



**Oloololo Game Ranch Limited v Ilekarekeshe Group Trust Registered Trustees & another
(Environment & Land Case 15 of 2021) [2024] KEELC 4894 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 15 OF 2021
EM WASHE, J
JUNE 20, 2024
(FORMERLY BAROK ELC CASE NO. 29 OF 2020)
(FORMERLY NAIROBI ELC CASE NO. 395 OF 2019)**

BETWEEN

OLOOLOLO GAME RANCH LIMITED PLAINTIFF

AND

**THE ILEKAREKESHE GROUP TRUST REGISTERED TRUSTEES 1ST
DEFENDANT**

ABERCROMBIE & KENT LIMITED 2ND DEFENDANT

RULING

1. The 1st Defendant (hereinafter referred as “the Applicant”) filed a Preliminary Objection dated 30.11.2020(hereinafter referred to as “the Present P.O”) against the 2nd Defendant’s (hereinafter referred to as “the Respondent”) Application dated 02.12.2019 on the following grounds: -
 - a. That this Honourable Court lacks the requisite jurisdiction to entertain the matters set out in the said Application as the same go beyond this Court’s constitutionally defined mandate and require it to either sit on appeal on decisions of Courts of concurrent jurisdiction or review the decision of a court of superior jurisdiction.
 - b. That the matters set out in the said Application are res judicata as the 2nd Defendant admits that Judgement was entered against it by this Honourable Court and its subsequent Appeal to the Court of Appeal was dismissed.
 - c. That the said Application is has been lodged for a collateral purpose and is otherwise an abuse of the Court process.



2. The 1st Defendant/Applicant therefore sought to have the 2nd Respondent's application dated 02.12.2019 dismissed with costs.
3. The present P.O was duly served on the 2nd Defendant/Respondent who expressed its desire to oppose the same.
4. The present P.O being contested, the Court directed that it should be canvassed by way of written submissions to which the 1st Defendant/Applicant filed his submissions on 25.04.2024 while the 2nd Defendant/Respondent filed their submissions on the 29.04.2024.
5. The Court having been supplied with the parties submissions as outlined hereinabove will proceed to briefly outline each of the parties pleadings so as to bring out the issue for determination in the present P.O.

Applicant's Submissions.

6. The 1st Defendant/Applicant in their submissions dated 13.03.2024 gave a long history of the various litigations between the parties herein in various courts.
7. To begin with, the 1st Defendant/Applicant submitted that the property known as LR.No.Narok/Transmara/Oloololo/1 was alienated and registered in the name of the Plaintiff herein way back on 22nd June 1993.
8. The 2nd Defendant/Respondent being aggrieved by the alienation and registration of the property known as LR.No.Narok/Transmara/Oloololo/1 to the Plaintiff herein filed a suit known as Nbi Hccc No.4090 of 1994 to challenge the registration of the Plaintiff herein as the lawful and rightful owner of the said property.
9. The 2nd Defendant's/Respondent's suit known as Nbi Hccc No. 4090 of 1994 was duly handled by a Court of competent jurisdiction struck out on 23/05/1995.
10. The 2nd Defendant/Respondent then proceeded to file a Notice of Appeal against the Ruling of 23.05.1995 but subsequently withdraw the same on the 13.06.1996.
11. In the year 1995, the Plaintiff filed the present suit against the 2nd Defendant/Respondent of the present P.O.
12. The present suit was handled by various Honourable Judges until 20.12.1999 when a Judgement was pronounced in determination of the said proceedings.
13. The 2nd Defendant/Respondent being aggrieved by the Judgement pronounced on the 20.12.1999 proceeded to file a an Appeal before the Court of Appeal which was registered as Nbi Court Of Appeal Civil Appeal No. 153 of 2002.
14. However, the 2nd Defendant/Respondent filed a Notice of withdrawal dated 20.04.2007 seeking to withdraw the entire Appeal filed against the judgement pronounced on the 20.12.1999.
15. After the 2nd Defendant's/Respondent's Notice of Withdrawal dated 20.04.2007 was endorsed by the Court of Appeal, they filed an Application which was registered Nbi Court of Appeal Civil Application No.Nai 258 of 2007 (UR 153/2002) seeking to set aside the said Notice of Withdrawal from the said Court.
16. The said Application known as Nbi Court of Appeal Civil Application No.NAI 258 of 2007 (UR 153/2002) was listed for hearing before a three-judge bench on the 18.10.2007 but the 2nd Defendant/



Respondent was unable to prosecute the same and consequently and the said Application was dismissed on the 02.03.2020.

