**Changi & another v Cabinet Secretary for Lands, Public Works, Housing and Urban Development & 4 others (Environment and Land Constitutional Petition E022 of 2023) [2024] KEELC 4706 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4706 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E022 OF 2023**

**EK MAKORI, J**

**JUNE 6, 2024**

**IN THE MATTER OF: ARTICLES 1, 391), 10, 22, 23, 40, 48, 50(1), 162 (2) (A) 165 (5), 232, 258, AND 259 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS ND FREEDOMS UNDER ARTICLES 1, 2, 3(1), 10, 201, 232, AND 259 (1) OF THE CONSTITUTION OF KENYA, 2010ANDIN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 43, AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: PLOTS NUMBERS 803 AND 891 MIKAHANI/MAWEMABOMU/ CHONYI ADJUDICATION SECTION IN KILIFI DISTRICT UNCONSTITUTIONAL, ILLEGAL, UNLAWFUL, WRONGFUL ACTIONS BY THE 1ST RESPONDENT IN AWARDING THE WHOLE OF THE PETITIONERS' PLOT NUMBER 803 AND A PORTION OF PLOT NUMBER 891 MIKAHANI/MAWEMABOMU/CHONYI ADJUDICATION SECTION IN KILIFI DISTRICT TO THE 3RD RESPONDENT**

**AND**

**IN THE MATTER OF: DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF INTERPRETATION, ENFORCEMENT, AND PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**CHEMBE KATANA CHANGI ..... 1ST PETITIONER**

**JAPHETH SAID CHEMBE ..... 2ND PETITIONER**

**AND**

**CABINET SECRETARY FOR LANDS, PUBLIC WORKS, HOUSING AND URBAN DEVELOPMENT ..... 1ST RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 2ND RESPONDENT**

**JAMES MWATELA MBAJI ..... 3RD RESPONDENT**

**THE ATTORNEY GENERAL ..... 4TH RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 5TH RESPONDENT**

## RULING

1. 1st, 2nd, 4th, and 5th Respondents have raised Preliminary Objection dated 5th July 2023 and filed on 6th July 2023:

   i. This court lacks jurisdiction to hear the application dated 6th June 2023 and the petition filed herein.

   ii. The Petition is time-barred.

   iii. That the Petition is res judicata Malindi HC 39/2006 Chembe Katana Changi v Minister of Lands and Settlement & 4 Others where the Petitioner sought similar orders.

   iv. The Petitioner lacks the necessary locus standi to institute and prosecute this petition.

2. Parties canvassed the Preliminary Objection through written submissions. After reviewing the materials and submissions placed before me, the Court will frame the issues for its determination as follows: whether the Preliminary Objection as raised meets the threshold for the same as enunciated in Mukisa Biscuits v West End Distributors Ltd [1969] EA 696 at page 700. Whether this petition is time-barred. Whether this suit is res judicata. Whether the Petitioners have locus standi to sustain the same. Who will bear the costs of the proceedings thus far?

3. As held by Law JA. in Mukisa Biscuit Case (supra):

   > "...so far as I'm aware, a preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

4. The thrust of a Preliminary Objection rests squarely on the jurisdiction of this Court, as held by Nyarangi JA., in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:

   > "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for

a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

5. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a Court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL (Civil Suit E021 of 2021)* [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

> " The Supreme Court in Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others cited the leading decision on Preliminary Objections, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. [1969] EA 696, where the Court held as follows:
>
> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is like what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".
>
> 8. The Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR made the following observation as relates to Preliminary Objections:
>
> "... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

6. The issues flagged here by the 1st, 2nd, 4th, and 5th Respondents are that this petition filed is time-barred, res judicata, Malindi High Court Civil Suit No. 39 of 2006: Chembe Katana Changi v Minister for Lands and Settlement & 4 Others [2014] eKLR and the petitioners lack locus standi to propagate it. I now turn to consider those issues.

7. The 1st, 2nd, 4th, and 5th Respondents submit that the Petitioners have listed the reliefs they seek from this Court in the petition. In summary, they seek an injunction, declaration of ownership, and judicial review orders. The 1st, 2nd, 4th, and 5th Respondents aver that an injunction may be sought together with declaratory orders in a civil suit relating to ownership of land. The judicial review orders can be sought in an appropriate judicial review application. The Petitioners are well aware that if they could have gone the two routes, either by filing a civil suit or judicial review proceedings, the same would be

time-barred, hence the choice to file the present petition seeking orders in the nature of the judicial review and those in the nature of a civil suit. In the petition, the Petitioners state as follows:

> " It is important to note that the Court of Appeal, in the said Ruling, confirmed that one of the clear ways of challenging the decision of the Minister under Section 29 of the *Land Adjudication Act* was through the judicial Review Process, which process can also be invoked through a Constitutional Petition Process, as is sought in this Petition."

