



**Kenya Anti – Corruption Commission v Lobo & Desa (Sued as Legal Representative/  
Administrator of the Estate of Paul Lobo Benard Atati) & another (Environment  
& Land Case 175 of 2009) [2024] KEELC 4511 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4511 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 175 OF 2009**

**LL NAIKUNI, J**

**MAY 30, 2024**

**BETWEEN**

**KENYA ANTI – CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**SARAH MARIA LOBO & MYRTLE DESA (SUED AS LEGAL  
REPRESENTATIVE/ ADMINISTRATOR OF THE ESTATE OF PAUL LOBO  
BENARD ATATI) ..... 1<sup>ST</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked with the determination of the Preliminary objection dated 18<sup>th</sup> March, 2024 by Bernard Atati, the 2<sup>nd</sup> Defendant herein.
2. Upon service of the application to the Respondent, the Plaintiff/ Respondent responded through filing of grounds of opposition dated 8<sup>th</sup> May, 24 and through their written submissions which the Court shall discuss at a later stage in this ruling.

**II. The 2<sup>nd</sup> Defendant’s case**

3. The 2<sup>nd</sup> Defendant herein raised an objection opposing the Plaintiff’s suit the points of law that the entire suit herein offended “the Doctrine of Res Judicata” having been heard and determined in the civil case High Court (Mombasa) Misc. Judicial Review No. 24 of 2011 (Hereinafter referred to as “The JR Suit”) in the circumstances was contrary to the provisions of Section 7 of the Civil Procedure Act, Cap 21.



### III. The Plaintiff's Response

4. The Plaintiff/Respondent filed Grounds of Opposition dated 8<sup>th</sup> May 2024 and their Submissions in opposition of the 2<sup>nd</sup> Defendant's Notice of Preliminary objection dated 18<sup>th</sup> March 2024 on the following grounds:-
  - a. The 2<sup>nd</sup> Defendant's Notice of Preliminary objection is frivolous, fatally incompetent, incurably defective and totally misconceived.
  - b. The 2<sup>nd</sup> Defendant's Notice of Preliminary Objection is utter abuse of the court process and consequently an afterthought, brought after 13 years of the delivery of Judgement of Miscellaneous Judicial Review Application No. 24 of 2011 and when the matter was at hearing stage having passed the pre-trial conference process with intent to frustrated and derail the expeditious disposal of this suit.

### IV. Submissions

5. On 20<sup>th</sup> March, 2024 while all the parties were present in Court, they were directed to have the Preliminary objection dated 18<sup>th</sup> March, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 13<sup>th</sup> May, 2024 a ruling date was reserved on 30<sup>th</sup> May, 2024 by Court accordingly.

#### A. The Written Submissions by the Plaintiff/Respondent

6. The Plaintiff/Respondent, through the office of Ethics and Anti – Corruption Commission filed their written submissions dated 16<sup>th</sup> May, 2024. M/s. Abdulrahim Advocate commenced her submission by stating that the Plaintiff/Respondent filed Grounds of Opposition dated 8<sup>th</sup> May 2024 and these Submissions in opposition of the 2<sup>nd</sup> Defendant's Notice of Preliminary objection dated 18<sup>th</sup> March 2024 on the following grounds and wished to submit as follows:-
  - a. The 2<sup>nd</sup> Defendant's Notice of Preliminary objection is frivolous, fatally incompetent, incurably defective and totally misconceived.
  - b. The 2<sup>nd</sup> Defendant's Notice of Preliminary Objection is utter abuse of the court process and consequently an afterthought, brought after 13 years of the delivery of Judgement of Miscellaneous Judicial Review Application No. 24 of 2011 and when the matter was at hearing stage having passed the pre-trial conference process with intent to frustrated and derail the expeditious disposal of this suit.
7. The Learned Counsel wished to submit that the 2<sup>nd</sup> Defendant's contention that the suit herein was a "Res-judicata" to JR Suit was unreasonable, unfounded and baseless and/or had not met the threshold of the conditions of the doctrine of res - judicata as provided under the provision of Section 7 of the [Civil Procedure Act](#) Chapter 21 of the laws of Kenya. The Plaintiff/ Respondent averred that their suit herein could not be deemed as Res - judicata to the JR Suit as the proceedings the High Court was of judicial review in nature and had been brought to challenge the authority of the Land Registrar and the process involved in revocation of the suit title.
8. The Learned Counsel further submitted that issues raised in this Suit vide a Paint herein dated 9<sup>th</sup> June 2009. In particular, the issues of fraud, illegality and irregular allocation of the suit property at Paragraph 13 (a) to (d) and Paragraphs 15, 16 17, 18, 19 were not substantially and directly in issues and facts in the JR Suit and the same had never been determined in the said High Court in the Judicial Proceedings and or at any other Court of competent jurisdiction of this Court.



