IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 109 OF 2014

BETWEEN

LIVINGSTONE KUNINI NTUTU …..……. APPELLANT

VERSUS

COUNTY COUNCIL OF NAROK …….. 1ST RESPONDENT

OL KIOMBO LIMITED ……. 2ND RESPONDENT

ATTORNEY GENERAL …….....…….……. 3RD RESPONDENT

(Being an appeal from the Ruling and the Order from High Court of Kenya at Nairobi (Nyamweya, J.) dated 19th March, 2014

in

ELC No. 1565 of 2000)

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JUDGMENT OF THE COURT

1. By an application dated 12th March, 2009 brought under **sections 80**

& 3A of the **Civil Procedure Act, Order XLIV rule 1 (a) & (b), Order XXI rule 22 (2)** of the **Civil Procedure Rules** and **section 128 of the Registered Land Act** (now repealed), the 1st respondent sought the

following orders:

> ***"1.*** **……..**

2. ***The Honourable court be pleased to stay the execution of the consent judgment recorded between the respondent and the applicant herein but which did notcrystallize into a decree as required by law pending the hearing and determination of this application.***

3. ***That the Honourable court be pleased to stay the execution of its decree entered without the 1st defendant?s knowledge AND inhibit any dealing with the land pending the hearing and determination of this application and the intended constitutional reference to the High Court by the 1st defendant/applicant.***

4. ***The Honourable Court may also be pleased to inhibit any attempt to take over possession of the area NAROK/CIS MARA/TALEK/155 or in any other way, the dealing with the said parcel of land pending the hearing and determination of the 1st defendant/applicant?s intended constitutional reference to the High Court.***
5. ***The Honourable court be pleased to stay the execution of its decree entered against the 1st defendant/applicant without its knowledge and dated the 24th of November 2005.***

6. ***That the said consent judgment between the applicant and respondent and the decree entered fraudulently herein on the 24th of November 2005 against the 1st defendant in favour of the plaintiff/respondent be reviewed, varied, discharged set aside on any terms as this Honorable court and just and the defendant be granted leave to present his defense to the plaintiff?s claim on any date the court may deem fit and just.***

7. ***The costs of this application be provided for."***

2. It is appropriate that we first set out the nature of the case that gave rise to the impugned consent judgment that was sought to be reviewed, varied, discharged and/or set aside. By an amended plaint dated 18th December, 2000, the appellant who was the plaintiff in H.C.C.C. No. 1565 of 2000 at Nairobi, instituted suit against the 1st and 2nd respondents. He claimed that by Legal Notice No. 412/92 dated 28th October, 1992 the Minister for Tourism & Wildlife, in exercise of his powers under **section 7(1)** of the **Wildlife (Conservation and Management) Act, Cap 376,** declared, among others, the area of land in the Talek area of Narok District as having ceased to be part of the Maasai Mara National Reserve.

4. The said area (hereinafter referred to as **"the Talek degazetted area")** measures approximately 48 square kilometers. On 6th May, 1997 by a Notice dated 6th May, 1997 made under **section 5** of the **Land Adjudication Act,** the Land Adjudication Officer, Narok, declared the Talek degazzetted area as an adjudication section.

5. Following the said declaration the adjudication exercise was carried out and completed. A total of 155 parcels of land resulted from the adjudication exercise. The appellant was registered as the absolute proprietor of one of the parcels of land known as **TITLE No. CIS-MARA/TALEK/155** (hereinafter referred to as **"the suit land"**), which measures 1610 Hectares (4000 acres) or thereabout.

6. The suit land was so registered on 14th October, 1997 in accordance with the provisions of the Registered Land Act, Cap 300 (now repealed).7. Falling within and forming part of the suit land is a portion of land known as L.R. No. 13325 measuring approximately 9.035 Hectares (20 acres) which had been leased by the 1st respondent to the 2nd respondent for a term of 33 years from 1st July, 1984. The appellant contended that with effect from 14th October, 1997 when the suit land was registered in his favour, all rights, interests and privileges that the 1st respondent had hitherto enjoyed in, over or in relation to the leased portion of land was *ipso facto* extinguished and the same were instead vested in him. The 1st respondent had however continued to exercise rights of the leased land, including rent, tariffs, royalties and fees and other revenue for the use and occupation of the leased land by the 2nd respondent.

8. The appellant contended that he was suffering loss and damage and sought:

"1. A declaration that with effect from 14th October, 1997, all rights interests and privileges hitherto enjoyed or had by the 1st defendant in or over or in relation to the leased portion, including but not limited to, reversionary interest, levying or collection of rent, tariffs, royalties, fees or other revenue were, and each of them, was extinguished and the same were vested in the Plaintiff instead.