8. 1st, 2nd, 4th, and 5th Respondents opine that the averment cannot be accurate. The same is misleading; judicial review is not concerned with the merits of a process, while a constitutional petition looks at its merit. The same can be seen by the reliefs sought in the current petition. They seek quashing of a decision by the District Commissioner, Kilifi. The Court is reminded of the wise saying - "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.". Meoli j.in Malindi High Court Civil Suit No. 39 of 2006: Chembe Katana Changi v Minister for Lands and Settlement & 4 Others stated:

> " Even assuming a normal suit was referred or applicable, the period for filing the proceedings challenging the Minister's decision should have been brought within twelve months in compliance with the *government proceedings Act*."

9. The 1st, 2nd, 4th, and 5th Respondents believe this multifaceted petition is also time-barred. As held in the above case, the decision of the Minister could not have been challenged in 2006. A question is posed as to whether it can be challenged now. The decision in Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR is quoted as applied with approval by Yano J. in the case of Kefa Were v Benedict Chepkering [2018] eKLR, where it was held that when a suit is time-barred, in whichever form it is renewed, it remains defeated by the operations of the Statute of Limitations.

10. The 1st, 2nd, 4th, and 5th Respondents state that the principle of res judicata is firmly anchored in the *Civil Procedure Act*, where Section 7 of the said Act states as follows;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

11. The 1st, 2nd, 4th, and 5th Respondents contend that a summary of the test for res judicata was restated in the case of Kefe Were (supra) as follows:

> " The test in determining whether a matter is res judicata was stated and summarised in Bernard Mugo Ndegwa -vs- James Nderitu Githae & 2 Others [2010] eKLR as follows:
>
> (1) that the matter in issue is identical in both suits;
>
> (2) the parties in the suit are the same;
>
> (3) sameness of the title/claim;
>
> (4) concurrence of jurisdiction; and
>
> (5) finality of the previous decision."

12. The 2nd, 4th, and 5th Respondents assert that a perusal of the annexed judgment in Malindi High Court Civil Suit No. 39 of 2006 reveals the main issue therein was on the decision of the District Commissioner, Kilifi, with regards to land adjudication in respect to Plots 803 and 891. The parties in the said case are the same as the parties herein. Meoli J., sitting at the Malindi High Court, dismissed the case on merit. This can be deduced from the words in paragraph 32 of the judgment:

> " In light of the foregoing, I am not satisfied that the plaintiff has made out his case before this court ....."

13. The 2nd, 4th, and 5th Respondents submit that this petition is res judicata Malindi High Court Civil Suit No. 39 of 2006: Chembe Katana Changi v Minister for Lands and Settlement & 4 others. That Yano J., in the case of Kefa Were(supra), had these wise words:

> " The doctrine of res judicata is important in adjudication of cases and serves two important purposes: (1) it prevents multiplicity of suits which would ordinarily clog the courts and cause parties to incur unnecessary costs to litigate and defend two suits which ought to have been determined in a single suit; and (2) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings."

14. On locus standi, the 2nd, 4th, and 5th Respondents aver that from the Petitioners' bundle and specifically the judgment in Malindi High Court Civil Suit No. 39 of 2006, Meoli J.found that just like the 3rd Defendant (3rd Respondent herein), the Plaintiff (1st Petitioner herein), too, had no locus standi for want of letters of administration to sustain the plaint and therefore cannot sustain the current petition.

15. The 2nd, 4th, and 5th Respondents firm that from the foregoing, it is clear that the suit properties belonged to the grandfather of the 1st Petitioner. The judgment also explained that an agent or a successor can represent one in adjudication disputes. However, in this case, the same is not applicable as the issue of locus standi is central to Court proceedings. One must be clothed with authority before instituting a suit. The decision in the case of Hawo Shanko v Mohamed Uta Shanko [2018] eKLR is cited. The importance and rationale of a party taking out limited grant of administration was well illustrated by the words of Justice Chitembwe J. as providing authority for one to appear in Court and controlling the flow of those claiming a benefit from the estate of a deceased.