17. According to the Applicant, the dismissal of Respondent's NBI Court of Appeal Civil Application No. NAI 258 of 2007 (UR 153/2002) legally meant that the Notice of Withdrawal dated 20.04.2007 remained as a document properly filed before the Court and the 2nd Defendant's/Respondent's Appeal known as Nairobi Court of Appeal No.153 of 2002 had indeed been withdrawn.
18. The Applicant's submission is that once the 2nd Defendant's/Respondent's Appeal known as Nairobi Court of Appeal No. 153 of 2002 was withdrawn, there was no litigation between the parties herein and the Judgement pronounced on the 20.12.1999 settled all the issues for determination in the present proceeding.
19. Be as it may, the National Land Commission caused to be published a Gazette Notice (Vol.CXXI-No.27) dated 01.03.2019 in which they revoked the Plaintiff's title and purported to revert back the property known as LR.No.Narok/Transmara/Ololo/1 to the Respondent herein.
20. The Plaintiff after the publication of the Gazette Notice dated 01.03.2019 filed the proceedings known as Narok ELC Constitutional Petition No. 5 of 2019 between Ololo Game Ranch Limited-versus-The National Land Commission & Ilkerekesh Group Trust & 4 Others.
21. The 2nd Defendant/Respondent herein who was also the 2nd Respondent in Narok ELC Constitutional Petition No.5 of 2019 filed a Cross-Petition on similar grounds as those contained in their pending Application dated 02.12.2019.
22. The Plaintiff's prayers in the proceeding know as Narok ELC Constitutional Petition No. 5 of 2019 were subsequently granted through a Judgement pronounced on the 16.04.2021 and the National Land Commission's Gazette Notice (Vol.CXXI-No.27) was quashed.
23. On the other hand, the 2nd Defendant's/Respondent's Cross-Petition in the proceeding known as Narok ELC Constitutional Petition No. 5 of 2019 was struck out through the Ruling pronounced on 14.11.2019.
24. The 2nd Defendant/Respondent being aggrieved with the Ruling of the Court issued on the 14.11.2019 striking out their Cross-Petition filed an Appeal in the Court of Appeal as well as an Application which was recorded as Nairobi Court of Appeal Civil Application No. 129 of 2019 (UR 92/19) to stay the further hearing of Narok ELC Constitutional Petition NO. 5 of 2019.
25. Unfortunately, the Court of Appeal declined to certify as urgent the 2nd Defendant's/Respondent's Application in the proceeding known as Nairobi Court of Appeal Civil Application No.129 of 2019 (UR 92/19) and so far, the Applicant has not taken any steps to prosecute the said Application and/or Appeal.
26. Based on the above facts and grounds, the 1st Defendant/Applicant raised an Objection on a point of law that this Court does not have jurisdiction to entertain the Respondent's pending Application dated 02.12.2019 for the reason that such an act would be to re-open an already concluded suit as per the Judgement and Decree issued on the 20.12.1999.
27. Secondly, even if the Court made a finding that it had jurisdiction to proceed and hearing the Applicant's pending Application dated 02.12.2019, it still did not have the powers to grant the said prayers sought in the pending Application dated 02.12.2019 as the same issues had been placed before the Court through a Cross-Petition in the proceeding known as Narok ELC Constitutional Petition No. 5 of 2019 and dismissed on the 14.11.2019.