2. ***A permanent injunction restraining the 1st defendant whether by itself, its servants or agent or otherwise howsoever from purporting to exercise such purported rights, interests or privileges and in particular from demanding, levying or collecting from the 2nd defendant or any other person rent, tariffs, royalties, fees or any other revenue whatsoever in respect of the use, occupation or enjoyment of the leased portion or any part thereof.***

3. ***An account of all the rent, tariffs, royalties, fees and other revenue collected or received by the 1st defendant from the 2nd defendant and any other person since 14th October, 1997 for the use, occupation or enjoyment of the leased portion or any part thereof.***

4. ***An order for the payment by the 1st defendant to the plaintiff of all the moneys received or found due to the plaintiff on the taking of such accounts.***

5. ***Interest on the amount found due to the plaintiff at such rate for such period as this honourable court shall think fit.***

6. ***The costs of the suit.***

7. ***Further or other relief."***

9. In its statement of defence, the 1st respondent through its advocates,

Kenta Moitalel & Company, contended that the notice of establishment of an adjudication section dated 5th May, 1997 was never implemented and was indeed retracted, cancelled and/or modified vide a notice of establishment of an adjudication section (correction of Declaration Notice No. LA/9/4/187 dated 6th May, 1997 on 31st July, 1997.

10. The 1st respondent stated that no demarcation and or adjudication was actually carried out in respect of the suit land. It added that the suit land did not constitute part of the alleged Talek degazetted area.

11. The 1st respondent further stated that no proper invocation of the provisions of the Land Adjudication Act would have been commenced and carried out in respect of the suit land without the mandatory cessation and/or degazettement **Management) Act.** The registration of the appellant as the absolute proprietor of the suit land was null and void, the 1st respondent contended.

12. By way of a counter claim, the 1st respondent reiterated that the

appellant's acquisition of the suit land was unconstitutional and contra

statute and sought a declaration accordingly. It also sought cancellation of

the said registration.

13. In its lengthy amended statement of defence, the 2nd respondent averred that the 1st respondent had, pursuant to its powers under **section 145(w) and 146(d)** of the **Local Government Act**

established the Mara Game Reserve. The 1st respondent in exercise of its powers under **section**

117. of the **repealed Constitution of Kenya** and **section 13** of the **Trust Land Act** granted the 2nd respondent within the National Reserve the area and site of parcel No. 13325.

14. The 2nd respondent supported the 1st respondent's contention that the appellant's acquisition of title to the suit land was unlawful and by way of a counterclaim sought a declaration that Title Number CIS-MARA/TALEK/155 is void and an order to cancel the said title.

15. The 3rd respondent also took the 1st and 2nd respondents' lines of defence and sought similar orders in respect of the suit land.

16. On 13th May, 2002, M/**S Wambuu Wainaina & Co. Advocates** took over the conduct of the 1st respondent's case from Kenta Moitalel & Co.

Advocates and they got into negotiations with the appellant's advocates,

M/S Kilukumi & Co. advocate. As a result, a consent judgment between the appellant and the 1st respondent was entered on 13th May, 2002. The consent judgment was on the following terms:

> ***"1. That the 1st defendant?s statement of defence and counter claim dated 7th October 2000 be and is hereby struck out.***
>
> 2. ***That judgment be and is hereby entered against the 1st defendant and in favour of the plaintiff in terms of prayers 1 and 2 of the Amended Plaint dated and filed in court on 18th December, 2000.***
>
> 3. ***That the plaintiff do hereby waive prayers 3, 4 and 5 of the Amended Plaint dated and filed in court on 18th December, 2000.***
>
> 4. ***That the suit be and is hereby marked as settled as between the plaintiff and the 1st defendant with no order as to costs."***

A decree was thereafter issued.

17. The 2nd respondent was not happy with the said consent judgment and on 7th June, 2002 filed an application seeking a review and/or setting aside of the same. The application was subsequently withdrawn.

18. Going back to the 1st respondent's application of 12th March, 2009 that was filed through **Okongo Omogeni & Co. Advocates**, the main ground in the application was that the appellant was in the process of executing the decree emanating from the consent judgment. It was argued that the basis of the 1st respondent's move to settle the suit with the appellant was an unconstitutional and illegal resolution by the 1st respondent which had since been vacated and/or overturned by the 1st respondent.