9. The 2<sup>nd</sup> Defendant was ignorant of the facts and the law that the JR Suit was challenging the process of revocation of title of properties MN/1/2418 and MN/1/2410 by the Registrar of Titles in the Gazette Notice No. 15570 dated 26<sup>th</sup> November 2010, while the suit herein was challenging the fraudulent, illegal and irregular allocation of properties MN/1/2418 Paragraphs 13 (a) to (d) and 15 of the Plaint 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants including the Former Commissioner of Lands.
10. Learned Counsel overemphasized that the cause of action and or issues raised in the JR Suit were not substantially and or directly similar to the cause of action or issues and facts raised in this suit. The 2<sup>nd</sup> Defendant was ignorant of the fact and the law that the JR Suit, was brought when this suit was already in existent and the High Court at Paragraph 3 of its Judgement acknowledged that the suit herein was mentioned but the particulars and the parties were never disclosed therein. The 2<sup>nd</sup> Defendant was misleading this Honourable court that the hearing and determination of the JR Suit had by extension determined the issues and facts contested this suit.
11. The Learned Counsel further submitted that the issues and disputes raised in this suit had not been settled in the JR Suit and could not have been settled summarily through a Judicial Review Proceedings but required full hearing to grant each party an opportunity to present their case in this Honourable Court. The Learned Counsel raised the following two issues for consideration in making a determination of the dispute herein. These were firstly whether the preliminary objection was an abuse of court process. The Learned Counsel submitted that the Preliminary objection herein was frivolous, fatally incompetent, incurably defective and totally misconceived. The 2<sup>nd</sup> Defendant could not raise the grounds of res - judicata by way Preliminary objection. The best way to raise grounds of res – judicata was by way of Notice of Motion where pleadings were annexed to enable the court review facts and make determination.
12. The Learned Counsel further submitted that it was not doubted that Preliminary Objections raised purely point of law, which was argued on the assumptions that all facts pleaded by the other side were correct. The same could not be raised if any facts had to be ascertained from elsewhere or if the court was called upon to exercise judicial discretion. The Court would also take into account that the Preliminary Objection must stem from pleadings and raised pure point of law and should not deal with disputed facts nor should it derive its foundations from factual information.
13. The Learned Counsel stated that the definition of “A Preliminary Objection” was described in the “*Mukisa Biscuits Manufacturing Company Ltd – Versus - West End Distributors Ltd (1969) EA696*” to mean:-

“So far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that:-

A Preliminary Objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does not nothing but unnecessary increase costs and on occasion confuse the issue. The improper practice should stop”.



