that the practical effect of the *res judicata* doctrine is that it acts as a complete estoppel against any suit or application that runs afoul of it, and cannot be circumvented for the very reason that that it is the court itself that is debarred by a jurisdictional injunction from entertaining such suit or application, as the case may be.
20. It was the 1st affected party's submission that, the court below cannot be faulted for failing to consider other aspects of the 10 prayers sought in the appellants' application dated 27th February 2020. In its view, the issues canvassed in that application were not related, but were critically directly and substantially in issue in the application dated 30th January 2014, which culminated in this Court's finding as reposed in its judgment of 19th May 2016. Even more critically, it was contended that the application dated 30th January 2014 was between the same parties, and that the subsequent joinder of the 2nd and 3rd appellants is immaterial because they were pursuing orders to set aside the consent recorded on 11th December 2013 through the 1st appellant. In other words, they were litigating under the same title. According to the 1st interested party, even if this Court were minded to interrogate the 1st affected party's subsequent presence in the proceedings, it would conclude that its presence is only attributable to its ownership of the property described as M.N./1/515, which it purchased pursuant to the court's issuance of a prohibitory order for sale on 11th December, 2013.
21. As regards the appellants' contention that the consent orders given by the superior court on 2nd December 2013 and issued on 11th December 2013 were irregular, the 1st affected party's position was that the said consent was never set aside on appeal, and that the invitation to review it was declined.
22. Having determined the *res judicata* objection in limine, the 1st affected party submitted that the court below was not bound to consider any other aspects of the appellants' application dated 27th February 2020. It was submitted that, based on this Court's restatement of the case of *Henderson v Henderson* [1843] 67 ER 313 in its decision in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR that a plea of *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In this case, it was submitted that the appellants are barred by both cause-of-action *res judicata* and issue-*res judicata*, and that on the first limb, and following this Court's decision in the *John Florence* decision (*supra*), the appellant's action in seeking to set aside the consent orders given on 2nd December 2013 and issued on 11th December 2013 vide the application dated 27th February 2020 is barred as the cause



- of action is identical to that in their earlier application of 31st December 2014; and that, even more critically, the second limb of issue res judicata activates to bar the appellants' attempt to re-litigate over the same subject matter, being the subsistence of the consent orders given on 2nd December 2013.
23. The 1st affected party drew our attention to the Supreme Court's decision in *Kenya Commercial Bank Limited v Mufri (check spelling) Coffee Estate Limited & another* [2016] eKLR which, considering a similar invitation to set aside a consent, cited with concurrence the remark in *E.T. v Attorney General & Another* [2012] eKLR that the courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court.
 24. Considering the essential ingredients for establishing res judicata, the 1st affected party concluded that identical claims were raised in the Application dated 27th February 2020 in Nairobi ELRC No. 133 (N) of 2008 to the claims raised in Petition No. 24 of 2014; Review Application dated 30th January 2014 in the Industrial Court (Nairobi) Cause Number 133N of 2008; Civil Appeal No.314 of 2014; and Petition No.17 of 2017. According to the 1st affected party, the parties in the Application dated 27th February 2020 in Nairobi ELRC No. 133 (N) of 2008 were the same parties in Petition No. 24 of 2014, the Review Application dated 30th January 2014 in the Industrial Court (Nairobi) Cause Number 133N of 2008, Civil Appeal No.314 of 2014 and Petition No.17 of 2017; and that the Courts which determined Petition No. 24 of 2014, Review Application dated 30th January 2014 in the Industrial Court (Nairobi) Cause Number 133N of 2008, Civil Appeal No.314 of 2014 and Petition No.17 of 2017 had the requisite jurisdiction to determine the said suits and rendered their decisions based on merit. We were urged to find that the application dated 27th February 2020 in Nairobi ELRC No. 133 (N) of 2008 by the appellants offended the principle of res judicata, and that the court below rightly held as much, and to dismiss the appeal with costs to the 1st affected party.
 25. We have considered the submissions made by the parties in this appeal. We must say, with due respect to learned counsel for the appellant and for the 1st respondent, that a substantial portion of the submissions put to us were not relevant to this appeal, but would have been relevant, if at all, before the learned Judge, considering that the learned Judge determined the application on the narrow doctrine of res judicata. We must point out that appeals before this Court from the High Court ought to be argued on the basis of the grounds upon which the decision appealed from is challenged. The submissions ought to deal with the decision sought to be set aside and should avoid sideshows. Similarly, reckless and unsubstantiated allegations unsupported by the record have no place in submissions made before a court of law, and parties should strive to draw the attention of the court to the facts and the law relevant to the case without maligning the character of the trial court or of any of the parties. We emphasise that submissions, however elegant, if not supported by the relevant facts and the law, do not sway the court in arriving at its decision.
 26. Elsewhere in this judgement, we have set out in extenso the decision of the learned Judge in order to appreciate the nature of the appeal before us. In our view, the outcome of this appeal rests on our determination on whether the learned Judge's finding that the application was res judicata was correct and whether, in the circumstances, it was proper for the learned Judge not to deal with and determine the remaining issues.
 27. The starting point must therefore be the law and principles guiding the application of the doctrine of res judicata. 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.