28. Consequently, the pending Application dated 02.12.2019 is in fact Res-Judicata to the Cross-Petition filed by the 2nd Defendant/Respondent in the proceedings known as Narok ELC Constitutional Petition No. 5 of 2019.
29. Lastly, the 1st Defendant/Applicant submitted that even if the Court was to proceed and entertain the pending Application dated 02.12.2019, it would lack jurisdiction to grant the Orders sought therein as it would require it to sit as an Appellate Court and/or review the entire Judgement yet it is *functus officio*.
30. The 1st Defendant/Applicant therefore concluded their submissions with a prayer that the present P.O be upheld and the 2nd Defendant's/Respondent's pending Application dated 02.12.2019 be struck out forthwith.
31. The 2nd Defendant/Respondent in his submission confirmed the existence of the various proceedings with the Plaintiff and the 1st Defendant/Respondent.
32. The 2nd Defendant/Respondent nevertheless stated that the present P.O has been filed by a person that is not a party to the pending Application dated 02.12.2019.
33. Similarly, the Respondent submitted that in fact the firm of Kemboy Law Advocates who filed by the present P.O had ceased acting for the Plaintiff and the 1st Respondent herein through a Ruling pronounced on the 22.02.2023.
34. As to the substantive P.O, the 2nd Defendant/Respondent further submitted that this Court has the jurisdiction to re-open any dispute filed in the Land Division of the High Court of Kenya before the promulgation of the 2010 Constitution of Kenya.
35. The 2nd Defendant/Respondent pointed out to this Court that the pending Application dated 02.12.2019 has been filed pursuant to the provisions of Article 40 and 159 (2) of the Kenyan Constitution, 2010.
36. Further to that, the 2nd Defendant/Respondent cited the provisions of the Section 30 of the Environment & Land Court Act, No. 19 of 2012 in support of Article 40 and 159 (2) of the Kenyan Constitution, 2010.
37. In essence, the 2nd Defendant/Respondent was of the considered view that this Court has both the Constitutional and Statutory powers to entertain the pending Application dated 02.12.2019 and/or powers to grant the orders sought therein.
38. On the issues of Res-Judicata, the 2nd Defendant/Respondent submitted that both the Consent recorded on the 30.07.1998 and the final judgement pronounced on the 20.12.1999 had been arrived at through a mistake in the proceedings and thereby denying the 2nd Defendant/Respondent herein an opportunity to ventilate their issues by way of viva voce evidence.
39. The 2nd Defendant/Respondent stated that the Consent recorded in Court on the 30.07.1998 in actual sense breached their Constitutional Rights as provided under Article 25 (C), Article 27 (1), Article 47, Article 40, Article 48 and Article 50 of the Kenyan Constitution, 2010.
40. The 2nd Defendant/Respondent sought to rely on the grounds adduced in the pending Application dated 02.12.2019 to prove that indeed a Mistake and Fraud had taken place in the previous proceedings resulting to the Judgement pronounced on the 20.12.1999 and therefore, this Court should look at the injustice rather than the principles of Res-Judicata in the strict sense of it.



41. On the issue of whether the pending Application dated 02.12.2019 was seeking a review or not, the 2nd Defendant/Respondent submitted that the application is not one premised on the provisions of Order 45 of the *Civil Procedure Rules*, 2010.
42. The 2nd Defendant/Respondent pleaded that the pending Application dated 02.12.2019 was brought through the provisions of Section 1 (A & B) and Section 3 A of the *Civil Procedure Rules*, 2010 which are inherent to this Court for purposes of ensuring that justice is achieved.
43. The 2nd Defendant/Respondent was of the view that the Consent recorded on the 30.07.1998 was entered into without their consent and/or instructions and therefore the same was entered into by either a mistake and/or fraud hence only just that the same be set-aside and/or vitiated.
44. In concluding their submissions, the 2nd Defendant/Respondent again reminded the Court to look at the bigger issues of constitutionality and legality of how the Plaintiff acquired the property known as LR.No.Narok/Transmara/Ololo/1 within all the relevant Government offices with a view of arriving at a just decision regarding the adjudication process concerning the above-mentioned property.
45. The Plaintiff and the 1st Defendant/Applicant filed a Rejoinder to the 2nd Defendant's/Respondent's submissions on the 30.04.2024 which in summary refuted both the factual and legal interpretation of the 2nd Defendant/Respondent and reiterated the original facts and/or legal provisions and interpretations contained in the initial submissions filed on the 25.04.2024.
46. The Court has carefully and thoroughly gone through the present P.O, the Submissions of the parties and the authorities therein and finds the issues for determination in the present P.O to be rather straight forward as outlined hereinbelow.

