



**Kimotho & another v Kakuru & 3 others (Environment & Land Case
E130 of 2023) [2024] KEELC 4396 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E130 OF 2023**

**JO MBOYA, J
MAY 27, 2024**

BETWEEN

WILSON GIKONYO KIMOTHO 1ST PLAINTIFF

JOHN MAGU 2ND PLAINTIFF

AND

NEWTON KAKURU 1ST DEFENDANT

STEPHENE MACHARIA KIHUMBA 2ND DEFENDANT

HASTEN PROPERTIES LTD 3RD DEFENDANT

LAND REGISTRAR NAIROBI 4TH DEFENDANT

RULING

Introduction and Background

1. The Plaintiffs/Applicants herein filed the instant suit vide Complaint dated the 23rd October 2023; and in respect of which same [Plaintiffs] sought for various reliefs as against the 1st and the 4th Defendants herein [who were the original Defendants] in the suit.
2. Subsequently, the Plaintiffs/Applicants herein filed an amended Complaint dated the 29th January 2024 and in respect of which same [Plaintiffs/Applicants] brought on board the current 2nd and 3rd Defendant/ Respondents. For coherence, the amended Complaint thus impleads the current 4th Defendants.
3. Contemporaneous with the filing of the amended Complaint, the Plaintiff/Applicants herein took out and filed a Notice of Motion Application dated the 29th January 2024; and wherein same [Plaintiffs/ Applicants] have sought for the following reliefs;
 - i. That this application be certified as urgent and service thereof be dispensed with and same be heard ex-parte in the first instance.



- ii. That this Honourable Court be pleased to issue a temporary order of injunction restraining the 1st 2nd and 3rd Defendants/Respondents by themselves or through their authorized servants and/or agents or any person claiming through them from interfering with the management of the suit properties or in any way interfering with the management of properties in Land Reference Number 209/2820/26 and Land Reference Number 36/1/173, pending the hearing and determination of this application inter-partes.
 - iii. That this Honourable Court be pleased to issue an order directing that Mamuka Valuers(Management) Limited continue to manage the suit properties and collect rent from the properties in Land Reference Number 209/2820/26 and Land Reference Number 36/1/173, pending the hearing and determination of this application inter-partes.
 - iv. That this Honourable Court be pleased to issue an order of injunction restraining the 1st ,2nd and 3rd Defendants/Respondents by themselves or through their authorized servants and/or agents or any person claiming through them from interfering with the management of the suit properties or in any way interfering Land Reference Number 36/1/173, pending the hearing and determination of this suit.
 - v. Mamuka Valuers (Management) Limited continue to manage the suit properties and collect Rent[s] from Land Reference Number 36/1/173, pending the hearing and determination of this suit.
 - vi. The costs of the application be provided for.
4. The instant application is premised on a plethora of grounds which have been highlighted and enumerated in the body thereof. Furthermore, the application beforehand is supported by the affidavit of Wilson Gigokonyo Kimotho [the 1st Plaintiff/Applicant] sworn on even date and to which the deponent has annexed a total of 9 documents.
 5. Upon being served with the instant application, the 1st Respondent filed a Replying affidavit sworn by Newton Gakuru on the 4th March 2024; and in respect of which the deponent thereto has averred that the subject application is premised and anchored on conscious and deliberate falsehood[s] and distorted facts, which are intended to mislead the honorable court into granting the reliefs sought.
 6. Furthermore, the 1st Defendant/Respondent has also contended that the issues that have been raised and adverted to at the foot of the current suit [Proceeding[s] as well as the application have hitherto been canvassed in previous proceedings and hence the suit is prohibited by the doctrine of Res-Judicata.
 7. On their part, the 2nd and 3rd Defendants have filed various Replying affidavits, namely, the Replying affidavit[s] of Stephen Macharia Kihumba and Danson Kibe Wamenju; which Replying affidavits are sworn on the 4th March 2024 and 21st February 2024, respectively.
 8. Additionally, the 2nd and 3rd Defendants have also filed Grounds of opposition dated the 12th February 2024; as well as a Notice of Preliminary Objection of even date. Notably, the preliminary objection under reference highlights inter-alia that the suit beforehand is prohibited by dint of Sections 7 and 34 of the *Civil Procedure Act*, chapter 21 Laws of Kenya and hence same [suit] ought to be struck out with costs.
 9. First forward, the Application beforehand came up for hearing on the 15th February 2024 whereupon the advocates for the respective parties covenanted to canvass and ventilate the application and the Notice of preliminary objection simultaneously. Furthermore, the advocates also agreed to file and exchange the written submissions.