14. The Learned Counsel relied on the case of “ELC Case No. 15 of 2022 *Margaret Njeri Gitau – Versus - Julius Mburu Gitau & 2 Others* [2022] eLKR”; “*Muranga and Henry Wanyama Khaemba - Versus - Standard Chartered Bank Ltd & Another* (2014) eKLR”, where the court held that raising issues of *res judicata* by way of Preliminary Objection was improper as *res judicata* required probing of evidence. Preliminary objection could not be raised on disputed facts and as to whether not the matter is *res - judicata*.
15. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant Preliminary Objection herein was an abuse of the court process, having been filed 13 years after the delivery of Judgement of the JR Suit and when this matter had gone through a Pre - Trial process and the suit had been considered ready for hearing.
16. The Learned Counsel further argued that the 2<sup>nd</sup> Defendant had been very active in this suit and no substantive reasons had been given to support the occasioning of the delay in filing the same. It was the Learned Counsel’s submission that the said Preliminary objection was an afterthought by the 2<sup>nd</sup> Defendant brought with intention to frustrate and derail the expeditious dispensation of justice in this suit. This deliberate decision contravened the provisions of Article 47 of the *Constitution* of Kenya, and Sections 1A and 1B of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya provides for expeditious dispensation of cases by the Court. The 2<sup>nd</sup> Defendant had been indolent in moving this court with the said Preliminary Objection for over 13 years and no substantive or reasonable cause had been given by the 2<sup>nd</sup> Defendant for this delay. Thus, she urged this Honourable Court not be entertained the 2<sup>nd</sup> Defendant as this will cause great injustice to the Plaintiff for the continued efforts it has made to move to court in determining this case it had filed 15 years ago. In view of the above, the Learned Counsel urged this Honourable Court to dismiss this Preliminary Objection in the fast instant for abuse of the court processes by the 2<sup>nd</sup> Defendant.
17. Secondly, whether this suit was *res judicata* to the JR Suit? The Learned Counsel submitted that the provision of Section 7 of the of the *Civil Procedure Act*, Cap. 21 provided the guide/condition for any suit to be considered for the doctrine of *res – judicata*. It was the Learned Counsel’ submission that the JR Suit, in its nature and contest could not be deemed as re-judicata to this suit for the following reasons:-
  - a. The contentious issues in the said JR Suit was on revocation of the 2<sup>nd</sup> Defendant’s Titles in respect of properties MN/1/2408 and MN/1/2410 vide Gazette Notice Number 15570 dated 26<sup>th</sup> November 2010 by the Registrar of Titles Mombasa, while the contested issues in this suit was fraudulent, irregular and illegal allocation of property MN/1/2408 to the 1<sup>st</sup> and later 2<sup>nd</sup> Defendant by the former Commissioner of Lands as set out in Paragraphs13 (a) - (d) and 15 of the Plaint. (The Learned Counsel referred the Court to Paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12 and 13 of the said Judgement).
  - b. The parties in the JR Suit and the Plaintiff were not a party to the said proceedings and the Registrar of Lands was not a party to this suit.
  - c. The relief or orders sought in respect to JR Suit was restricted to challenging the action by the Registrar of Title as *ultra vires* his authority to cancel the 2<sup>nd</sup> Defendant's Title, while the relief and orders sought by the Plaintiff/Respondent in this suit was for a declaration that the allocation and subsequent transfer of the suit property to 1<sup>st</sup> and 2<sup>nd</sup> Defendants was irregular, fraudulent, illegal, null and void.
  - d. The Plaintiff/Respondent further sought orders for rectification of the register by cancellation of the title and all entries made on the land register in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the suit property.



- e. The relief sought by the Plaintiff/Respondent in this suit was for an order of permanent injunction against the 2<sup>nd</sup> Defendant, his agents, servants, assigns restraining him from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with the MN/1/2408 otherwise that by transfer/surrender to the Kenya Civil Aviation Authority and or the Government of Kenya.
18. The Learned Counsel submitted that the proceedings in the JR Suit were of Judicial Review nature/ process and the same were limited in nature and only restricted to the questioning of the decision making process of cancellation of title of the suit property vide Gazette Notice 15570 of 26<sup>th</sup> November 2010 by the Registrar of title. The said proceedings could not be deemed to be res - judicata. The Learned Counsel relied and invited the Honourable Court to adopt the decision in the case of “Robert Ayasi & 2 others – Versus - The Speaker of Nairobi City National County Assembly & Another [2017] eKLR” where the court expounded on the doctrine of res-judicata and held that Judicial review proceedings were limited and restricted in nature and could not be deemed as re-judicata to a main suit.
19. According to the Learned Counsel the “Supreme Court Petition 17 of 2015 John Florence Maritime Services Limited & Another – Versus - Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR)(Civ) (supra)”, at Paragraph 100 of the said Judgement the court held that

“Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant involving supervisory jurisdiction of the court through proceedings brought nominally by the Republic.”