Issue No. 1- What is the legal status of the present file?

Issue No.2- Is the firm of Kemboy Law Advocates the lawful representatives of the 1st respondent?

Issue No.3- Does this court have the jurisdiction to entertain an application to review, vary, discharge and/or set-aside the judgement pronounced in the year 1999 after an appeal was preferred to the court of appeal?

Issue No. 4- Is the present application dated 02.12.2019 res-judicata to the counter-claim filed in narok elc constitutional petition no.5 of 2019?

Issue No 5 - Is the present p.o merited?

47. The Court having outlined the issues for determination hereinabove, the same will now be discussed as provided for below.

Issue No. 1- What is the legal status of the present file?

48. The first issue for determination is the legal status of the proceedings known as Kilgoris ELC Case No. 15 of 2021 which were formerly known as Narok ELC Case No. 29 of 2020 and also Nairobi High Court Civil Case No. 3457 of 1995.
49. It is not in dispute by any of the parties that the proceedings currently known as Kilgoris ELC Case No.15 of 201 which were formerly known as Narok ELC Case No. 29 of 2020 and also Nairobi High Court Civil Case No. 3457 of 1995 were concluded through the Judgement pronounced on the 20.12.1999.



50. The Plaintiff and the 1st Respondent/Applicant submitted that the 2nd Defendant/Respondent filed an Appeal against the Judgement and Decree issued on the 20.12.1999 which was recorded as Nairobi Court of Appeal No. 153 of 2002.
51. However, the 2nd Defendant's/ Respondent's Appeal No. Nairobi Court of Appeal No. 153 of 2002 was withdrawn by a Notice of Withdrawal dated 20.04.2017.
52. The fact that the 2nd Respondent's/Respondent's Appeal known as Nairobi Court of Appeal No. 153 of 2002 was withdrawn has not be challenged at all.
53. In essence, this Court hereby makes a finding that the present suit known as Kilgoris ELC Case No. 15 of 2021 and formerly known as Narok ELC Case No.29 of 2020 and also Nairobi Law Court No. 3457 of 1995 was concluded and/or fully determined through the Judgement pronounced on the 20.12.1999.
54. So far, the Judgement and Decree issued on the 20.12.1999 has not been set-aside and/or reviewed by any Competent Court of Law and is binding between the parties herein.

Issue No.2- Is the firm of Kemboy Law Advocates the lawful representatives of the 1st respondent?

55. In this issue, the 2nd Defendant/Respondent is seeking for the present P.O to be struck out for the reason that the 1st Defendant/Applicant is not represented by the firm of Kemboy Law Advocates pursuant to an Order made on the 22.02.2023.
56. In addition to the above, the 2nd Defendant/Respondent stated that the present P.O was filed by a party who was not affected and/or required to participate in the pending Application dated 02.12.2019.
57. Indeed, the present P.O was filed by the firm of Kemboy Law Advocates way back on 30.11.2020.
58. A perusal of the proceedings which took place on the 22.03.2023 shows a pronouncement of a Ruling relating to an Application dated 14.03.2021.
59. According to the Ruling pronounced on the 22.03.2023, the Court upheld the Consent allowing the change of advocates representing the Plaintiff from the firm of Chelanga & Ssociates To The Firm of Kemboy Law Advocates.
60. There is no proceeding which indicates that the firm of Kemboy Law Advocates were ceasing to act for the 1st Defendant/Applicant on the 22.03.2023.
61. In fact, the understanding of the Court regarding the Ruling dated 22.03.2023 was that the firm of Kemboy Law Advocates was taking over from Chelanga & Associates in terms of representing the Plaintiff herein and not ceasing to act for the 1st Defendant/Applicant.
62. In essence, the firm of Kemboy Law Advocates has full and proper authority to act for the 1st Defendant/Applicant herein.
63. The second aspect of this issue is whether it was irregular for the 1st Defendant/Applicant to file the present P.O while the pending Application dated 02.12.2019 was only against the Plaintiff herein.
64. It is true that the pending Application has been filed by the 2nd Defendant/Respondent against the Plaintiff only.
65. However, it is clear that the 1st Defendant/Applicant has been a party to this suit since its inception in the year 1995.