19. The alleged unconstitutionality and illegality may be summarized as follows:

a. ***That the suit property was the subject of a constitutional trust held by the 1st defendant pursuant to the provisions of section 115 of the previous Constitution, and has never prior to its registration in the plaintiff?s name been adjudicated under the provisions of the Land Adjudication Act, 284 as stipulated by section 116 of the previous Constitution.***

b. ***That the area purportedly represented by the suit property has never, pursuant to the provisions of section 7 subsection (1) of the Wildlife (Conservation and Management) Act, been excised from the trust land of the Maasai Mara National Reserve, and that its registration was not preceded by any resolution of the National Assembly approving the excision thereof as required under section 7 subsection (2) of the Wildlife (Conservation and Management) Act.***

c. ***That the area of the suit property did not form part of Gazette Notice No. 145 of 1984 under which the Minister for Tourism and Wildlife expressed his intention to declare the Talek excision area of cessation area to cease to be part of the Trust Land of the Maasai Mara National Reserve.***

d. ***That the area of the suit property did not form part of the Minister?s cessation order published vide Legal Notice 412 of 1992 made under section 8 of the Wildlife (Conservation and Management) Act, and that area had therefore not been excised from the Trust Land of the Maasai Mara Reserve and therefore was still held in trust by the 1st defendant in terms of section 115(2) of the previous Constitution.***

e. ***That the councilors of the 1st defendant in office at the time the consent judgment was entered acted in an unconstitutional, reckless and negligent manner, without due diligence and in total breach and disregard of their mandate and/or duty as trustee in purporting to yield or cede the proprietorship of the area of the suit property to the plaintiff herein without adjudication or setting apart.***

20. The 1st respondent's application was supported by an affidavit sworn

by **Joseph Mutua Malinda,** the Clerk and Chief Executive/ Administrative Officer. There is also another affidavit sworn by **Pius Mwinzi Mutemi** who was a clerk of the 1st respondent.

21. Mr. Malinda explained that the suit land was unlawfully curved out of the trust land of Maasai Mara National Reserve following Gazette Notice No. 145 of 1984 published by the Minister for Tourism and Wildlife which notified of the Minister's intention to declare that the Talek area would cease to be part of the Maasai Mara National Reserve. He added that the suit land was not and had never been part of the area subject of the cessation order or any other area of the Maasai Mara National Reserve. The suit land was fully and completely outside the gazetted area and that was confirmed by a boundary survey report dated 8th June, 2005, he added.

22. Mr. Malinda further explained that the suit land was unconstitutionally, illegally and fraudulently hived off the Maasai Mara National Reserve without due regard to the mandatory provisions of the Constitution of Kenya, the Land Adjudication Act, the Registered Land Act, the Registration of Titles Act, the Trust Land Act and the Wildlife (Conservation and Management) Act.

23. The deponent stated that following Legal Notice No. 412 of 1992 declaring the cessation of the Talek area from Maasai Mara National Reserve, a notice from the establishment of an adjudication section was declared whereby individual titles were to be registered in favour of the residents of the said area and registered as such under the Land (Group Representatives) Act, Cap 287. The adjudication exercise was undertaken and completed on 5th June, 1997 and thereafter certificate of finality was signed on 29th August, 1997 by the Director of Land Adjudication and Settlement. Subsequently, the Principal Land Adjudication Officer forwarded the adjudication register to the Chief Lands Registrar for registration and issuance of title deeds. The Principal Land Adjudication Officer forwarded a total of 154 parcels covering a total area of 4521.81 acres with parcel number 154 being the only one created through

determination of the only objection raised during the objection period.

24. The 1st respondent contended that the suit land was allegedly created by an adjudication report

dated 25th June, 1997, coincidentally on the same date on which parcel number 154 was created. Following various enquires made, the Director of Land Adjudication and Settlement declared the suit land a nullity.

25. Mr. Malinda stated that there had been conspiracy and fraudulent acts by the previous members of the County Council of Narok and the appellant to compromise the High Court matter. The objective was to have the 1st respondent cede ownership of the trust land comprising the suit land to the appellant, albeit in an unconstitutional and illegal manner. He stated that on 10th of May, 2002 there was a resolution of an illegally and/or irregularly constituted meeting of Finance and General Purposes Committee that purported to instruct another advocate, other than the one who was on the record at the time, to enter into a consent with the appellant. Mr. Malinda set out a plethora of alleged irregular activities that were done by previous members of the 1st respondent which, in his view, showed that the resolution to enter into a consent to resolve the High Court matter was irregular. Several former councilors of the 1st respondent also swore affidavits stating that the meeting of Finance and General Purposes Committee of 10th May, 2002 was improperly convened and that no resolution to enter into a consent with the appellant was reached. When all these illegalities surrounding the aforesaid resolution were unearthed, the 1st respondent rescinded the said resolution and instructed another firm of advocates to move to the High Court to set aside the impugned consent judgment.