10. Arising from the foregoing position, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions. For good measure, the parties thereafter complied and filed their respective written submissions.
11. Instructively, the Plaintiffs/Applicants herein filed written submissions dated the 13th March 2024, whereas the 1st Defendant/Respondent filed written submissions dated the 25th March 2024. Besides, the 2nd and 3rd Defendants filed written submissions dated the 28th March 2024.
12. For coherence, the three [3] sets of written submissions [details in terms of the preceding paragraphs], form part of the record of the court.

PARTIES' SUBMISSIONS:

a. APPLICANTS' SUBMISSIONS:

13. The Applicants herein filed written submissions dated the 13th March 2024; and wherein same adopted the grounds contained at the foot of the Application under reference and similarly reiterated the averments contained in the body of the supporting affidavit.
14. Furthermore, learned counsel for the Applicants thereafter proceeded to and highlighted three [3] salient and pertinent issues for consideration by the court. Firstly, learned counsel for the applicants has submitted that the preliminary objection which has been filed by and on behalf of the 2nd and 3rd Defendants is ambiguous and does not specifically highlight the points of law which are intended to be canvassed and agitated. In this regard, learned counsel for the Applicants has submitted that where the preliminary objection is ambiguous and ambivalent, like the instant case, the honorable court ought to decline to entertain such preliminary objection.
15. In any event, learned counsel has submitted that it was incumbent upon the 2nd and 3rd Defendants to disclose at the foot of the preliminary objection how and in what manner the Plaintiffs' suit fails to disclose a reasonable cause of action or why same [suit] constitute an abuse of the due process of the court.
16. To this end, learned counsel for the Applicants has cited and relied on inter-alia the holding in the case of Albert Mwaniki Nyaga vs Josphat Nthiga Gakoni & Another [2018]eKLR and Joshua Silu Mukusa & 2 Others vs Titus Tali Kioko & Others [2022]eKLR, respectively.
17. Secondly, learned counsel for the Applicants has submitted that the amendment of the Plaint which has also been complained of [contested], was undertaken in accordance with the provisions of Order 8 Rule 1 of the Civil Procedure Rules; which prescribes that a party to the suit, the Plaintiffs not excepted, is at liberty to amend their pleadings once before the close of pleadings.
18. Additionally, learned counsel for the Applicants has also submitted that by the time the Plaintiffs herein filed the amended Plaint dated the 29th January 2024, the pleadings had not closed. For good measure, Learned Counsel for the Applicants has cited and relied on the provisions of Order 2 Rule 13 of the Civil procedure Rules 2010.
19. Thirdly, learned counsel for the Applicants has submitted that the current suit is neither barred nor prohibited buy the doctrine of Res-Judicata, either as alleged or at all. Furthermore, learned counsel for the Applicants has added that the previous suits namely, Nairobi HCC No. 475 of 2006 and ELC No. E018 of 2022 [OS], did not concern the said subject matter which is being canvassed at the foot of the instant suit.