66. The 2nd Defendant's/Respondent's pending Application dated 02.12.2019 is seeking to review, vary and/or set-aside the final judgement pronounced on the 20.12.1999.
67. The 1st Defendant/Applicant being one of the parties that is bound by the final judgement pronounced on the 20.12.1999 is no doubt going to be affected by the review, variation and/or setting-aside of this final judgement.
68. The 2nd Defendant/Respondent can not therefore be right to say that the pending application dated 02.12.2019 does not concern the 1st Defendant/Applicant or he can not participate in the same.
69. The 1st Defendant/Applicant has a right to be heard as enshrined under Article 47 & 50 of the Kenyan Constitution, 2010 and filing of the present P.O against the pending application dated 02.12.2019 is one that can not be deemed irregular as alleged by the 2nd Defendant/Respondent.
70. In conclusion, the Court hereby makes a finding that the present P.O is properly filed by the 1st Defendant/Applicant and should be considered on its merits.

Issue No.3- Does this court have the jurisdiction to entertain an application to review, vary, discharge and/or set-aside the judgement pronounced in the year 1999 after an appeal was preferred to the court of appeal?

71. The third issue for determination is actually the gist of the present P.O by the 1st Defendant/Applicant.
72. The 1st Defendant/Applicant is challenging the Court's jurisdiction to entertain and/or hear an Application seeking to review, vary, discharge and/or set-aside the final judgement that was pronounced on the 20.12.1999.
73. For clarity purposes, the 2nd Defendant's/Respondent's pending Application dated 02.12.2019 seeks for the following Orders; -
 - a. The Honourable Court be pleased to set-aside the Consent Order recorded herein on the 30th July 1998.
 - b. The Honourable Court be pleased to review, vary, discharge and/or set-aside the consequential judgement delivered on the 20.12.1999.
 - c. That upon granting Orders 4 & 5 this case be heard by the parties adducing *viva voce* evidence.
 - d. The Honourable Court be pleased to grant such further and/or other Orders as the Court may deem fit, justice and expedient.
 - e. Costs of this application be in the cause.
74. The 2nd Defendant's/Respondent's pending application is founded under the provisions of Order 9 (b) of the Civil Procedure Rules, 2010, Section 13 of the Environment & Land Court Act, No. 19 of 2011, Section 1 (A & B) & 3 A of the Civil Procedure Act, Cap 21, Sections 3,10,13,14,19, 23 & 24 of the Land Adjudication Act, Cap 284, Section 30 of the Registered Land Act, Cap 300, Section 28 & 80 of the Land Registration Act (Amendment) 2016 and Sections 2,10,25 (c), 27(1), 40,47,48,50 (1), 63, 159 (2) (b) & 259 of the Kenyan Constitution, 2010.
75. The first point of law that the 1st Defendant/Applicant has raised on the issue of jurisdiction is that the 2nd Defendant/Respondent's pending application dated 02.12.2019 is seeking to set-aside the judgement of 20.12.1999 and thereafter re-hear the entire suit after setting aside the Interlocutory Consent recorded on 30.07.1998.