26. Although the 2nd respondent opposed the 1st respondent's application, it decided not to take a position when the application came up for hearing before the High Court. It however stated that it had instituted judicial review proceedings in **Nairobi High Court Misc. Application No. 1271 of 2002** seeking to quash the resolution and decision of the 1st defendant that led to entry of the consent judgment between the appellant and the 1st respondent. However, the 2nd respondent reached an amicable settlement with the appellant in which the appellant acceded to the 2nd respondent's request for a grant of a lease over a portion of the suit land. In view of that settlement, a consent judgment pursuant thereto was recorded on 16th November, 2005 between the appellant and the 2nd respondent. The 2nd respondent's position was that it had continued to enjoy the fruits of the settlement with the appellant and did not wish to be involved with the 1st respondent's approbation and reprobation in the matter.The 3rd respondent supported the 1st respondent's application. In an affidavit sworn by **Edward Kakoi**, State Counsel in the Attorney General'

Office, the 3rd respondent stated that while the High Court suit was pending, the Government through the District Land Registrar, Narok, revoked the title to the suit land vide Gazette Notice No. 2934 of 2010. Upon the said revocation the appellant filed a judicial review application seeking to quash the decision to cancel the title.

28. The appellant opposed the 1st respondent's application and filed an affidavit sworn on 28th April, 2011 stating that he was the registered sole proprietor of the suit land. He further stated that the registration of the suit land and issuance of the title thereto was a first registration which is indefeasible in any way outside the provisions of the Registered Land Act.

29. Mr. Ntutu further stated that the 1st respondent had on its own motion and volition decided to enter into a consent with him, stating that it was the 1st respondent's then advocate, **Mr. Wambuu Wainaina**, who contacted his advocate so that they could record the impugned consent judgment. He contended that Mr. Wainaina advocate was properly on record for the 1st respondent and had ostensible authority to enter into the said consent with him.

30. Mr. Ntutu further deponed that when the 2nd respondent commenced proceedings in **Nairobi High Court Miscellaneous Application No. 1271of 2012** seeking to review the 1st respondent's

decision made on 10th May, 2002 and quash the 1st respondent's minutes of the said date, the 1st respondent opposed the application and defended its decision to settle the suit between itself and the appellant. The 1st respondent strongly contended that the appointment of **Mr. Wambuu advocate** to represent it was unanimously made by the council and for good reasons. A letter dated 22nd May, 2002 by one **J.L. ole Kayuni**, the then clerk of the 1st respondent addressed to its former advocates, Kenta Moitalel & Company, was relied upon by **Mr. Ntutu** to demonstrate that the 1st respondent's Finance and General Purpose Committee duly passed the resolution of 10th May, 2002 vide which **Mr. Wainaina advocate** was appointed and duly instructed to record the consent.

31. In the aforesaid judicial review matter, **Khamoni, J.** upheld the 1st respondent's position and held, *inter alia*, that the resolution of 10th May, 2002 and the decision to enter into the judgment was duly passed by the 1st respondent and consequently the 1st respondent was estopped from changing its position. **Mr. Ntutu** contended that the issue of legality of the meeting of 10th May, 2002 and/or the resolution made thereunder is *res judicata* in view of the decision of **Khamoni, J.** He also cited the doctrine of judicial estoppel which, he contended, demands that where a party assumes a certain position in a legal proceeding and succeeds in attaining that position, may not thereafter, simply because its interests have changed, assume a contrary position, especially if the new position is prejudicial to an opponent.

32. The appellant further stated that he had separate severable and distinct claims against each of the respondents and could therefore compromise his claim with any of the respondents to the exclusion of the others. He added that the 1st respondent's application had been brought after inordinate and inexplicable delay of seven years and urged the court to dismiss it.

33. In her considered ruling, Nyamweya, J. identified two main issues for determination that is:

1. ***Whether the consent judgment and subsequent decree could be set aside and or reviewed, and***

2. ***Whether stay of execution of the decree could be granted.***

For reasons stated in her ruling and which shall be examined in due course, the learned judge set aside the consent judgment and granted the 1st respondent leave to file and serve a statement of defence to the appellant's claim within 30 days from the date of the ruling.