20. Arising from the foregoing, learned counsel for the Applicants has submitted that before the court can invoke and apply the doctrine of Res-Judicata, the court ought to be convinced that the issues in dispute beforehand were directly and substantially in issue in the previous [former] suits, which is not the case herein.
21. Further and in any event, learned counsel for the Applicants has submitted that the contents of paragraphs 7 to 15 of the 1st Plaintiffs'/Applicants' supplementary affidavits have highlighted [illuminated] the issues that were canvassed in the previous suits.
22. Premised on the foregoing, learned counsel for the Applicant[s] has therefore contended that the doctrine of Res-Judicata and by extension the provisions of Section 7 of Civil Procedure Act Chapter 21, Laws of Kenya; do not apply to the instant suit.
23. Finally, learned counsel for the Applicants has submitted that the application beforehand [which seeks for orders of temporary and mandatory injunction], has satisfied the requisite ingredients to warrant the grant and/or issuance of the orders sought.
24. Instructively, learned counsel for the Applicant[s] has submitted that it is the Applicants herein who were constituted as the Trustees of the Welfare group and thus bestowed with the mandate and authority to manage the suit properties.
25. Nevertheless, learned counsel for the Applicants has contended that despite the mandate [authority] conferred upon the Applicants, same [Applicants] have been divested of the right to manage the suit properties by the 1st, 2nd and 3rd Defendants, albeit without lawful basis and/r sufficient cause.
26. Consequently and in view of the foregoing, learned counsel for the applicants has therefore invited the court to find and hold that same [Applicants] have indeed established a prima facie case with probability of success and are thus entitled to the issuance of an order of temporary injunction.
27. To buttress the foregoing submissions, learned counsel for the Applicants has cited and relied on the holding in *Giella vs Cassman Brown* [1973] EA 358 and *Mrao Ltd vs first American Bank of Kenya Ltd & 2 Others* [2003]eKLR, respectively.
28. In a nutshell, learned counsel for the Applicants has thus implored the Honourable court to find and hold that the application beforehand is meritorious and thus worthy of being allowed.

b. 1ST RESPONDENT'S SUBMISSIONS:

29. The 1st Respondent herein filed written submissions dated the 25th March 2024; and in respect of which same [1st Defendant/Respondent] has amplified the averments contained in the body of the Replying affidavit sworn on the 4th March 2024. Furthermore, the 1st Respondent has thereafter raised, highlighted and canvassed two [2] salient issues for consideration by the court.
30. First and foremost, learned counsel for the 1st Respondent has submitted that the issues which have been raised and canvassed at the foot of the current suit replicate the issues which have been hitherto been canvassed and determined in two [2] previous suits involving the same parties.
31. Pertinently, learned counsel for the 1st Respondent has submitted that the issues pertaining to the identities of the trustees and the membership of welfare group, which colors the instant suit was duly addressed and determined vide Nairobi HCC No. 475 of 2006; and which case has been variously referenced by the Plaintiffs/Applicants herein. For good measure, learned counsel for the 1st Respondent has highlighted grounds 1 and 5 at the foot of the Application beforehand.



32. On the other hand, learned counsel for the 1st Respondent has also submitted that the question as to the appointment of the managing agent, which the Plaintiffs have also adverted to was also addressed and canvassed in the previous proceedings.
33. Other than the foregoing, the first Respondent herein has also submitted that the Plaintiffs themselves also proceeded to and filed another suit, namely, ELC No. E018 of 2022 [OS] wherein same sought for orders pertaining to and concerning the administration and management of the issues pertaining to the suit properties.
34. Based on the foregoing, learned counsel for the 1st Respondent has submitted that the issues that are being raised and canvassed at the foot of the instant suit are issues that have hitherto been canvassed and addressed in the previous suits [proceedings] and hence the current suit is prohibited by the doctrine of Res-Judicata.
35. Additionally, learned counsel for the 1st Respondent has invited the court to take cognizance of various decisions of inter-alia the case of Dysara Investment Ltd & Another vs Woburn Estate Ltd & Another [2021]eKLR; Gurbacham vs Yowani Ekori [1958] EA 450 and Henderson vs Henderson [1] 67 ER 313, respectively.
36. Secondly, learned counsel for the 1st Respondent has submitted that the Applicants herein have neither established nor demonstrated the existence of a prima facie case with probability of success, to warrant the grant of an order of temporary injunction, either in the manner sought or at all.
37. On the other hand, learned counsel for the 1st Respondent has also submitted that the Applicants herein have similarly failed to established and demonstrate a basis for the grant of an order of mandatory injunction.
38. In this regard, learned counsel for the 1st Respondent has cited and relied on inter-alia the holding in the case of Kenya Breweries Ltd vs Washington Okeyo [2002]eKLR and Locabail International Finance Ltd vs Agro Export & Others [1968] 1 All ER 901, respectively.
39. Based on the foregoing submissions, learned counsel for the 1st Respondent has submitted that the application beforehand is devoid and or divested of merits and hence same ought to be dismissed with costs to the 1st Respondent.