16. The Petitioners aver that they seek to enforce their fundamental constitutional rights over the suit properties, which were taken away by flagrant abuse of *the Constitution*. Several authorities from the Superior Courts opine that when one is seeking to enforce a fundamental right, there is no limitation period—see, for example - Safepak Limited v Wambega & 11 others [2019] eKLR.

17. The Petitioners further aver that Article 22 of *the Constitution* confers:

> " (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

Article 23 of *the Constitution* clothes this Court with jurisdiction to grant appropriate reliefs to include:

> (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens

a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation and (f) an order of judicial review.

18. According to the Petitioners, they seek expansive orders as of right – as they do from this Court, including the grant of judicial review orders.

19. The Petitioners aver that res judicata does not apply in this matter. In Malindi Civil Suit No. 39 0f 2006, which went to the Court of Appeal in Civil Application No. 7 of 2015, both Superior Courts did not hear the merits of the case but decided that the procedure adopted was wrong and that the Petitioners were required to approach the Court pursuant to Section 29 of the *Land Adjudication Act* via judicial review application. That is precisely what they have done in this petition.

20. On the issue of locus standi, it is submitted that the 1st Petitioner participated in the proceedings before the Adjudication Committees and in the suit that ensued emanating therefrom in the High Court and the subsequent Appeal to the Appellate Court, the 2nd Petitioner is his son. They have all the rights under *the Constitution* and relevant laws to sue and protect their interests about the suit properties. This issue was addressed in the suit that ensued in the High Court, where it was held that the proceedings during adjudication are conducted in a quasi-judicial manner, with the understanding that any party can litigate representing his interest and those not before the adjudicative body, ensuring the inclusivity of the legal system.

21. The Preliminary Objection largely hinges on the findings of the Superior Court in Malindi Civil Suit No. 39 0f 2006, reported as Chembe Katana Changi v Minister for Lands & Settlement & 4 others [2013] eKLR and the subsequent appeal in the Court of Appeal in Civil Appeal 7 of 2015 reported as Chembe Katana Changi v Minister for Lands & Settlement & 4 others [2015] eKLR respectively.

22. Concerning the issues raised in the Preliminary Objection, in the Superior Court (Meoli J.), the claim by the plaintiff was crafted as follows:

> " a) An injunction restraining the Defendants either by themselves, servants and/or agents from implementing the decision of the first defendant altering the duplicate adjudication register to confirm with the determination/decision in the alleged appeals, certifying on the duplicate adjudication register that it has become final in all respects, sending details of the alterations and a copy of the certificate to the fifth defendant and/or specifically from registering the 3rd defendant and/or any other person as the owner of plot nos. 803 and 891 / Mikahani/Mawemabomu/Chonyi Adjudication Section 1 Kilifi.
>
> b) A declaration that all the proceedings conducted before the 1st defendant through the District commission, Kilifi, in alleged appeal Nos. 9 and 12 of 2002 and the decision made thereunder on the 22nd August 2005 were a nullity and an order setting the same aside and an Order restoring the original decision of the Land Adjudication Officer."

23. Among the issues framed for the decision of the Superior Court included:

> " That the disputes were brought before the Land Adjudication Committee and the Land Adjudication Board, and in respect of plot 803 an objection was preferred to Land Adjudication Officer, which were all decided in favour of the plaintiff. In respect of plot 891 Mwangolo Nyachi did not file an objection. The 3rd Defendant was not a party in these proceedings prior to filing an appeal in respect of the same before the 1st defendant.

11. The court must determine whether the proceedings conducted by the 1st Defendant were a nullity and should be set aside and whether present suit is bad in law, time barred and/or brought to secure judicial review through the back door.

12. The court has also been asked to determine whether the plaintiff is the owner of the plots number 803 and 891 within MIKAHANI/MAWEMABOMU/ CHONYI ADJUDICATION SECTION. The court declines the invitation to determine that issue for reasons that will soon become apparent."

24. The Superior Court proceeded to decide on the issues as hereunder:

"the parties conducted the hearing in a manner to suggest that this court was expected to determine the true owners of the land parcels and even the respective acreage. At some point, the parties seemed to agree that the dispute relating to plot 891 is about boundaries. The land in question is unregistered land, which was under the process of adjudication when these disputes arose. The law applicable does not donate any jurisdiction to the High Court to deal with the merits of adjudication disputes or allow parties to re-agitate their disputes before the High Court after exhausting the mechanisms under the *Land Adjudication Act*. The court cannot deal with boundary disputes, let alone ownership disputes regarding land under adjudication.