34. Being aggrieved by the said ruling the appellant preferred this appeal. The memorandum of appeal consists of 14 grounds of appeal which are as follows:

"1. The learned judge erred in law and fact in finding that the decree issued on 24th November 2005 had fatal errors on its face and therefore defective.

2. ***The learned judge erred in law and fact in holding that***

Justice Khamoni did not make substantive findings in Miscellaneous Application No. 1271/2002 as to the regularity or otherwise of the resolutions made by the 1st defendant to compromise the suit.

3. ***The learned judge erred in law and fact by placing reliance on repealed and obliterated provisions of the old Constitution to set aside her consent judgment.***

4. ***The learned judge erred in law and fact by failing to appreciate that the matters in controversy in the suit became res judicata upon entry of the consent judgment.***

5. ***The learned judge erred in law and fact by failing to appreciate that the issues of***

constitutionality and illegality forming the key pillar of her verdict were expressly pleaded by the 1st respondent and deliberately compromised.

6. ***The learned judge erred in law and fact by holding that the acquittal of the appellant on forgery charges in CMC Criminal case no. 2157/2003 did not conclusively address the issue of the constitutionality and the illegality of the registration of the suit property.***

7. ***The learned judge erred in law and fact by failing to find and hold that the 1st respondent?s review application did not meet the legal criteria for grant of such applications.***

8. ***The learned judge erred in law and fact by failing to appreciate that none of the grounds justify variation and rescission of a contract such as a consent judgment was proved to the required standard of proof.***

9. ***The learned judge erred in law and fact in failing to take into account the conduct of the 1st respondent which precluded and estopped the 1st respondent from resiling from the consent judgment.The learned judge erred in law and fact in failing to find that a title deed issued under the Registered Land Act (now repealed), was indefeasible under the then governing section 143 thereof even on the grounds of fraud or any other illegality, hence the consent judgment was properly grounded on the law as it existed at the time of entry.***

11. ***The learned judge erred in law and fact in failing to find that there was inordinate delay in moving the court to review the consent judgment.***

12. ***The verdict of the learned judge was erroneous for being ultra vires the provisions of section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, 2010.***

13. ***The learned judge erred in law and fact in considering the 1st respondent?s complaint of unconstitutionality and illegality of the consent judgment under the ground of „other sufficient reasons? when no such ground had been pleaded and specified in the grounds in support of the 1st respondent?s notice of motion seeking review.***

14. ***The learned judge erred in fact and in law in finding and holding that the appellant had not disputed nor broughtany evidence to controvert the evidence presented by the 1st respondent that showed that property CIS- Mara/Talek/155 was not part of the land excised for adjudication by Legal Notice No. 412 of 1992."***

35. This Court was urged to allow the appeal and set aside the ruling delivered on 19th March, 2014 and substitute therefore an order dismissing the notice of motion dated 12th March, 2009 and uphold the decree dated 24th November, 2005.

35.36. The appellant and the 1st respondent filed written submissions and briefly highlighted the same. The 2nd and 3rd respondents did not file any submissions and both adopted the submissions made by the 1st respondent. We shall consolidate some of the grounds of appeal and determine the appeal on four broad areas as hereunder:

i. **<u>Scope and Jurisdiction of Review of Judgments/Rulings (Grounds 2, 3, 6, 7, 8, 9, 11, 12, 13 & 14)</u>**

37. In Misc. Application No. 1271 of 2002 the 2nd respondent sought an order of certiorari to quash the decision of the County Council of Narok (1st respondent) made on 10th May, 2002 and recorded as minute number 18/2002 together with the decision recorded as minute number 25/2002 made on the same day by the Finance and General Purposes Committee of the County Council of Narok. The 2nd respondent also sought an order of prohibition to prohibit the 1st respondent from implementing or otherwise taking

any proceedings or actions founded on the decisions recorded in the aforesaid minute number 25/2002 as well as the decision recorded in minute number 18/2002. The third relief sought was an order of mandamus to revoke the aforesaid minutes of the 1st respondent **„so as to avoid breach of the constitutional trusteeship that the County Council has over L.R. 13325 leased by the County Council of Narok to Olkiombo Limited under the Registration of Titles Act under Grant Number I.R. 4453 and to ensure that High Court Civil Case No. 1565 of 2000 (Livingstone Kunini Ntutu (plaintiff) v The County Council of Narok, Olkiombo Limited (defendants) and the Attorney General (third party) proceeds to full hearing unless properly compromised by the parties thereto.?**

38. **Khamoni, J.** dismissed the application in its entirety but did not make specific findings as to whether the suit land had procedurally been acquired by the appellant. However, the learned judge pointed out that it was well within the 1st respondent's mandate to compromise its interest in any suit. We may point out that in that particular suit, the 1st respondent opposed the 2nd respondent's application and contended that its decision made on 10th of May, 2002 and the subsequent resolutions were lawful.