Paragraph 108 the Court held:

We arrive at the inescapable conclusion that the high court in determining a judicial review application, exercises only a frustration the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under constitutional petition. The considerations are different, the orders the court may grant are more expanded under constitutional Petition and therefore the outcome are different”.

20. The Learned Counsel submitted that the elements or test of determining the doctrine of res - judicata had been decided various precedents. In the case of:- “Civil Appeal No. 110 of 2011, Nicholas Njeru – Versus - The Attorney General & 8 Others [2013]eKLR” and “Supreme Court Petition 17 of 2015 John Florence Maritime Services Limited & Another – Versus - Cabinet Secretary Transport & Infrastructure & 3 Others [2021]KESC 39 (KLR) (Civ) (6<sup>th</sup> August 2021)( particularly Paragraphs 86 -97)” the doctrine of re-judicata was well expounded as hereunder and the courts held that the principle of res - judicata was wrongly invoked in the case of “Supreme Court Petition 17 of 2015 John Florence Maritime Services Limited (Supra)” as follows:-

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res-judicature. For res-judicature to be invoked in a civil matter the following elements must be demonstrated:-

- a) The former is a Judgement and order which is final;



- b) The Judgement or order was on merit
- c) The Judgement or order was 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 identical parties, subject matter and cause of action.”

21. In view of the above expounded opinions and decision the Learned Counsel invited this Honourable Court to adopt the decision was the above case and exercise its jurisdiction to dismiss the Preliminary Objection herein and hold that the JE Suit could not be termed as a final determination of the issues raised in this suits as the orders sought in this suit are more expounded and different and the final outcome may be different. The suit herein was not res - judicata to the JR Suit and pertinent issues had been raised that require each party to be granted an opportunity to present their case for hearing and determination on merit.

22. In conclusion, the Learned Counsel submitted that the Plaintiff/Respondent prayed that the Preliminary Objection herein be dismissed with costs to the Plaintiff/Respondent. The costs to be paid before the hearing of the matter.

#### **V. Analysis & Determination.**

23. I have carefully read and considered the Preliminary objection dated 18<sup>th</sup> March, 2024 by the 2<sup>nd</sup> Defendant, the grounds of opposition raised by the Plaintiff dated 8<sup>th</sup> May, 2024, the submissions and the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.

24. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

- a. Whether the objection through the Preliminary Objection dated 18<sup>th</sup> March, 2024 raised by the 2<sup>nd</sup> Defendant meets the threshold of an objection based on Law and precedents?
- b. Whether the Present suit is Res Judicata to Mombasa High Court Misc. Judicial Review No. 24 of 2011 and if by virtue of that offends Section 7 of the Civil Procedure Act, Cap 21.
- c. Who will bear the Costs of Preliminary objection dated 18<sup>th</sup> March, 2024.

#### **Issue No. a). Whether the objection through the Preliminary Objection dated 18<sup>th</sup> March, 2024 raised by the 2<sup>nd</sup> Defendant meets the threshold of an objection based on Law and precedents**

25. Under this Sub heading, the main substrata here is an Preliminary objection raised by the Defendant. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

26. To begin with, the provision of Order 2 Rule 9 of the Civil Procedure Rules, 2010 provides:-

“ A party may by his pleading raise any point of law.”