20. Along with this issue is the question of the efficacy of the remedies sought. Concerning the 1st, 2nd, 4th and 5th defendants Ouko J had in a considered ruling regarding a Preliminary Objection raised earlier on, stated that the remedy of injunction is not available, and I agree with that position. Moreover, the present suit was brought well after twelve months after the impugned decision. Hence as against the 1st, 2nd 4th and 5th defendants, it is definitely time barred by virtue of Section 16 of the *Government Proceedings Act*.

21. The scope of the court's jurisdiction in a matter of this nature is really supervisory, concerned with the legality and propriety of the quasi-judicial proceedings before the bodies. The court while exercising such jurisdiction cannot substitute its own findings for those of the inferior tribunal."

25. The Superior Court went further to state:

"The remedies in the Amended plaint are really disguised prayers for the issuance of prerogative orders of certiorari and prohibition, which, could in proper cases be available against all the defendants but not the 3rd defendant. Even if the court were to accept, courtesy of Article 159(2) of *the Constitution* that the said jurisdiction may be invoked through judicial review proceedings or otherwise and that these proceedings should not be defeated on a technicality (even though it appears the matter is more suited to judicial review) that would not be the end of the matter.

25. I suspect that the present approach was taken because the six-month window for bringing Judicial Review proceedings lapsed before the plaintiff could file his proceedings. There is no cure however for the fact that under Section 16 of the *Government Proceedings Act* the proceedings came too late as far as the 1st, 2nd, 4th and 5th defendants are concerned.

26. That aside, the only question this court could validly go into would be an issue as to the propriety of the proceedings before the minister. With regard to plot no. 803 the plaintiff's complainant is that the 3rd defendant had not been a party to previous proceedings, including the objection to the Land Adjudication Officer and was therefore not competent to lodge an appeal to the Minister.

27. The 3rd defendant's answer is that proceedings under the *Land Adjudication Act* are quasi-judicial, and the usual rules and procedure of the court will necessarily apply with modification. Neither the *Land Adjudication Act* nor the rules made thereunder, the Land Adjudication Regulations define a party. Both Section 29 of the Act and Regulation 4(1) appear to allude to the possibility of a person who was not involved in previous proceedings bringing an appeal before the minister."

26. The Superior Court, in its finality, concluded on the issues under discussion and which issues are also raised in this petition as follows:

> "With regard to the question of the authority of the 3rd Defendant to appear before the minister, I think that the Plaintiff too suffers the same handicap. In his evidence, he stated that he was claiming ownership of the suit land because he was entitled through his father and the ancestors before him. It cannot therefore lie in his mouth to demand letters of administration from the 3rd defendant whose basis of claim is not any different. Indeed, the *Land Adjudication Act* recognizes land claims based on Land customary law in respect of a tribe, clan, family or to a group."

27. On an appeal to the Court of Appeal for a stay pending appeal, The Court of Appeal, in its significant ruling, pointed out the elaborate dispute resolution mechanism laid out under the *Land Adjudication Act*. It emphasized that according to Section 29 of the Act, the last line of recourse under this process is an appeal to the Minister, for the time being, responsible for Land, whose decision is final. This is an established position in law (see. Nicholas Njeru v A-G & 8 Others [2013] eKLR). The Act even addresses the question of locus standi. Indeed, Section 29 of the Act and Regulation 4(1) thereunder hint at the possibility that even a person who was not involved in previous proceedings can bring an appeal before the Minister. Given these points, the Court of Appeal cast doubt on whether the question of locus standi could turn the intended appeal into an arguable appeal. It further clarified that beyond the Minister's order, neither itself nor the Superior Court below has the jurisdiction to entertain the issue further, save on a judicial review application, which was not the case herein. The Court of Appeal also raised the question of the efficacy of the judgment of the 3rd Respondent only, considering that the 1st, 2nd, 4th, and 5th Respondents have been removed from the proceedings. It concluded that there could be no likelihood of an arguable appeal, and without the possibility of an arguable appeal, there could be no risk of the same being rendered nugatory. Both limbs (arguability of appeal and its possibility of being rendered nugatory) must be demonstrated to exist before one could obtain relief under Rule 5(2) (b) of the Rules (See. Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31. It thus followed that the application for stay had to fail.

28. From the reasoning and findings of the High Court and the Court of Appeal, we are dealing with the same subject matter, which was subject to the Land Adjudication process. The subsequent suit filed in the High Court in 2006 collapsed because, instead of filing a judicial review application, the 1st Petitioner commenced a suit via a plaint to overturn the decision by the Minister, which was final,

and the entire adjudication process. The manner in which the Court was approached was faulted by both the High Court and the Court of Appeal. So many years down the line, the same issues and the same parties are litigating before this Court under the banner of a constitutional petition, oblivious of the guidance by the Superior Courts that the only way to challenge the Adjudication process and the finality of an award by the Minister was through a judicial review application and not through a constitutional petition.

29. I agree with the Attorney General that the only conclusion one can draw is that the Petitioners seek to circumvent the Limitation of Actions timelines by filing this constitutional petition. It is not absolutely true that constitutional petitions do not suffer a limitation period for filing proceedings - in Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR, the Court had this to say on the issue:

> "Further in James Kanyiita supra, contrary to the submissions by the petitioners, the court held that although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of *the constitution* is entitled to consider whether there has been inordinate delay in lodging the claim. The court further stated that the court is obliged to consider whether justice will be served by permitting a respondent whether an individual or the state, in any of its manifestations, should be vexed by an otherwise stale claim.
>
> 37. In the present case, it is submitted on behalf of the petitioners that the delay in instituting the instant suit was because of the lack of the requisite legal knowledge as well as financial constraints in getting an advocate.
>
> 38. In Mombasa Civil Case No. 128 of 1962, Rawal v Rawal [1990] KLR 275, the learned judge stated thus:
>
> "The effect of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."
>
> 39. The point was further successfully made in Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco machinery services and Milamo investments limited vs Government Central Bank of Kenya and 2 others, Misc. Civil Application 1759 of 2004 where the court observed:
>
> "In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in *the constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitation periods".

30. We are having a petition, which ought to have been brought as a judicial review application to challenge the adjudication process and the decision by the Minister under Section 29 of the *Land Adjudication Act*. The petitioners approached the Court via a plaint and were red-flagged by the High Court, stating that the claim was wrongfully filed and ought to have been brought as a judicial review application. In the ensuing appeal to the Court of Appeal, the same stance was reiterated by the Appellate Court.

31. The Petitioners, so many years later, after the Superior Courts had rendered their decisions and guided them on how to proceed, we have a constitutional petition instead of bringing a judicial review application; the two are different. The position has not changed.

32. The High Court, in discussing the issue of limitations of action timelines within which to file judicial review proceedings to challenge the decision of the Minister, stated that such a claim ought to have been brought six months after the decision by the Minister and one year against the government under the *Government Proceedings Act* – Cap 40 Laws of Kenya. This, the Petitioners had not achieved in 2006. It cannot be achieved here. It is an ingenious way of side-stepping the limitation of action timeframe on matters under the purview of the *Land Adjudication Act*. As submitted by Mr. Ojwang for the AG, the wise words by Yano J. in the case of Kefa Were v Benedict Chepkering [2018] eKLR come in handy:

> " The fresh suit filed by Njue was christened a "declaratory suit" which he contended was an alternative to "Judicial Review". By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial Review Application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac) ....."

33. I have said enough that the constitutional petition herein is stale and defeated by the Statute of Limitations in the manner and style in which it is brought.

34. On res judicata, whereas the decision in the High Court was not merit-based, the current petition suffers what is termed as constructive res judicata; this was discussed in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR:

> " To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate, and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts has been or could have been raised before the High Court in the previous suits."

35. The Petitioners have had their days in Court starting from the Adjudication process, which dates back to the earlier 1980s and in the High Court, Court of Appeal, and back again to the ELC in this petition over the same matter; what is it that has been so complex for all those years that our Courts cannot fix? Further relitigating, canvassing, and agitating cannot be allowed; if allowed, it will represent manifest abuse of the court process. Parties must be diligent enough to choose the appropriate manner to invoke the jurisdiction of the Court. Witnesses do die, evidence gets lost, and visions get blurred with the lapse of time. The doctrine of constructive res judicata demands that any opportunity to approach the Court should be spent wisely. Even *the Constitution* does not support larches and delays – Article 159 (2)(b) speaks to that - justice shall not be delayed.

36. On locus standi, the Superior Court ruled in the excerpts I reproduced in paragraph *26* above that the 1st Petitioner lacked locus standi to propagate the suit for want of letters of administration and, therefore, lacks the same here.

37. In conclusion, the pending application dated 6th June 2023 and the entire petition are struck out with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6TH DAY OF JUNE 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr. Tindika for the Petitioners**

**Mr. Munga, for the 1st and 2nd Respondents**

**Mr. Kiponda H/B for Mr. Kithi for the 3rd Respondents**

**Happy: Court Assistant**