76. The 1st Defendant/Applicant further submitted that the 2nd Defendant/Respondent duly participated in the proceedings before the judgement dated 20.12.1999 was pronounced and thereafter being aggrieved by the said judgement proceeded to file an Appeal before the Court of Appeal known as Nairobi Court of Appeal Civil Appeal No. 153 of 2002.
77. The 2nd Defendant's /Respondent's substantive Appeal known as Nairobi Court of Appeal No.153 of 2002 was subsequently marked as Withdrawn after his Application known as Nairobi Court of Appeal Civil Application No. Nai 258 of 2007 (UR 153/2002) seeking to vacate the said Notice of Withdrawal dated 20.04.2017 was dismissed and the Court of Appeal confirmed the endorsement of the Notice of Withdrawal dated 20.04.2007.
78. In essence, once the 2nd Defendant/Respondent opted to prefer an Appeal against the judgement of this Court pronounced on the 20.12.1999, then the superior Court became *functus officio* and can not entertain any further proceedings before it.
79. The 2nd Defendant/Respondent on the other hand submitted that the Court indeed has jurisdiction to entertain the pending Application dated 02.12.2019 based on the provisions of Section 1 & 3 of the Civil Procedure Act, Cap 21, Section 13 of the Environment & Land Court, No. 19 of 2011 and Article 2,10,25,27,40,47,48,50,63,159,162 & 259 of the Kenyan Constitution, 2010.
80. The 2nd Defendant's/Respondent's view was that this Court is obligated to look at the bigger picture of justice and not restrict itself to the narrow issue of jurisdiction as it would lead to a miscarriage of justice.
81. The 2nd Defendant/Respondent pleaded that the present Application is not brought under Order 45 of the Civil Procedure Rules, 2010 which deals with application for Review but rather through Section 1 & 3 of the Civil Procedure Act, Cap 21 which grants inherent jurisdiction on the Courts of Law to look at substantive justice.
82. In other words, the 2nd Defendant/Respondent submitted that based on the provisions of Section 1 & 3 of the Civil Procedure Act, Cap 21, the provisions of Section 13 of the Environment & Land Act, No. 19 of 2011 spelling out the mandate and jurisdiction of the Court as well as the provisions of the Kenyan Constitution, 2010, this Court has the appropriate jurisdiction to entertain and determine the pending application dated 02.12.2019.
83. The issue for determination is whether or not this Court has the jurisdiction to entertain the pending Application dated 02.12.2019 filed by the 2nd Defendant/Respondent.
84. The 1st Defendant's/Applicant's point of law is that this Court does not have the jurisdiction to entertain the pending Application dated 02.12.2019 in view of the fact that the 2nd Defendant/Respondent preferred an Appeal to the Court of Appeal against the entire judgement pronounced on the 20.12.1999.
85. The 1st Defendant's/Applicant's view is that the 2nd Respondent invoked the jurisdiction of the Appellate Court through the Court of Appeal Case Number 153 of 2002 and therefore cannot purport to come back to the Superior Court to set aside the Judgment which he appealed against.
86. The 1st Defendant's/Applicant's submission was that upon determination of the 2nd Defendant/Respondent Appeal known as Nairobi Court of Appeal Civil Appeal of Number 153 of 2002 then the litigation emanating from the superior court came to a close and was finalised in totality.
87. The 2nd Defendant /Respondent on the other hand is of the view that this court has the Jurisdiction to entertain the pending application dated 02.12.2019 by virtue of the inherent jurisdiction provided for