28. 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 vs. 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.”

29. The learned Judges in the preceding decision were fully aware of and applied their minds to these elements when, applying this Court’s decision in *Uhuru Highway Development Ltd vs. 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.”

30. 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.

31. 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.”

32. 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.”

33. 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”.

34. In the case of *Siri Ram Kaura v M J E Morgan* [1961] EA 462, the predecessor of this Court expressed itself as follows:

“The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.” [Emphasis ours].

35. In this matter, when arriving at her decision that the application dated 27th February 2020 was res judicata, the learned Judge considered the earlier decisions in the review application dated 30th January 2014 in the Industrial Court (Nairobi) Cause Number 133N of 2008, the Court of Appeal (Nairobi) Civil Appeal No. 314 of 2014 and Petition No. 17 at the Environment and Land Court in Mombasa dated 18th December 2017 and found that they all revolved around execution of the impugned consent; that the three suits were between the same parties; that this Court in its determination in Civil Appeal No. 314 of 2014 was competent and had jurisdiction to entertain the appeal; and that this Court upheld the decision of the Employment and Labour Court thereby determining the issue with finality.



It is therefore important for us, in determining this appeal, to examine the three matters with a view to determining whether the decision of the learned Judge was correct.

36. Regarding Mombasa ELC Petition No 17 of 2017, it is clear that the petition was dismissed for want of prosecution. One of the conditions for the successful invocation of the doctrine of res judicata is that the earlier suit must have been determined on merits. A suit that is dismissed for want of prosecution cannot be said to have been determined on merits. While a court may well decline to entertain subsequent proceedings where the conduct of a party who files one suit after another, but fails to prosecute them amounts to an abuse of the process of the court, it cannot invoke the doctrine of res judicata to dismiss the suit based on the earlier dismissed suit. In *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880, this Court was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits. In that event, as was held by the predecessor to this Court in *Ngoni-Matengo Co-Operative Marketing Union Ltd v Alimahomed Osman* [1959] EA 577, there would be no res capable of being judicata.
37. Regarding Court of Appeal (Nairobi) Civil Appeal No. 314 of 2014- *Sheila Nkatha Muthee v Alphonce Mwangemi Munga & Others* – the appellants have introduced an ingenious but, in our view, mistaken argument and without citing any authority for the same, that an appeal to this Court irrespective of its outcome is not an action within the meaning of section 7 of the [Civil Procedure Act](#) as this Court does not exercise any original jurisdiction. However, section 2 of the [Interpretation and General Provisions Act](#) defines the meaning of the word “action” as:
- “any civil proceedings in a court and includes any suit as defined in section 2 of the [Civil Procedure Act](#) (Cap. 21).”
38. The same position is taken in the cases of [Patrick Olasa Wabidonge v Kobil Petroleum Limited Civil Appeal \(Application\) No. Nai 36 of 2004](#); [Kirtesh Premchand Shah v Trust Bank Limited Civil Application No. Nai. 188 of 2006](#); *Anarita Karimi Njeru v The Republic (No 1)* [1979] KLR 154; [1976-80] 1 KLR 1272; and *Ngotho Njuguna & Another v Chege Njau Civil Appeal No. 2 of 1980* [1981] KLR 225.
39. We therefore hold that an appeal is an action and that the doctrine of res judicata applies with the same force to an appeal just as it applies to a decision by the court exercising its original jurisdiction.
40. Court of Appeal (Nairobi) Civil Appeal No. 314 of 2014 - *Sheila Nkatha Muthee v Alphonce Mwangemi Munga & Others*- dealt with an appeal from the ruling of the Employment and Labour Relations Court at Nairobi (Nduma, J.) delivered on 11th July, 2014 in the primary suit. That ruling resulted from an application in which the court was asked to review and/or set aside consent orders made on 11th December 2013. From the record, on 11th December 2013, the matter came up before Nduma, J when Mr. Kurauka appeared for the Claimants while Mr. Kabiru appeared for the 3rd affected party. It was then recorded that:
1. By consent pursuant to the search dated 27th November 2013, and filed in court on 28th November 2012, a prohibitory order do issue for sale by way of public auction of plot no. MN/1/1515 CR No. 1337 and
 2. Court Registrar do issue notification of sale and execute all necessary documents to facilitate the sale.
41. The 1st appellant herein then filed Succession Cause No. 305 of 2013 and obtained grant of letters of administration ad colligenda bona on 24th January 2014 limited to taking legal steps to preserve parcel