c. 2ND AND 3RD RESPONDENTS' SUBMISSIONS:

40. The 2nd and 3rd Respondents filed written submissions dated the 28th March 2024; and wherein same have adopted and reiterated inter-alia the averments at the foot of the Replying affidavits sworn by the 2nd Defendant/Respondent; as well as one, Danson Kibe Wamenju, respectively.
41. On the other hand, the said Respondents have also reiterated the contents of the Grounds of opposition and the Notice of preliminary objection dated the 12th February 2024, respectively.
42. Furthermore, learned counsel for the said Respondents has proceeded to and highlighted and canvassed four [4] pertinent issues for consideration and determination by the court.
43. First and foremost, learned counsel for the said Respondents has submitted that the amended Plaint dated the 29th January 2024; and which led to the joinder of the said Respondents was illegally undertaken without leave of the court being sought for and/or obtained beforehand.



44. Instructively, learned counsel for the 2nd and 3rd Respondents has submitted that no amendment can be undertaken with a view to joinder of additional parties [in this case the 2nd and 3rd Defendants] without leave of the court.
45. Owing to the fact that no leave was ever sought for and/or obtained before the joinder of the 2nd and 3rd Defendants, learned counsel for the said Defendants has therefore contended that the amended Plaint is therefore illegal and thus ought to be struck out.
46. In support of the foregoing submissions, learned counsel for the said Respondents has cited and relied on the case of Stephen Kipkebut T/a Riverside Lodge & Rooms vs Naftali Ogole [2009]eKLR, where the court held that no joinder of an additional party can be taken without leave of the court.
47. Secondly, learned counsel for the 2nd and 3rd Respondents has submitted that the reliefs being sought at the foot of the current application [and which have been highlighted in terms of grounds 1 and 5 of the application] show that what is being sought for are orders towards enforcing the Judgment and decrees that were issued in the previous suits.
48. In particular, learned counsel for the 2nd and 3rd Respondents has submitted that what the Applicants herein are seeking include [sic] the contention that same [Applicants] are the trustees of the welfare group, namely, Kairi Kiruri & partners Welfare Group, which issue had been addressed and determined vide ELC No. E018 of 2022.
49. On the other hand, learned counsel for the 2nd and 3rd Respondents has also submitted that the other limb of the suit relates to the appointment of M/s Mamuka Valuers – Management Ltd, which the Applicants contend to have been appointed to manage the suit properties by dint of the decree issued in Nairobi HCC No. 475 of 2006.
50. Arising from the foregoing, learned counsel for the 2nd and 3rd Respondents has therefore submitted that it is evident that the instant suit has been filed merely for purposes of enforcing the Judgment and decrees which were issued elsewhere. In this regard, counsel for the 1st and 2nd Respondents has submitted that the suit beforehand is therefore barred by the provisions of Section 34 of the [Civil Procedure Act](#).
51. To support the foregoing submissions, learned counsel for the said Respondents has cited and relied on the holding in Moses Wamalwa Mukhamari vs John Mutali Wekesa [2023]eKLR and Peter Mungai vs Josepg Ngaba Kuria & Another; Leah Njeri Ndichu; Interested Party [2022]eKLR, respectively.
52. Thirdly, learned counsel for the 2nd and 3rd Respondents has also submitted that insofar as the issues being agitated and canvassed at the foot of the instant suit had been determined elsewhere, the instant suit is thus prohibited by the Doctrine of Res-Judicata.
53. At any rate, learned counsel for the said Respondents has submitted that the doctrine of Res Judicata cannot be evaded and/or be defeated by the mere addition and/or subtraction of parties in the subsequent suit. Pertinently, learned counsel has cited and relied on the holding of the Supreme Court of Kenya [the Apex Court] in the case of John Florence Maritime Services Ltd & Another vs Cabinet Secretary Transport and Infrastructure & 3 Others [2021]eKLR; as well as the holding in E.T vs Attorney General & Another [2012]eKLR, respectively.
54. Finally, learned counsel for the said Respondents has also submitted that the application beforehand does not establish the requisite ingredients to warrant the grant of the orders of temporary injunction, either in the manner sought or at all.