- under section 1 and 2 of the [Civil Procedure Act](#) CAP 21 as read with Section 13 of the [Environment and Land Act](#) Number 19 of 2011 and supported by the provisions of the Kenyan [Constitution](#) 2010
88. The question that this court now seeks to understand is what is the true intention of the 2nd Respondent/Defendant in seeking the orders contained in the pending application dated 02.12.2019 against the Judgement pronounced on 20.12.1999.
89. Can this court or does this court have the Jurisdiction to consider the 2nd Defendant's/Respondent's Application in view of the determination made by the Court of Appeal in the proceedings known as Nairobi Court of Appeal Civil of Appeal Number 153 of 2002.
90. The 1st Defendant /Applicant submits that the 2nd Defendant's/Respondent's pending application dated 02.12.2029 offends the principal of finality in litigation by seeking to review and set aside a Judgement which concluded this particular suit and which on Appeal no orders were issued to upset the Judgement pronounced by this court.
91. The 2nd Defendant/Respondent is of the view that this court has the inherent jurisdiction to relook at the manner and or procedure that was applied during the hearing of a matter and if it is satisfied that such procedure and manner in which the court undertook the hearing is not just, can in exercise of its jurisdiction to ensure justice is achieved, review and/or set aside the final Judgement pronounced therein.
92. Jurisdiction is usually provided for through [the Constitution](#) and Statutory provisions contained in our Legislation not forgetting the pronouncement by the Courts of Law.
93. The [Civil Procedure Act](#), Cap 21 specifically provides the manner in which a party can invoke the jurisdiction of the Court while seeking for various orders.
94. With specific reference to the 2nd Defendant's /Respondent's pending application dated 02.12.2019, the order being sought for is to set aside the Judgement pronounced 20.12.1999.
95. Order 21 of the [Civil Procedure Rules](#) 2010 does not provide for setting aside a Final Judgement of the Court.
96. The only available remedy under the [Civil Procedure Rules](#),2010 in challenging a final judgment pronounced in compliance of Order 21 of the [Civil Procedure Rules](#),2010 is through a review under Order 45 of the [Civil Procedure Rules](#), 2010 or an Appeal under Section 65 of the [Civil Procedure Act](#), Cap 21.
97. In the 2nd Defendant's /Respondent's pending Application dated 02.12.2019, the substantive prayer is for a review, variation, discharge and /or setting aside of the Final Judgement pronounced on 20.12.1999.
98. The question then that arises is whether this Court has Jurisdiction to entertain an application for review of a Final Judgement after an appeal has been lodged.
99. The provisions of Order 45 Rule 1 state as follows; -
- “ (1) Any person considering himself aggrieved
- a. By a decree or an order from which an appeal is allowed, but from no appeal has been preferred: or
- b. A decree or order from which no appeal is preferred.”



100. The interpretation of this Court as regards to Order 45 rule 1 is that a Party is allowed to file an Application for Review after pronouncement of a final Ruling and/or Judgement instead of preferring an Appeal.
101. In the alternative, a party who does not have a right of Appeal or the applicable procedure does not have an Appeal process can file an Application for Review before the same forum that determined the matter.
102. The pending application dated 02.12.2019 is one which has been filed after the 2nd Defendant / Respondent elected to file an appeal to the court of Appeal which is known as Nairobi Court of Appeal Civil Appeal Number 153 of 2002.
103. In other words, the 2nd Defendant/Respondent elected and in fact exercised the Right of Appeal after the judgement pronounced on the 20.12.1999 but now seeks to Review the same judgement after the Appeal was concluded by the Court of Appeal.
104. In the case of *Serephen Nyasani Menge-versus- Rispah Onsase* (2018) eKLR, the Court made the following observations as relates to Order 45 and Section 80 of the *Civil Procedure Rules*, 2010; -

“Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.

Subrule (2) of Order 45 of the *Civil Procedure Rules* further makes the matter clearer...In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.

In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal.

The applicant wants to have a second bite of the cherry.

She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against.

Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error.

That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.”

105. In the Court of Appeal decision of *Gerald Kithu Muchanje-versus- Catherine Muthoni Ngare & Another* (2020) eKLR, stated as follows; -

“The applicant was aggrieved by the judgment of the trial court.

Under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review.



In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment.

The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review.

In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure rules*, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order.

One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed.

And having exercised the right to a review, she lost the right of appeal against the same order ...” See also the case of *Multichoice (K) Ltd v Wananchi Group (K) Ltd & 2 Others* (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.”

106. From the interpretation of this Court as pertained to the provisions of Order 21 regarding pronouncements of Judgements, Order 45 relating to review and section 65 and 75 of the *Civil Procedure Act*, Cap 21, it is clear that where a party elects to file an appeal after a Final Judgement, then such party cannot come back to the same court and seek a review of the same Judgement.
107. The 2nd Defendant/Respondent filed an appeal before the Court of Nairobi Court of Appeal Civil Of Appeal Number 153 of 2002 and therefore, cannot purport to come back and file an application for review as contained in the pending application dated 2.12.2019.
108. This Court does not have the Jurisdiction to entertain such an application for review of a final Judgement after the aggrieved party opted to file an appeal in the Court of Appeal.
109. In conclusion, this Court finds that it does not have Jurisdiction to entertain such an application for review regardless of the provisions of sections 1 and 3 of the *Civil Procedure Act*, Section 13 of the *Environment and Land Act* Number 19 of 2011 or any Constitutional Provisions as outlined by the Applicant.