39. In view of that ruling, the appellant is right in saying that Nyamweya, J. erred in law in holding that **Khamoni, J.** did not make substantive findings in Misc. Application No. 1271 of 2002 as to the regularity or otherwise of the resolutions made by the 1st respondent on 10th May 2002 to compromise the suit. **Khamoni, J.** held:

> ***"…….it was High Court Civil Case No. 1565/2000 which gave rise to the existence of two impugned decisions. That is a civil suit, involving personal and not public interest. As such I do not see how it can be said that a party in such a suit has no right to compromise his rights. This is private litigation and if any other party in the same suit is aggrieved, it is the aggrieved party?s right to proceed and make appropriate application or otherwise take appropriate step in the same suit. They do not go to public litigation where judicial review is found. Litigants in private litigation are the best guardians of what is in their best interest and compromising a suit is one aspect of that."***

40. In other words, the learned judge, having considered the reasons expressed by the 1st respondent in compromising the appellant's claim against it, and the manner in which it was done, found nothing unlawful about it. We will reproduce a few paragraphs of the affidavit sworn by the 1st respondent, through **Joseph Kayioni**, its Clerk, on 19th December, 2002 in opposition to the 2nd respondent's application.

> ***"35. That on or about 13th May, 2002 and pursuant to the resolution adopted by the full council I instructed the firm of Wambuu Wainaina & Co. Advocates the interested party herein to act for the respondent with instructions to seek a settlement of this suit as between the respondent and the plaintiff in Nairobi HCCC No. 1565 of 2000 on specified conditions as resolved by the Council of the respondent.***

41. ***That the proceedings of the respondent in its Finance staff and General Purposes Committee meeting and the full council held on 10th May, 2002 were conducted in accordance with the Local Government Act and the standing orders and nothing was done outside the legal powers conferred by the Local Government Act on the 1st respondent.***

42. ***That the 1st respondent as a litigant and a party to the civil proceedings has the power and capacity to decide on how best to proceed with civil proceedings including the power to enter into consent judgments and that power cannot be curtailed by another party to the litigation who wishes the respondent to give him company all along in a litigation likely to end up against the respondent and expose it to astronomical expenses and costs."***

Khamoni, J. agreed with the 1st respondent's contention and dismissed the application that sought to quash the 1st respondent's decision to compromise the appellant's suit against it. That was a conclusive finding on a legal issue. We do not therefore agree with the holding by Nyamweya, J. that:

> ***"The doctrine of res judicata cannot therefore apply as the judge made no substantive findings as to the regularity or otherwise of the resolutions made by the 1st defendant."***

42. If any of the parties was of the view that **Khamoni, J.** had erred in law in reaching the aforesaid conclusion, it was at liberty to appeal against that decision but not to seek a review. **Mulla: The Code of Civil Procedure**, Volume III Pages 3652-3653 states as follows:

> ***"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure ……***
>
> ***The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."***

43. This Court has on countless occasions pronounced itself on the scope of review of decisions. In **JOHN KAMAU RUHANGI v KENYA REINSURANCE CORPORATION, Civil Appeal No. 208 of 2006**, the Court

held:

> ***"It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal."***

44. Going back to the application that was before **Khamoni, J.** the 1st respondent is a body corporate with perpetual succession and a common seal. It has power to sue and to be sued. See **section 28(3)** of the **Local Government Act**, now repealed. **Section 263(1)** of the repealed **Act** gave a local authority power to prosecute or defend any legal proceedings. Having initially decided to defend the appellant's suit in the High Court, later on the 1st respondent formally decided to compromise the suit for the reasons stated in its affidavit sworn by its clerk, Mr. Kayioni.

That was a decision lawfully made by a body corporate with perpetual succession and was therefore binding on the local authority, its successors and all other parties thereto. The 1st respondent acted through its committee in making the decision. The decision to compromise the suit was therefore procedurally passed and it was binding upon the local authority and its successors. See **section 143** of the **Local Government Act.** It would be absurd to imagine that every time a new county government is elected and comes to power it would be allowed to renege on decisions and/or resolutions made and implemented by officials who were in office earlier.