27. According to the Black Law Dictionary a Preliminary Objection is defined as being:
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
28. The above legal proposition has been made graphically clear in the now famous case of “Mukisa Biscuits -Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”
29. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
- “A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
30. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005[2005] LLR 7396”, the Court held that;
- “A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
31. This decision has been affirmed and reiterated severally in our Courts including the Supreme Court in “Independent Electoral & Boundaries Commission – Versus - Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR” that a preliminary objection should be founded upon a settled and crisp point of law.
32. The test to be applied in determining a proper preliminary objection can be deduced as follows; -
- a. A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
  - b. A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
  - c. A Preliminary Objection cannot be entertained where;
    - a. The facts are disputed/contested.
    - b. The facts are liable to be contested.
    - c. Facts are to be proved through process of evidence.
    - d. What is sought is an exercise of judicial discretion.
33. The Honourable Court therefore disagrees with the Plaintiff/ Respondent that the issue of res judicate can only be raised through a Notice of Motion application. Having opined as much and from the above



holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

34. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 2<sup>nd</sup> Defendant herein. Therefore at this stage, this Court is expected to consider legal issue(s) that go to the root of whether there is a competent suit before Court and/or whether the Court has/lacks jurisdiction to hear and determine such matter. I hold the issues being raised by the Defendant are overly on factual nature, and I dare say, no Court may be competent to handle them effectively through a Preliminary Objection. The only available route would be through filing of a notice of motion accompanied by an affidavits deponing facts and annexures as provided for under the provision of Orders 19 and 51 of the Civil Procedure Rules, 2010. As things stand now, the Preliminary objection must fail like doodle – dead on arrival.

**Issue No. b). Whether the Present suit is res judicata to Mombasa High Court Misc. Judicial Review No. 24 of 2011 and if by virtue of that offends Section 7 of the Civil Procedure Act, Cap 21**

35. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles, the provision of Section 7 of the Civil Procedure Act provides:-

“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”

36. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of “Nicholas Njeru – Versus - the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR”.

37. The Black’s law Dictionary 10<sup>th</sup> Edition defines “Res Judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

38. In the case of “Christopher Kenyariri – Versus - Salama Beach (2017) eKLR”, the court clearly stated the ingredients to be satisfied when determining res judicata thus;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit
- b) Former suit between same parties or parties under whom they or any of them claim
- c) Those parties are litigating under the same title
- d) The issue was heard and finally determined.



e) The court was competent to try the subsequent suit in which the suit is raised.”

39. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

40. In the case of:- “E.T – Versus - Attorney General & Another (2012) eKLR” where it was held 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. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi – Versus - National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of Res - Judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu – Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

41. Having considered the pleadings and rival submissions by counsel, it is not in dispute, that there exists a Judgment in JR Suit where the matter was for the revocation of the 2<sup>nd</sup> Defendant’s titles in respect to properties MN/1/2408 and MN/1/2410 vide Gazette Notice Number 15570 dated 26<sup>th</sup> November 2010 by the Registrar of Titles Mombasa, while the contested issues. What is the common issue in both suits? The suit properties MN/1/2408 and MN/1/2410. Who are/were the litigants? The parties in Mombasa High Court Judicial Review Application No. 24 of 2011 and the Plaintiff was not a party to the said proceedings and the Registrar of Lands is not a party to this suit.

42. Can the Plaintiff herein then hide behind the fact that he was not a party in the previous suit? The Court will refer back to Section 7 of the *Civil Procedure Act* Cap 21. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. I seek refuge from the case of:- “Republic – Versus - National Transport & Safety Authority & 10 others Ex - Parte James Maina Mugo [2015] eKLR” where it was held:-

“.....where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine



such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits”

43. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction. In the judicial review, the ex parte is simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. An application for judicial review is normally commenced by a party seeking leave to file a substantive motion to apply for the respective judicial review remedies that they are seeking. In respect of the same one cannot contend that a land dispute was resolved through judicial review proceedings because land claims are very sensitive matters that ought to be addressed heard through viva voce evidence and determined on merit.
44. Notably this Court has held recently in the case of:- “Ware Transport Limited – Versus - Third Engineering Bureau of China City Construction Group Co Ltd; Tiba Freight Forwarders Limited (Third party) (Environment & Land Case 252 of 2021) [2024] KEELC 1550 (KLR) (7 March 2024) (Ruling)”, that land is an emotive resource in Kenya. The complexity about the intertwining weavings and intersections between its ownership and the attachment many a person in Kenya give it so much so that it brings out the intensity of emotions attendant to it can only be discerned from the length of time some cases take and the energy and zeal they often take from both the litigant and learned counsel as well as judicial officers. Different scenarios present themselves to courts when they handle matters on land which draw long and protracted litigation.
45. According to the Plaintiff, the proceedings in JR Suit were of Judicial Review process and the same were limited in nature and only restricted to the questioning of the decision making process of cancellation of title of the suit property vide Gazette Notice 15570 of 26<sup>th</sup> November 2010 by the Registrar of title. The said proceedings cannot be deemed to be res-judicata.
46. Having said as much, the Honourable Court is in agreement with the Plaintiff/ Respondent that the relief or orders sought in respect to in JR Suit was restricted to challenging the action by the Registrar of Title as ultra vires his authority to cancel the 2<sup>nd</sup> Defendant's Title, while the relief and orders sought by the Plaintiff/Respondent in this suit is a declaration that the allocation and subsequent transfer of the suit property to 1<sup>st</sup> and 2<sup>nd</sup> Defendants was irregular, fraudulent, illegal, null and void and that the Plaintiff/Respondent further sought orders for rectification of the register by cancellation of the title and all entries made on the land register in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the suit property. In this suit the Plaintiff has sought for an order of permanent injunction against the 2<sup>nd</sup> Defendant, his agents, servants, assigns restraining him from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with the MN/1/2408 otherwise that by transfer/surrender to the Kenya Civil Aviation Authority and or the Government of Kenya. Orders which may only be granted by the Environment and Land Court of Kenya and not the High Court. See the provision of Article 162 of COK and Section 13 ELC Act.
47. The gist and substance of the provision of Section 7 of the *Civil Procedure Act* defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.”



48. In the case of “Tee Gee Electrics and Plastics Company Limited – Versus - Kenya Industrial Estates Limited [2005] KLR 97” the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal 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”.

49. In the circumstances of this case I am guided by the provision of Article 50 (1) of the Constitution which provide for fair hearing as well as Art 159 (2)(d) of the Constitution which direct this Court to tend to the substance of the case and its attendant justice. The suit herein is not res-judicata to the JR Suit and pertinent issues have been raised that require each party to be granted an opportunity to present their case for hearing and determination on merit

50. For those reasons the Court finds that the Objection by the Defendants unmerited and hereby dismisses it with no orders as to costs.

**Issue No. c). Who will bear the Costs of Preliminary objection dated 18<sup>th</sup> March, 2024.**

51. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

52. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

53. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18<sup>th</sup> Edition,



2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

54. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

55. Further, In the case of:- “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

56. In this case, as this Honourable Court has opined above, the 2<sup>nd</sup> Defendant/Applicant has not convinced this Honourable Court that the suit is res judicata under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 as per the Preliminary objection dated 18<sup>th</sup> March, 2024. Therefore, it follows that the Plaintiff shall have the costs having participated in the hearing and determination of the same to be paid by the 2<sup>nd</sup> Defendant.

## VI. Conclusion & Disposition

57. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the objection by the 2<sup>nd</sup> Defendant herein, this court arrives at the following decision and makes the orders below:-

- a. That the Preliminary objection dated 18<sup>th</sup> March, 2023 be and is hereby found to lack merit hence the same is hereby overruled with costs.
- b. THAT the hearing dates of 23<sup>rd</sup> and 24<sup>th</sup> July, 2024 without fail to be maintained accordingly.
- c. That unless otherwise stated and all facts remaining constant, the Honourable Court reserves 15<sup>th</sup> October, 2024 for the delivery of Judgement herein.
- d. That the costs of the Preliminary objection dated 18<sup>th</sup> March, 2024 are awarded to the Plaintiff to be borne by the 2<sup>nd</sup> Defendant herein before the next hearing date.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 30<sup>TH</sup> DAY OF MAY 2024.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI,**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the 2<sup>nd</sup> Defendant/Applicant
- c. M/s. Abdulrahim Advocate for the Plaintiff/ Respondent