55. For good measure, learned counsel for the 2nd and 3rd Respondents has submitted that it was incumbent upon the Applicants to demonstrate the existence of a prima facie case with a probability of success. However, it has been contended that the Applicants herein have failed to establish and/ or demonstrate even a semblance of what amounts to a prima facie case.
56. Further and in any event, learned counsel for the 2nd and 3rd Respondents has also submitted that the application by the applicants is also premised on conscious and deliberate falsehood[s] as well as distortion of material facts and hence the court ought not to countenance such falsehood[s].
57. In sum, learned counsel for the said Respondents has invited the court to find and hold that the entire suit together with the application founded therewith are misconceived and otherwise legally untenable. In this regard, Learned Counsel for the 2nd and 3rd Respondents has implored the court to proceed and strike out the suit beforehand with costs.

d. 4TH RESPONDENT'S SUBMISSIONS:

58. Though duly served with the application beforehand, the 4th Defendant neither filed any response thereto nor any written submissions in opposition to same.
59. Notably and for good measure, the only written submissions which were filed are the ones which have been highlighted in the preceding paragraph[s] and in any event which forms part of the record of the court.

ISSUES FOR DETERMINATION:

60. Having evaluated and appraised the application beforehand and the Responses thereto; and upon the consideration of the written submissions filed, the following issues do emerge [crystalize] and are thus worthy of determination;
 - i. Whether the Applicants herein have the requisite Locus standi [Legal Capacity] to maintain the suit or otherwise.
 - ii. Whether the instant suit constitutes an endeavor to enforce decrees issued in the previous suits and if so, whether the suit is prohibited by the provisions of Section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya.
 - iii. Whether the suit beforehand is barred by the Doctrine of Res-Judicata and by extension Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

ANALYSIS AND DETERMINATION :

ISSUE NUMBER 1- Whether the Applicants herein have the requisite locus standi [Legal Capacity] to maintain the suit or otherwise.

61. The instant suit has been filed and/or commenced by the Plaintiffs/Applicants herein who contend that same are the lawful and duly appointed trustees of the assets of Kairu Kiruri & Partners Welfare Group. Pertinently, the Plaintiffs/Applicants have contended that same were duly appointed as such pursuant to a Judgment rendered vide ELC No. E018 of 2022 [OS].
62. Given the contention by and on behalf of the Plaintiffs/Applicants that same were duly and lawfully appointed as the trustees of the welfare group, it becomes important to ascertain and discern the nature of the orders and/or reliefs, if any, that were issued at the foot of the said suit.



63. Fortunately, the Plaintiffs/Applicants herein have themselves exhibited [annexed] a copy of the decree arising from ELC No. E018 of 2022 [OS]. In this regard, it suffices to reproduce the terms of the orders that were granted by the court.
64. Same are reproduced as hereunder;
- i. That Wilson Gikonyo Kimotho and John Magu are hereby appointed as Trustees of the Assets of the Welfare Group known as Kairu Kiruri & Partners being land reference No. 209/2820/26 and plot number 173 Section 1 Eastleigh along side the surviving Trustees appointed vide the consent order given on 26th September 2008 and issued on the 16th October 2008 but excluding the Respondent.
 - ii. The newly appointed Trustees to execute the agreement of sale and transfer forms for the groups parcel of land L.R No. 209/2820/26 and Plot No. 173 Section 1 Eastleigh and such other documents as may be required to facilitate the disposal of the two properties on behalf of the group.
 - iii. The Applicants are awarded costs of this application
65. From the terms of the decree which was issued vide ELC NO. E018 of 2022 [OS], it is evident and apparent that the Plaintiffs/Applicants herein were being appointed as Trustees of the Welfare Group to join and act alongside the surviving trustees who had hitherto been appointed vide the consent order given on the 26th September 2008 and issued on the 16th October 2008.
66. My understanding of limb one [1] of the decree under reference is to the effect that there were other trustees who had hitherto been constituted and appointed vide consent in a previous suit and that the two [2] Plaintiffs herein were to join the surviving trustees thereunder. Notably, the two [2] Plaintiffs herein are not the only trustees of the named welfare group.
67. Additionally, to the extent that the Plaintiffs herein were appointed to join and act alongside the surviving trustees who were appointed at the foot of the consent issued on the 16th October 2008, it suffices to underscore that the two [2] Plaintiffs herein do not have the exclusive [read, absolute] authority to run the affairs of the designated welfare group.
68. Put differently, the Plaintiffs herein can only act alongside the surviving trustees, whose names are duly captured and reflected at the foot of annexure WGK -3 [which has been exhibited by the Plaintiffs].
69. To the extent that the Plaintiffs herein have neither shown nor exhibited any resolution and/or authority procured from the surviving trustees, who were appointed under the consent issued on the 16th October 2008, it becomes apparent that the Plaintiffs herein do not have the capacity and or locus standi [Legal Capacity] on their own to purport and/or contend to be the lawful trustees capable of acting for and on behalf of the Welfare Group. Certainly, not on their own.
70. Simply put, the Plaintiffs herein can only institute and propagate a suit touching on and or concerning the management and administration of the properties of Kairu Kiruri & Partners Welfare Group, including the suit properties, albeit in conjunction with and/or alongside the surviving trustees hitherto appointed at the foot of the consent.
71. However, to the extent that no resolution and/or authority has been exhibited and or displayed by the Plaintiffs herein, [on behalf of the other Trustees], it is my finding and holding that the Plaintiffs before the court do not have the requisite locus standi [Legal Capacity] to mount and/or propagate the instant suit.



72. In the absence of the requisite locus standi [taking into account lack of authority from the co-trustees], the suit by the Plaintiffs herein is not only misconceived, but incompetent and thus legally untenable.
73. To underscore the centrality and significance of locus standi [Legal Capacity]; and its implication on a suit, it suffices to take cognizance of the holding in the case of Alfred Njau & Others v City Council of Nairobi [1986]ekl, where the Court of Appeal stated and held thus;

“Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”

The court proceeded to state:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

74. In a nutshell, my answer to issue number one[1] is to the effect that the Plaintiffs herein [without the resolution of the co-trustees appointed at the foot of the consent issued on the 16th October 2008] are divested of the requisite locus standi [Legal Capacity] to mount and maintain the instant suit.

ISSUE NUMBER 2- Whether the instant suit constitutes an endeavor to enforce decrees issued in the previous suits and if so, whether the suit is prohibited by the provisions of Section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

75. As pertains to the second issue herein, it is important to take cognizance of the contents of grounds 1 and 5 obtaining at the foot of the application beforehand.
76. For ease of reference, the said grounds are reproduced as hereunder;
1. That the 1st and 2nd Plaintiffs/Applicants were appointed as trustees of the assets of Kairi Kiruri & partners Welfare group being L.R No. 209/2820/26 and L.R No. 36/1/173 [also known as Plot No. 173 Section 1 Eastleigh] vide a court Judgment delivered by Justice A. Omollo on the 22nd June 2023 in ELC Case No. E018 of 2022 [OS] in the Environment and Land Court At Nairobi.
 5. That Mamuka Valuers [Management Ltd] was appointed as the agent mandated to collect rents from the suit property and manage the properties vide a consent order issued on the 26th September 2008 in Civil Case No. 475 of 2006 in the High Court of Kenya at Nairobi, which consent order explicitly provided that it would only be set aside, reviewed or varied by a further order of the court.
77. Notably, the said grounds, which have been produced in the foregoing paragraphs have also been highlighted in the body of the amended Plaint. For good measure, the contents of paragraphs 11, 12, 13, 16, 21 and 22 of the amended Plaint are pertinent.
78. Having reproduced the salient features of the suit beforehand, it is now appropriate to revert back and consider what is the substratum and crux [gravamen] of the dispute beforehand.
79. To start with, one of the reliefs that is being sought by the Plaintiffs herein relates to a confirmation that same [Plaintiffs] were duly appointed and constituted as the trustees of the welfare group.



80. To my mind, the question of the appointments of the Plaintiffs as trustees of the welfare group was canvassed and disposed of vide ELC E018 of 2022 [OS]. Consequently and in this regard, the same issue cannot be re-agitated afresh at the foot of the instant suit.
81. Secondly, the other aspects of the dispute beforehand touches on and/or concerns the legitimacy of the appointment of M/s Mamuka Valuers [Management] Ltd as the agents mandated to collect rents and manage the suit properties, which [sic] belong to the welfare group.
82. Furthermore, the Plaintiffs herein have posited that the said management agents [details in terms of the preceding paragraph] were appointed by consent recorded in Nairobi HCC No. 475 of 2006. In this regard, if a question [issue] does arise as pertains to the appointment of the said agent or otherwise, such a question can only be addressed in the said suit.
83. In my humble view, the two [2] critical issues, which underpin the instant suit, touch on and/or concern execution, enforcement and/or implementation of the terms of the decrees which were issued in the previous [former] suits. Consequently, the said issues cannot be agitated on the basis of a separate and distinct suit, pitting the same parties or nearly the said parties.
84. Pertinently, I come to the conclusion that the issues raised at the foot of the instant suit cannot be agitated in the manner propagated by the Plaintiffs. On the contrary, the entire suit is barred and prohibited by the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 laws of Kenya.
85. For brevity, the provisions of Section 34 [supra] states as hereunder;

34. Questions to be determined by court executing decree

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

86. Furthermore, it suffices to point out that the import and tenor of the provisions of Sections 34 [supra] have hitherto been highlighted and elaborated upon by the Court of Appeal in the case of *Kuronya Auctioneers v Maurice O. Odhoch & another* [2003] eKLR, where the court held and stated as hereunder;

Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails.



87. Consequently and taking into account the ratio [holding] highlighted in the decision [supra], there is no gainsaying that the question as pertains to whether the management agent has been discharged from executing the terms of her mandate [if any] in accordance with the consent order or otherwise, can only be addressed and resolved in the suit that gave rise to that consent.
88. Simply put, the issue in this respect is one touching on execution and/or discharge of the orders that were issued at the foot of the consent and hence the same [issues] cannot be agitated vide a separate and distinct suit.

ISSUE NUMBER 3- Whether the suit beforehand is barred by the doctrine of res-judicata and by extension Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

89. Other than the import and tenor of the provisions of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya; which has been discussed in the preceding paragraphs, there is a question as to whether the issues raised at the foot of the instant suit are Res-Judicata.
90. To start with, it is not lost on the court that there was a previous suit, namely, Nairobi HCC No. 475 of 2006; wherein there was a dispute as pertains to their identities of the trustees and membership of Kairi Kiruri & Partners Welfare Group.
91. Instructively, the said suit [details in terms of the preceding paragraph] was heard and disposed of culminating into a consent which was issued on the 16th October 2008.
92. For the sake of completeness and brevity, the terms of the consent were as hereunder;
- i. That prayer [a] of the plaint be and is hereby allowed and a declaration issued that the Defendants are registered as trustees over land parcel number 209/2820/26 and plot number 173 Section 1 Eastleigh on their own behalf and on behalf of the Plaintiffs and other members whose identity and shareholding is as follows.
93. Suffice it to point out that beneath [attached to] the consent there is a comprehensive table containing the names of all the trustees and the general membership [Members] of the welfare group.
94. Notably and to my mind, the consent which was issued on the 16th October 2008 addressed and determined inter-alia
- a. The trustees of the welfare group.
- b. The General membership [Members] of the welfare group.
95. Arising from the foregoing, there cannot be any further debate as to who is and/or who is not a member of the said welfare group. In any event, where a particular member has since passed on, the administrators/administratrix [whichever the case] of the estate thereof, shall by operation of the Law of succession, Chapter 160, Laws of Kenya; become an automatic member.
96. Given the foregoing position, the question as to whether or not the 1st and 2nd Defendants are legitimate members or by extension trustees, is one that had hitherto been addressed and determined.
97. Other than the foregoing, there is also the invite by the Plaintiffs that this court does proceed to decree that M/s Mamuka Valuers [Management] Ltd as the duly appointed agents for purposes of managing the properties of the welfare group. However, the same Plaintiffs have posited elsewhere that the said management was duly appointed at the foot of the consent issued vide Nairobi HCC 475 of 2006; and which consent is stated to be still in existence.



98. Quiet clearly, the aspect of the suit that touches on and/or concerns [sic] the appointment of Mamuka Valuers [Management] Ltd is a question or issue which was directly and substantially dealt with in the previous suit.
99. To my mind, the various issues which color the instant suit were directly and substantially ventilated in the previous [former] suits and hence same [issues] cannot be agitated afresh.
100. Simply put, it is my finding and holding that the issues being agitated and canvassed at the foot of the instant suit are barred and prohibited by the Doctrine of Res-Judicata as espoused vide the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
101. Pertinently, the doctrine of Res-judicata [scope and tenor thereof], were elaborated upon and succinctly amplified by the Supreme Court of Kenya [the apex court] in the case of John Florence Maritime Services Ltd vs The Cabinet Secretary, Transport & Infrastructure [2021]eKLR, where the court held as hereunder;

57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:...

where a given matter becomes the subject of litigation in, and 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 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 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” [emphasis supplied].

58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case³/₄to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

- i. the matter in issue is identical in both suits;
- ii. the parties in the suit are the same;
- iii. sameness of the title/claim;
- iv. concurrence of jurisdiction; and
- v. finality of the previous decision.



59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:

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 v 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 v 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 face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment 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. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)
102. Without belaboring the point, it is my finding and holding that the issues being raised and canvassed at the foot of the current suit were directly and substantially canvassed and determined vide *Nairobi HCC No. 475 of 2006*; and hence the instant suit is barred by the Doctrine of Res-judicata.

Final Disposition:

103. Having analyzed the various thematic issues [details in terms of the preceding paragraphs], it is evident and apparent that the suit beforehand is not only premature and misconceived; but same is bad in law and legally untenable.
104. Nevertheless, before venturing to make the final orders, it is appropriate to mention and highlight two short issues. Firstly, the details of the trustees of the welfare group herein and the general membership [Members] thereof have hitherto been clarified by the court[s] in terms of the decree vide *Nairobi HCC No. 475 of 2006* and *ELC No. E018 of 2022 [OS]*.
105. Secondly, it is incumbent upon the trustees and the membership [whose details have been clarified] to convene and hold an Annual General Meeting [AGM]; and to address the myriad issues affecting the group, inter-alia, the sale and disposal of the suit properties.
106. Other than the foregoing observations [which are orbiter], the final orders of the court are as hereunder;



- i. The Application dated the 29th January 2024 is incompetent and same is hereby struck out.
- ii. The entire Suit vide Amended Plaint dated the 29th January 2024 is equally struck out for contravening inter-alia the provisions of Section 7 and 34 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
- iii. Costs of the Application and the Suit are hereby awarded to the 1st, 2nd and 3rd Defendants; and same [costs] shall be taxed by the Deputy Registrar.

107. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Juma Odek h/b Mr. S N Ng'ng'a for the Plaintiffs/Applicants

Ms. Lilian Nyagah for the 1st Defendant/Respondent

Mr. Paul Amuga for the 2nd and 3rd Defendants/Respondents

N/A for the 4th Defendant/Respondent