45. The review judge cited the case of **BROOKBOND LIEBIG LTD v MALLYA [1975] E.A. 266** and held that "a court can review a consent judgment on the same grounds that would justify the varying and

rescinding of a contract between parties." The grounds, she stated, are instances where: **"the consent judgment was obtained by fraud or collusion; or by an agreement contrary to the policy of the court; if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts; or in general for a reason which would enable the court to set aside an agreement."**

46. The learned judge did not find that any of the above factors were applicable in the consent judgment that the court had been urged to review. Instead, the learned judge set aside the consent judgment because of "concerns raised as to the constitutionality and legality of the registration of the suit property", which she said constituted sufficient reason. With great respect to the learned judge, those cannot be grounds for reviewing and setting aside a consent judgment. The jurisdiction of the court on review is donated by **section 80** of the **Civil Procedure Act** and operationalised by **order 45** of the **Civil Procedure Rules, 2010**. **Order 45 rule 1 (1)** states"

> ***"Any person considering himself aggrieved –***
>
> a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> b. ***by a decree or order from which no appeal is hereby allowed, and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay."***

48. The scope of review is thus well circumscribed, see **PANCRAS T. SWAI v KENYA BREWERIES LTD, [2014] eKLR**. In that matter, the court emphasized that a review must be strictly confined to the aforesaid factors. And commenting on the words, **"for any sufficient reason",** the court held that the words **"must be viewed in the context of firstly; section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."**

49. Nyarangi, J.A., in **KIMITA v WAKIBIRU, [1975] KLR 317** held that:***"The words „for any other sufficient reason? have therefore to be construed ejusdem generis with the ground of discovery to which I have referred. See Tanitalia Ltd. v Mawa Handels Anstalt, (1951) E.A. 215. In other words that the words, „for any other sufficient reason? in order XLIV rule 1 are hence confined to a reason which would be regarded as akin to those specified immediately previously in the order: see Ahmed Hassan Nivlji v Shirinbai Jadavi (1963) E.A. 217, Yusuf v Nokrach (1971) E.A. 104.***

> ***I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words „for any other sufficient reason? need not be analogous with the other grounds specified in the order."***

50. The allegations of unconstitutionality and illegality in the process leading to the registration of the suit property in favour of the appellant were all along within the knowledge of the 1st respondent and had been raised by the 2nd respondent in its application that was dismissed by

Khamoni, J. In any event, they are issues of law that could only be addressed through the appellate process and not in an application for review. The review judge erred in law by extending the jurisdiction of the court in dealing with the application that was before her.

ii. **Res Judicata & Estoppel (Grounds 4 & 5)**

51. The appellant's counsel submitted that the consent judgment, having been sanctioned by the court, constituted a determination of the matters in controversy contained in the pleadings and the agreement. He cited the case of **KENYA COMMERCIAL BANK v MUIRI COFFEE ESTATE LIMITED & 4 OTHERS, Civil Appeal no. 100 of 2010** where this Court held that a consent judgment determines the issues which are subject of the controversy in a matter and those issues cannot be re-litigated once settled. See also **section 7** of the **Civil Procedure Act**.

52. In **POP-IN (KENYA) LIMITD & 3 OTHERS v HABIB BANK A.G. ZURICH, [1990] eKLR**, this Court held that:

> ***"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end except when "legal ingenuity is exhausted".***

53. The 1st respondent's advocate tried to draw a distinction between a

consent judgment entered into between the parties disposing of a suit and a judgment delivered by a court. In his view, since the alleged unconstitutionality and illegality in the said consent was occasioned by the parties and their respective advocates and not by the trial judge, it was in order for the court to review the judgment. We do not agree. This Court in **KENYA COMMERCIAL BANK v MUIRI COFFEE LIMITED & OTHERS**

(supra) held that in an application for review, it does not matter that the judgment was by consent and not on merit after trial. In our view, therefore, the matters in controversy in the suit became *res judicata* upon entry of the consent judgment. The 1st respondent was estopped from reneging on the consent and attempting to found a new cause of action. It is the 1st respondent who approached the appellant for a settlement of the suit between them and as a result the appellant lost the opportunity to prosecute his case against the 1st respondent. And when the 2nd respondent attempted to quash the said consent, the 1st respondent vehemently opposed the 2nd respondent's application. In the circumstances, the 1st respondent, in seeking to set aside its own freely negotiated consent, was a classical case of approbating and reprobating which the law frowns upon. The 1st respondent was estopped from so doing.