of land No. M.N./1/515 grant No. CR 13371, and proceeded to file Petition No. 24 of 2014 at the High Court where, on 2nd May 2014, she obtained an injunction to restrain the respondents from selling or purporting to effect sale of the said parcel of land. The order also barred the Registrar of Lands, Mombasa, from registering any transfer, lease, vesting order or any other transaction purporting to dispose of the subject property pending the hearing and determination of the application. That petition appears not to have been prosecuted, and was dismissed for want of prosecution.

42. In the meantime, the 1st appellant had also filed, in the primary suit, an application dated 30th January 2014 seeking, inter alia:

That the Honourable Court be pleased to order a review of the order made on 11/12/13 and/or setting aside of the same pending the hearing and determination of this suit.

43. On considering the application and the objections raised, the court found that there was material non-disclosure to the High Court in Mombasa Petition No. 24 of 2014. The court further found that the 1st appellant lacked locus standi to institute the suit, and that the 1st appellant was conflicted in acting both as the administratrix of the estate of the deceased and as advocate for the estate. It was that decision that gave rise to Civil Appeal No 314 of 2014 in which this Court, in its judgement delivered on 19th May 2016, held that:

“He [the Judge] held in the main that the High Court had been misled when relevant matter being that the Industrial Court had issued the orders it did on 11th December, 2013 had not been placed before the High Court or brought to its attention. In the event the court held that there had been material non- disclosure of the status of the matter at the Industrial Court when the High Court was moved for orders of injunction on 30th December, 2013.

On our own consideration we cannot find any error in the way the learned judge dealt with that aspect of the application. The learned judge was being asked to set aside or review orders made on 11th December, 2013 – the request was being made by a party who was aware of those orders but who crossed the road to another court and obtained orders of injunction which were in effect a contradiction of the orders granted by the Industrial Court. That party – the appellant – did not inform the High Court that there was on record orders issued by the Industrial Court on the same issue and that the High Court would, in effect be overturning orders of the Industrial Court. The appellant was certainly not entitled to exercise of the discretion created by the *Civil Procedure Act* or any other law particularly Order 45 Civil Procedure Rules on factors to be satisfied by a party seeking review of a decree or order... The other aspect of the ruling appealed from was whether the appellant had the necessary locus standi to file the application. The learned judge found that the appellant lacked such locus...The limited grant ad colligenda bona does not give authority to the holder to file an action in court on behalf of a deceased and more so where the grant does not bear an endorsement to the effect that it is limited to the purpose of instituting a suit. ...Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent...The learned judge of the Industrial Court was right to find that the represent the estate of the deceased lacked the necessary locus to take the application. We find no merit in this appeal which we hereby dismiss with costs.” [Underlining ours]

44. It is our view that, by expressly finding that the appellant was not “entitled to exercise of the discretion created by the *Civil Procedure Act* or any other law particularly Order 45 Civil Procedure Rules on factors to be satisfied by a party seeking review of a decree or order”, this Court dealt with the



merits of the application the subject of that appeal, and not just the 1st appellant's locus standi as submitted herein by the appellants. As long as that decision stands, the 1st appellant cannot bring further proceedings in respect of the same decision.

45. As regards the other appellants, since they all derive their claims from the estate of the deceased, the 1st appellant having brought the earlier proceedings in her capacity as the administratrix of the deceased, an application that we reiterate was dismissed on merits, they are similarly barred from challenging the said decision.
46. Regarding the contention that the affected parties in this appeal were not parties to the earlier proceedings, our view is that a party cannot escape the snare of res judicata merely by addition of parties in a subsequent suit since cosmetic surgery to proceedings, while the substance remains intact, will not assist a party in evading the rigours of res judicata. In the cases of *Mburu Kinyua v Gachini Tuti* [1978] KLR 69; [1976-80] 1 KLR 790 and *Churanji Lal & Co v Bhajee* (1932) 14 KLR 28, it was held that parties cannot, by face-lifting the pleadings, evade the said doctrine, and cannot do so by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. The mere introduction of the affected parties to the subsequent application, we hold, does not of itself shield the appellants from the said doctrine.
47. As already stated, the subject matter of Civil Appeal No. 314 of 2014 was the setting aside of the consent orders made on 11th December 2013. The subject matter of the application from which this appeal arises is similarly the setting aside of the consent orders recorded and adopted as orders of the Court on 2nd December 2013. It is clear that the consent orders sought to be set aside in the application giving rise to this appeal pre-dated those that were issued in the consent orders that were the subject of Civil Appeal No. 314 of 2014. Clearly, at the time the 1st appellant sought to challenge the consent orders made on 11th December 2013, nothing prevented her from also seeking to set aside the consent orders recorded and adopted as orders of the Court on 2nd December 2013. No explanation was given as to why this was not done. In the absence of any plausible explanation, explanation (4) to section 7 of the *Civil Procedure Act* must of necessity kick in. It 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.

48. This is what is commonly referred to as res judicata in its extended meaning. Dealing with this explanation, the predecessor to this Court held in the case of *Gurbachan Singh Kalsi v Yowani Ekori* [1958] EA 450, while citing *Henderson v Henderson* (1843) 3 Hare 100 at 115, as follows:

“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.”



49. This Court in *Greenfield Investments Limited v Baber Alibhai Mawji* Civil Appeal No. 160 of 199 held, while citing *Greenhalgh v Mallard* [1974] 2 All ER 255 at 257, that:

“Res judicata is not confined to the issues which the Court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.”

50. The 1st appellant having chosen not to attack the consent orders recorded and adopted as orders of the Court on 2nd December 2013 in her earlier application challenging the consent orders made on 11th December 2013, meant that the appellants were barred from doing so in the application whose ruling gave rise to the present appeal. We therefore find no merit in the attack on the finding of res judicata as regards the reliefs that sought the setting aside the consent orders. Just as this Court held in *Uburu Highway Development Limited v Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996*, we find, on the issue of res judicata, that it would require the skills of a spin-doctor to say that the Judge was wrong.

51. However, that is not the end of the matter. In the application dated 27th February 2020, the appellants also sought an order setting aside the sale of the suit premises to Erdemann Property Limited, the 1st Affected Party, which was alleged to have taken place on 8th April 2014, on the ground that it was conducted against the terms and conditions of sale approved by the Court and to have been conducted fraudulently, incompetently, criminally and illegally and, therefore, null and void. This issue which clearly involved a new transaction in the sequence of events could not have been dealt with by this Court in Civil Appeal No. 314 of 2014 or in the previous proceedings since it was a subsequent occurrence. Whereas, the consent order of 2nd December 2013, permitted the public auction of the suit properties, if it was contended that there were irregularities in the process of conducting the said auction, the appellants were within their rights to challenge the same even though they could not challenge the consent themselves. Such challenge could not be said to have been barred by res judicata merely because the appellant could not challenge the consent order on the basis of which the sale was being conducted. The distinction between discovery of new facts and fresh happenings was made by the predecessor to this Court in the case of *Siri Ram Kaura v M J E Morgan* [1961] EA 462. While the former may not necessarily escape the application of the doctrine of res judicata since parties cannot by face-lifting the pleadings evade the said doctrine, the Court noted that:

“The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before.”

52. This Court in *Muga v Kiunga* [2007] 2 KLR 53 cited its decision in *Mburu Kinyua v Gachini Tuti* [1978] KLR 69 for the position that a party can successfully institute a second suit or application if it is based on facts not known to him at the time he lodged the first suit. In this case, the facts giving rise to the application dated 27th February 2020 regarding the irregularity in the conduct of the public auction on 8th April 2014 were not only unknown to the appellants at the time the earlier application was made, but were not in existence at that time and, hence, could not be caught up by the doctrine of



res judicata. Ringera, J (as he then was) was of the same view in *Kanorero River Farm Ltd. & 3 Others v National Bank of Kenya Limited* [2002] 2 KLR 207 in which he expressed himself as hereunder:

“..provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of res judicata. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices. A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given carte blanche to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of res judicata does not preclude the application now before the court.

53. Similarly, in this case, a new cause of action would arise if, in purporting to execute the consent order, the respondents and affected parties flouted the law and procedures relating to the conduct of the auction sale. That seems to be what the appellants were complaining about in prayer (g) of the application. By failing to deal with that issue, we find that the learned Judge erred.
54. Accordingly, we partly allow the appeal, set aside the ruling of the learned Judge to the extent that she found that the entire application was res judicata and direct that the allegations relating to the wrongful conduct of the auction sale of the suit property be heard and determined by a Judge other than Omollo, J. Save for that, the appeal against the finding that the application seeking the setting aside of the consent orders was res judicata fails and is hereby dismissed.
55. We make no order as to the costs of this appeal.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024.

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