Issue No. 4- Is the present application dated 02.12.2019 res-judicata to the counter-claim filed in narok elc constitutional petition no.5 of 2019?

110. The other issue is whether the 2nd Defendant’s /Respondent’s pending application dated 02.12.2019 is *Res Judicata* the cross petition filed in the proceeding known as Narok ELC Constitutional Petition No.5 of 2019.
111. The 1st Defendant / Applicant herein produced the Judgment of Narok ELC Petition No.5 of 2019 in which the cross petition was dismissed.
112. According to the 1st Defendant /Applicant, the grounds, facts and issues contained in the cross petition filed by the 2nd Defendant /Respondent in Narok ELC Constitutional Petition No.5 of 2019 are the same as those pleaded in the pending application dated 02.12.2019.



113. In other words, the 1st Defendant/Applicant submitted that the ruling pronounced on 14.11.2019 striking out the Cross-Petition by the 2nd Defendant/Respondent fully determined the issues that have been pleaded in the present pending application dated 2.12.2019.
114. An application dealing with the issue of Res-Judicata is one which requires the Court to look at the issues between the previous application and/or suit against the subsequent application and/or suit.
115. It is only once the Court is satisfied that the issues determined in the previous Application/Suit and again raised in the subsequent Application and/or suit, then it can apply the principle of *Res-Judicata*.
116. A Preliminary Objection being a point of Law should be raised only when the facts in support of the same not contested and/or challenged.
117. However, if a party is raising Preliminary Objection on the issue of Res-Judicata between two different and distinct files, the proper procedure is to file a substantive Application and attach the pleadings and determination of the previous file so that the Court gets the benefit of perusing the issues and determination of the previous file and compare them with the new file and draw its own independent determination on the issue of *Res-Judicata*.
118. Unfortunately, in this present P.o, the Applicant did not present the pleadings of the Cross Petition in Narok ELC Constitutional Petition No.5 of 2019 to enable the Court peruse and determine if the issues therein were same as those in the present pending Application.
119. The net effect is that this Court is not able to confirm on its own motion whether or not the issues raised by the 2nd Defendant/Respondent in the cross petition are similar to the ones raised in the pending application dated 02.12.2019.
120. It would therefore be prejudicial to declare the pending application dated 01.12.2019 *Res-Judicata* in the absence or before this court goes through the pleadings in the Cross-Petition filed in Narok ELC Constitutional Petition No.5 of 2019.
121. In conclusion, this declines to make a finding that the pending application dated 02.12.2019 is Res-Judicata to the cross petition filed in Narok ELC Constitutional Petition No.5 of 2019.

Issue No 5 - Is the present P.O merited?

122. Based on the determination of Issue No. 3 hereinabove, this Court is clear that it does not have Jurisdiction to entertain an application for review the final judgment when the aggrieved party had elected to prefer an appeal to the Court of Appeal.
123. To this end, the 1st Defendant/Applicant's present P.O is merited and therefore upheld by this Court.

Issue No 6 - Who bears the costs of the present P.O?

124. On the issue of costs, it a settled principle that costs follow the event.
125. The 1st Defendant /Applicant has succeeded in the present Preliminary Objection then costs should be awarded against the 2nd Defendant/Respondent.

Conclusion

126. In conclusion, the court hereby makes the following orders as appertains the Preliminary Objection dated 30.11.2020.
 - A. That the preliminary objection dated 30.11.2020 be and is hereby upheld.



- B. The 2nd defendant's /respondent's pending application 2.12.2019 is hereby struck out for lack of jurisdiction to entertain the same.
- C. The 2nd defenadant/respondent shall bear the cost of the present preliminary objection dated 30.11.2020

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH OF JUNE 2024.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr Ngeno

Advocate For The Plaintiff: Mr. Kere

Advocate For The 1st Defendant/applicant: Mr. Kere

Advocate For The 2Nd Defendant/respondent: N/a