(iii) Fatal Error on the Face Of the Decree (Ground 1)

54. **Mr. Kilukumi**, learned counsel for the appellant, submitted that the learned judge erred in fact and in law in finding that the decree issued on 24th November, 2005 had fatal errors on its face, being three different dates, reference to two consents and a notice of discontinuance by the 3rd respondent and was therefore defective. He said that the said issue had not been raised by the 1st respondent as one of the grounds in support of its application. In any event, counsel added, the conclusion arrived at by the learned judge is erroneous because a decree can invariably make reference to different dates as it sets out recitals or memorials of significant events leading to its issuance. Counsel added that in relying on a ground that had not been raised by the 1st respondent, the appellant was denied an opportunity to make his views on the issue.

55. **Mr. Kamunda**, learned counsel for the 1st respondent, argued that the learned judge was right in finding that the decree dated 24th

November, 2005 had fatal errors on its face. He said that the trial judge relied on the provisions of **Order xx** of the **Civil Procedure Rules** (now repealed) and **Order 22** of the **Civil Procedure Rules, 2010** as to how a decree ought to be drawn. Mr. Kamunda urged the court to uphold the judge's finding regarding the decree.

56. We have looked at the impugned decree at pages 421-423 of the record of appeal. It is true that the decree contains several dates. Those dates refer to the dates when various events took place in court. 17th November, 2005 is the date when the decree was given and 24th November, 2005 is the date when the decree was issued. **Order 21 rules 7** of the **Civil Procedure Rules, 2010** requires a decree to agree with a judgment and further, a decree should contain the number of the suit, the names and description of the parties, particulars of the claim, the leave granted, the date of the day on which the determination was made, among others. All these events take place on different dates.

57. The learned judge cited this Court's decision in **SIMON KINYUA v EVEREADY BATTERIES (K) LIMITED, Civil Appeal (Application) No. 281 of 2004** where the Court held that the format of a decree as provided in the Civil Procedure Rules must be adhered to but we do not agree that the Court held that a decree bearing two dates is fatally defective. A proper reading of the said ruling shows that the court appreciated that a decree may show the date when a judgment was written by a particular judge and the date that it was delivered by a different judge on behalf of the one who wrote it. That *per se* would not make a decree defective.

58. We agree with the appellant that the decree issued on 24th November, 2005 is not defective for the reasons that it bears different dates. We also find that as there were two different consents that were recorded in the same matter, the decree had to reflect the same. And since one of the parties had discontinued its suit against the others, that aspect was also rightly reflected in the decree. We allow the first ground of appeal.

(iv) Defeasibility of the Appellant?s Title To The Suit Property

59. The appellant's title was a first registration of the suit property.

Section 143 of the **repealed Registered Land Act** which was then in force stated:

> ***"143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."***

The learned review judge held that the appellant could not rely on the provisions of the Land Adjudication Act and the repealed Registered Land Act as these Acts were subject to the Constitution, and cannot have been intended to undermine due process and the rule of law.

60. Under the repealed Constitution, trust lands were administered on behalf of the local communities by county councils. Under **section 116** of the **repealed Constitution,** when a title to any parcel of land is registered otherwise than in the name of the county council, the land ceased to be trust land, the appellant's counsel submitted. That argument was expressly admitted by the 1st respondent. The suit property, having been registered in the name of the appellant, whether rightfully or fraudulently, ceased to be trust land. There is a plethora of decisions that have restated the indefeasibility of titles obtained on a first registration. They all reiterate that such registration cannot be defeated, even upon proof of fraud.

In **NGATUNI MURUGU v MUKINDIA MAGAMBO & 4 OTHERS [2013] eKLR,** this Court held; *inter alia:*

> ***"Lastly, by section 143(1) RLA, a first registration such as obtained by the respondents herein could not be rectified for fraud or mistake. Any person suffering damage by such registration which cannot be rectified has only a claim for indemnity against the Government (section 144(1) RLA)."***

The learned judge, we find, erred in failing to give effect to the express provisions of **section 143(1)** of the **Registered Land Act.**

61. We have said enough, we believe, to demonstrate that this appeal must and is hereby allowed. The ruling delivered by the review court on 19th March, 2014 is set aside. We substitute therefor an order dismissing the Notice of Motion dated 12th March, 2009. The decree dated 24th

November, 2005 is upheld. The 1st respondent shall bear the appellant's costs of this appeal as well as the costs in the High Court. We award no costs to the 2nd and 3rd respondents as they were basically supporting the 1st respondent's application.

Dated and Delivered at Nairobi this 24th day of April, 2015.

R.N. NAMBUYE

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR