



Raas Residence Limited v M Dalamr Trading Company Limited & another (Land Case Appeal E046 of 2023) [2024] KEELC 6082 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE APPEAL E046 OF 2023**

**JO MBOYA, J
SEPTEMBER 23, 2024**

BETWEEN

RAAS RESIDENCE LIMITED APPELLANT

AND

M DALAMR TRADING COMPANY LIMITED 1ST RESPONDENT

MARY WAMBUI GAKIBE 2ND RESPONDENT

*(Being an appeal against Ruling and/or Orders of Chief
Magistrate Hon. Wendy K. Micheni dated 6th November 2023)*

JUDGMENT

Introduction And Background:

1. The appeal herein arises from the Ruling and orders of the learned Chief Magistrate [Hon. Wendy K. Micheni], dated the 6th of November 2023 and wherein the learned Chief Magistrate (as she then was) proceeded to and held inter-alia that same [Chief Magistrate's Court] was seized of the requisite jurisdiction to entertain and adjudicate upon the suit and the counter-claim.
2. In addition, the learned Chief Magistrate also proceeded to and held that the 2nd Respondent's suit appears to have been filed by the 2nd Respondent who thereafter procured and obtained interim orders pertaining to the suit property. However, the learned Chief Magistrate left the issue hanging as to whether or not the suit by the 2nd Respondent ought to be struck out, in the manner sought by the said 2nd Respondent, or otherwise.
3. For good measure, the learned Chief Magistrate on one hand appears to have found that the suit on behalf of the 2nd Respondent was not filed by same [2nd Respondent] while on the other hand, there appears to be a suggestion that the suit was indeed filed by her [2nd Respondent].



4. Arising from the Ruling rendered on the 6th of November 2023 the Appellant herein felt aggrieved and thus proceeded to and filed the instant appeal vide Memorandum of Appeal dated the 15th of November 2023 and in respect of which the Appellant has raised a plethora of grounds totaling seventeen (17) in number.
5. Owing to the number of grounds which have been raised at the foot of the Memorandum of Appeal, it suffices to reproduce same. In this regard, the grounds of appeal are reproduced as hereunder:
 - a. The Honourable Magistrate erred in law and in fact by failing to properly analyse, contextualize and appreciate the legal arguments advanced by the Appellant and the 2nd Respondent as regards the issues of facts and law relating to this matter. The Ruling fails to coherently address the issues holistically and comes out as haphazard and contradictory.
 - b. The Honourable Magistrate erred and misdirected herself in law in failing to acknowledge that the Honourable court does not have the requisite pecuniary jurisdiction to entertain the dispute relating to the subject parcel of land i.e. LR No. 36/VII/435 located in Eastleigh Nairobi.
 - c. The Honourable Magistrate erred and misdirected herself in law and in fact by without any cogent legal or factual basis ignoring the valuation report placed before her by the 2nd Respondent demonstrating the value of the suit property to be in excess of Kshs.110 million which amount is beyond the Honourable Chief Magistrate's pecuniary jurisdiction of Kshs.20,000,000/=.
 - d. The Honourable Magistrate erred and misdirected herself in law and in fact by ignoring the fact that the question of whether or not to grant interim/preservative and/or status quo orders in relation to the disputed property, was an issue that was Res judicata the same having been the subject of ELC Case No. E001 of 2023; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others and subsequently Court of Appeal Misc. Civil Application No. NAI. E076 of 2023; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others.
 - e. The Honourable Magistrate erred and misdirected herself in law by ignoring the fact that Court of Appeal had vide a Ruling dated 9th June 2023 in Court of Appeal Misc. Civil Application No. NAI. E076 of 2023; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others declined to issue any interim orders and/or status quo orders in favour of the 1st Respondent pending referral to Arbitration of the dispute between itself and the 1st Respondent.
 - f. The Honourable Magistrate erred and misdirected herself in law and in fact by ignoring the question of who is in control and/or possession of the disputed property i.e. LR No. as LR No. 36/VII/435 was an issue that was considered and addressed by Honourable Justice Ogembo vide a Ruling delivered on 4th October 2022 in Criminal Revision *No. E170 of 2022*; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others and also by the Court of Appeal in Misc. Civil Appl. No. NAI. E076 of 2023; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others.
 - g. The Honourable Magistrate erred and misdirected herself in law and in fact by ignoring the fact that Honourable Justice Wabwoto had vide a Ruling dated 16th February 2023, in ELC Case No. E001 of 2023; M. Dalamr Trading Company Limited Vs Mary Wambui Gakibe & 2 others struck out the 1st Respondent's suit and made a finding that the 1st Respondent was



engaged in abuse of the court process by filing multiple suits over the disputed property; one of the issues for consideration before Honourable Justice Wabwoto was the fact that the 1st Respondent had filed multiple suits seeking similar reliefs. The reliefs in question were in the nature of orders of injunction in relation to the suit property, pending referral to arbitration of the dispute between itself and the 2nd Respondent.

- h. The Honourable Magistrate erred and misdirected herself in law and in fact by ignoring the fact that the 1st Respondent has preferred an appeal against the decision of Honourable Justice Wabwoto in ELC Case No. E001 of 2023.
- i. The Honourable Magistrate erred and misdirected herself in law and in fact by failing to strike out the 1st Respondent's counter-claim dated 21st April 2023.
- j. The Honourable Magistrate erred and misdirected herself in law and in fact by purporting to arrogate herself of the responsibility of deciding whether or not the dispute between the 1st and 2nd Respondents should be referred to Arbitration.
- k. The Honourable Magistrate erred and misdirected herself in law and in fact by failing to take cognizance of the fact that the 1st Respondent had lost the right (if any) to rely on the Arbitration clause when it took procedural steps in several matters between the same parties on the same subject matter before courts with jurisdiction.
- l. The Honourable Magistrate erred and misdirected herself in law and in fact by appearing inclined to give further orders and/or direction realign to the suit property in total disregard of the fact that the Appellant is now the beneficial and/or legal owner of the suit property.
- m. The Honourable Magistrate erred and misdirected herself in law and in fact by ordering a site visit to the dispute property;
 - i. The court has no capacity to ascertain the value of the suit property though a site visit.
 - ii. A site visit intended to address the question as to who is on possession and/or control of the suit property is misplaced as the issue has been settled by Superior Courts.
 - iii. By ordering a site visit the court in essentially assuming jurisdiction on a matter that it has no jurisdiction.
- n. The Honourable Magistrate erred and misdirected herself in law making the Notice of Motion application dated 30th October 2023 (contempt application) the subject of her impugned Ruling despite a clear indication by the Appellant that the said application had not been served nor was the Appellant aware of it; the Honourable Magistrate ignored the directions issued on 3rd November 2023 by Honourable R.L. Musiega in relation to the said application.
- o. The Honourable Magistrate erred and misdirected herself in law and in fact by failing to articulate her decision clearly in relation to the issues raised in the Appellant's notice of motion application dated 12th June 2023 and the 2nd Respondent's notice of motion application dated 7th June 2023.
- p. The Honourable Magistrate erred and misdirected herself in law and in fact by failing to appreciate and contextualize the dispute between the 1st and 2nd Respondent.
- q. The Honourable Magistrate erred and misdirected herself in law and in fact by failing to seriously interrogate the 2nd Respondent's contention that she did not originate the suit before the Chief Magistrate's Court.



6. The appeal beforehand came up for directions on the 16th of May 2024, whereupon the Advocates for the respective parties covenanted to canvass and dispose of the appeal by way of written submissions. In this respect, the court proceeded to and circumscribed the time for the filing and exchange of written submissions.
7. Suffice to point out that thereafter, the Appellant proceeded to and filed written submissions dated the 5th of June 2024 whereas the 1st Respondent filed written submissions dated the 30th of July 2024. For completeness, the 2nd Respondent did not file any written submissions.
8. The written submissions [details in terms of the preceding paragraph] form part of the record of the court and shall be taken into account and considered by the court in determining the dispute beforehand.

Issues For Determination:

9. Having reviewed the pleadings that were filed by the parties before the Chief Magistrate's Court, the proceedings of the court, the Ruling rendered on the 6th of November 2023, as well as the written submissions filed by and on behalf of the parties, the following issues do arise and are thus worthy of determination.
 - i. Whether the Chief Magistrate's Court was seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the subject suit.
 - ii. Whether the suit before the Chief Magistrate was barred by the doctrine of res judicata or otherwise.
 - iii. Whether the 1st Respondent's counter-claim before the Chief Magistrate's Court was/is legally tenable.

Analysis And Determination

Whether the Chief Magistrate's Court was seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the subject suit.

10. The dispute before the Chief Magistrate touched on and concerned the property known as LR No. 36/VII/435 situate within Eastleigh Area in the city of Nairobi. Furthermore, the suit property was stated to have been registered in the name of the 2nd Respondent who thereafter leased/rented same to the 1st Respondent.
11. On the other hand, there is also evidence that subsequently the 2nd Respondent entered into and executed a sale agreement with the Appellant herein, culminating into the transfer of the suit property to and in favour of the Appellant.
12. It appears that before the 2nd Respondent entered into and executed the sale agreement with the Appellant, the 1st Respondent, who was hitherto a tenant in the premises, was evicted from the suit property culminating into the 1st Respondent filing a Reference before the Business Premises Rent Tribunal.
13. However, the Reference which was filed before the Tribunal was thereafter disposed of vide Ruling rendered on the 16th of December 2022 wherein the Tribunal found and held that same [Tribunal] was not seized of the requisite jurisdiction to entertain the tenant's dispute taking into account that the tenant had been evicted.



14. Be that as it may, there is no gainsaying that the dispute beforehand touches on and concerns the suit property and hence it is appropriate to discern the monetary value of the suit property before venturing to ascertain whether or not the Chief Magistrate Court was seized of the requisite jurisdiction to entertain the suit and the counter-claim, respectively.
15. To start with, the 2nd Respondent herein filed an application dated the 7th of June 2023 and which application was supported by the 2nd Respondent's affidavit. In addition, the 2nd Respondent attached to the said affidavit a copy of a valuation report prepared by Avenue Valuers Limited. Same is dated the 5th of June 2023. Besides the valuation report is contained at pages 59 to 68 of the record of appeal.
16. According to the valuation report, [details in terms of preceding paragraph], the suit property is shown to have a market value of Kshs.110,000,000/- only. For good measure, the valuation report was acknowledged by the learned Chief Magistrate in her Ruling.
17. However, despite acknowledging the valuation report and taking into account the market value highlighted thereunder, the learned Chief Magistrate held the opinion that the value alluded to was brought to court on the basis of a valuation report but not through the pleadings.
18. On the other hand, the learned chief Magistrate proceeded and stated that the dispute beforehand had arisen because there was a contention that the suit property had been condemned and same was not habitable. In this regard, the Chief Magistrate posited that despite the value contained at the foot of the valuation report, there was still need for the court [Chief Magistrate] to visit the locus in quo and to ascertain what was exactly obtaining on the ground prior to making further directions.
19. What I hear the learned Chief Magistrate to be saying is to the effect that even though a valuation report had been placed before her and even through the valuation report indicates the market value of the suit property, same [Chief Magistrate] was not prepared to accept the market value espoused vide the valuation report.
20. Furthermore, I also hear the learned Chief Magistrate to be contending that despite the value being contained in the valuation report, same [Chief Magistrate] was still keen to visit the locus in quo and ascertain the status quo obtaining thereon before making a decision on the question of jurisdiction.
21. On the other hand, there is also an aspect that flows from the reasoning of the learned Chief Magistrate to the effect that the market value which was being relied upon by the Appellant and the 2nd Respondent to challenge the jurisdiction of the court was brought before the court vide a valuation report but same is neither contained nor highlighted in the pleadings.
22. Arising from the foregoing, the learned Chief Magistrate, without making a clear and succinct finding on the question of jurisdiction proceeded to and held that same [Chief Magistrate] was seized of jurisdiction to proceed with the matter including undertaking a visitation to the locus in quo.
23. Having reviewed the record before the court, and upon taking into account the submissions by the learned counsel for the respective parties, I beg to address the question of jurisdiction in a three-pronged manner.
24. Firstly, there is no gainsaying that jurisdiction goes to the root of the matter. In this regard, before a court of law can engage with and/or undertake proceedings in a particular matter, it behooves the court to discern/ascertain whether same [court] is indeed seized of the requisite jurisdiction to entertain and adjudicate upon the matter.
25. Furthermore, it is crystal clear that where a court is divested of jurisdiction, then the court is obligated to interrogate the question of jurisdiction and upon such interrogation, to make a firm finding on



whether or not the court is seized of jurisdiction. At any rate, where the court finds that same is divested of jurisdiction, then the court has no alternative but to down its tools.

26. To this end, I can do no better than to cite and reference the holding of the Supreme Court in the case of; In the matter of Interim Independent Electoral Commission [2011] eKLR, where the court stated at paragraphs 29 and 30 as hereunder:

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“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.”

30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

27. The obligation of the court to interrogate and discern whether the court is seized of jurisdiction prior to and before undertaking further proceedings in a matter was also elaborated in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR where the court stated thus;

In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

28. Without belaboring the point, it is instructive to underscore that whenever a court of law is confronted with a jurisdictional question, like in the instant case, it is the duty of the court to interrogate the issue of jurisdiction and thereafter to make a firm determination thereof. Quite clearly, it was the obligation of the learned Chief Magistrate to ascertain and/or discern whether she was seized of jurisdiction or otherwise.

29. Furthermore, when dealing with the question of jurisdiction, it is incumbent upon the court to speak with clarity on whether or not the court has ascertained that same has jurisdiction or otherwise. For good measure the question of jurisdiction cannot be tossed around and/or postponed pending visitation to the locus in quo.

30. Secondly, it is also imperative to underscore that where the question of jurisdiction is raised and canvassed before the court, the court is called upon to address the question of jurisdiction with clarity and finality taking into account the provisions of *the Constitution* and the constitutive charter/statute, or both.



31. On the other hand, there is no gainsaying that while engaging with or determining the issue of jurisdiction, a court of law must not endeavor to confer upon itself jurisdiction by way of craft and innovation. To the contrary, the existence or otherwise of jurisdiction must be dependent on the clear wordings of *the Constitution* and/or statute and the duty of the court is merely to discern the intention of the legislature and thereafter, proclaim same.
32. The Supreme Court of Kenya addressed the situation in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the court stated and held at paragraph 68 as hereunder;
 - (68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
33. Thirdly, where a court is confronted with a question of jurisdiction, the court cannot run away from determining the question pending taking of further evidence and/or visitation of the locus in quo. Suffice to point out that the learned Chief Magistrate failed to engage with and/or determine the question of jurisdiction because in her mind there was need and necessity to visit the locus in quo and thereafter discern what is actually on the ground.
34. To this end, it is apposite to reproduce the salient arguments by the court.
35. Same are reproduced as hereunder.

“The Plaintiff and the 2nd Defendant appear to be in agreement that the value of the disputed property is beyond the courts jurisdiction A whopping Kshs.110,000,000/=. I have however noted from the previous proceedings like the Criminal matter that the Premises were said to be condemned at some point. One must also wonder how this matter came to this court and who the mischievous party is.”
36. Furthermore, the court proceeded and stated as hereunder;

“Without going into the merits of the case, the court would like to see firsthand what we are dealing with and we can only get a clear picture through a scene visit. So the court will schedule a scene visit to see what is on the ground and that will advise on the best way forward.”
37. It is imperative that the question of jurisdiction be determined without awaiting visitation and/or further evidence. For good measure, the determination of jurisdiction is a question of law and not one



of fact. In this regard, the visitation to the locus in quo, in the manner posited by the learned Magistrate would have been unhelpful.

38. In this respect, it suffices to reiterate the holding of the court in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, where the court stated and held as hereunder;

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

39. From the foregoing discussion, there is no gainsaying that the learned Chief Magistrate was duty bound to interrogate the question of monetary jurisdiction and to determine same on the basis of the evidence which was placed before her, including the valuation report. At any rate, the valuation report demonstrated that the market value of the suit property was Kshs.110,000,000/= only and hence same exceeded the pecuniary jurisdiction of the Chief Magistrate’s Court. [See Section 7 of the Magistrate’s Act 2015].

40. Other than the foregoing, it is also important to underscore that the contents of the valuation report which had been placed before the Hon. Chief Magistrate and which indicated the market value of the suit property, had not been controverted and/or challenged in any manner. Consequently, it was incumbent upon the learned Chief Magistrate to take into account the contents of the said valuation report. [See the holding of the Supreme Court in the case of *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment)].

41. Arising from the foregoing, I come to the conclusion that the monetary value of the suit property was discernable from the valuation report which was tendered and placed before the court. To this end, it is crystal clear that the value of the suit property exceeded the monetary jurisdiction of the Chief Magistrate’s Court.

42. In the premises, it was incumbent upon the learned Chief Magistrate to find and hold that the Chief Magistrate Court was devoid and divested of the requisite jurisdiction to entertain and engage with not only the suit but also the counter-claim.

43. To surmise, my answer to issue number one [1] is to the effect that the learned Chief Magistrate erred in finding and holding that same was seized and possessed of jurisdiction and furthermore in postponing the effective determination of the question of jurisdiction awaiting [sic] visitation to the locus in quo.

Whether the suit before the Chief Magistrate was barred by the doctrine of res judicata or otherwise.

44. Other than the question of jurisdiction which has been canvassed and dealt with in the preceding paragraphs, the other issue which arose before the learned Chief Magistrate relates to and concerns the doctrine of res judicata. In this respect, the Appellant and the 2nd Respondent, had contended that the suit before the Chief Magistrate’s Court was barred by the doctrine of res judicata.

45. It was the contention by and on behalf of the Appellant and the 2nd Respondent that the claim contained at the foot of the counter-claim had been canvassed before various courts including the Environment and Land Court and the Business Premises Rent Tribunal.

46. On the other hand, the 1st Respondent posited that though same [1st Respondent] had filed various proceedings beforehand, the only proceedings that related to the subject matter before the court was



ELC E263 of 2022 and ELC E001 of 2023. Furthermore, the 1st Respondent contended that the former suit was withdrawn whereas the latter suit was struck out.

47. Arising from the foregoing, it was the position by the 1st Respondent that neither of the previous suits had been heard and determined on merit. In this regard, the first Respondent contended that in so far as the previous suits had not been determined on merit, the doctrine of res judicata was irrelevant and inapplicable.
48. Having reviewed the rival submissions by the Appellant and the 1st Respondent on the question of res judicata, it is my humble position that the suits/proceedings which were highlighted by the Appellant to underpin the application of the doctrine of res judicata were neither heard nor determined on merits.
49. To the extent that the previous suits were neither heard nor determined on merit, the fundamental ingredients that underpin the plea of res judicata have neither been established nor demonstrated. In this regard, it is my finding and holding that the contention that the counter-claim by the 1st Respondent was res-judicata, was misconceived and legally untenable.
50. At any rate, it suffices to underscore that before a court of law can make a positive finding on the doctrine of res-judicata, the court must be convinced that claimant has been able to satisfy all the requisite ingredients in the manner articulated vide Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
51. Before departing from the issue herein, I beg to adopt and reiterate the holding of the Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court stated and held as hereunder;
 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
 58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.
 59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA



177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’”

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action.
52. In answer to issue number two [2] it is my finding and holding that the doctrine of res judicata was irrelevant and inapplicable to the dispute before the Chief Magistrate’s Court. In any event, there was no determination on merit in respect of the previous proceedings, which is a condition precedent to the invocation and reliance on the doctrine of res judicata.
53. In a nutshell, the learned Chief Magistrate reached and arrived at the correct decision as pertains to the question of res judicata. However, it is not lost on this court that the determination of the question of res judicata was secondary to the determination of the question/issue of pecuniary jurisdiction.

Whether the 1st Respondent’s counter-claim before the Chief Magistrate’s Court was/is legally tenable.

54. The 1st Respondent herein filed a counter-claim dated the 21st of April 2023 and in respect of which same sought for various reliefs. In particular, the 1st Respondent had sought for an order of permanent injunction to restrain the Plaintiff/Defendant in the counter-claim [now 2nd Respondent] whether by herself, agents, servants or any other person claiming interest through her from causing any form of nuisance, developing, constructing, leasing, evicting, or otherwise interfering with LR No. 36/VII/435, Eastleigh Nairobi.
55. Instructively, the determination of the interests and/or rights of the 1st Respondent herein, including the grant of the reliefs sought would have been dependent on the ascertainment of the value of the suit property and confirmation whether the court was seized of the pecuniary jurisdiction.
56. Be that as it may, while discussing issue number one [1] this court found and held that the monetary value of the suit property far exceeded the pecuniary jurisdiction of the Chief Magistrate’s Court. For good measure, the pecuniary jurisdiction of the Chief Magistrate’s Court presided by a Chief Magistrate is Kshs.20,000,000/- only whereas the suit property was valued at Kshs.110,000,000/- only.
57. Quite clearly, the suit property fell outside the jurisdiction of the Chief Magistrate Court and thus there is no gainsaying that the relief[s] sought at the foot of the counter-claim would not be tenable or otherwise.
58. On the other hand, it is also not lost on the court that the 1st Respondent herein had himself filed a notice of preliminary objection dated the 27th of March 2023 and wherein same [1st Respondent] had



contended that the contract document between the 1st Respondent and the 2nd Respondent contained an arbitral agreement/clause. In this regard, the 1st Respondent had thus posited that the court was not seized of jurisdiction to entertain the suit that had [sic] filed by the 2nd Respondent.

59. To the extent that the 1st Respondent had himself highlighted the fact that the contract document contained an arbitral agreement/clause the question that does arise is whether that arbitral agreement/ clause does not impact on the counter-claim that was filed by the 1st Respondent.
60. In my humble view, if the contract documents between the 1st and 2nd Respondent had an arbitral agreement/clause, then the learned Chief Magistrate could not purport to entertain and adjudicate upon the dispute vide the counter-claim or otherwise. For good measure, the jurisdiction of the Chief Magistrate would stand ousted by the existence of the arbitration agreement. [See *Scott vs. Avery* 25 L.J. Ex. 308].
61. See as also the case of *Kisumuwalla Oil Industries Limited V Pan Asiatic Commodities PTE Limited & another* [1997] eKLR].
62. Flowing from the foregoing discussion, it is my finding and holding that the counter-claim by and on behalf of the 1st Respondent herein was neither tenable nor capable of being canvassed before the learned Chief Magistrate.
63. In the premises, I find and hold that the learned Chief Magistrate was in error in making the various orders at the foot of the Ruling rendered on the 6th of November 2023. For good measure, the totality of the proceedings and the resultant orders that were made by the learned Chief Magistrate were a nullity, and thus void. [See *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR].

Final Disposition:

64. Having dealt with and addressed the issues that were highlighted in the body of the judgment, it is now appropriate to bring the matter to closure. Nevertheless, it suffices to state that while discussing the various issues, the court found and held that the Chief Magistrate Court was not seized of the requisite jurisdiction to entertain and adjudicate the dispute beforehand.
65. Arising from the foregoing, there is no gainsaying that the entirety of the proceedings that were undertaken before the Chief Magistrate Court were in vain. In this regard, there is no gainsaying that no precipitate order could have been issued by the Chief Magistrate Court.
66. Consequently, and in the premises, I come to the conclusion that the appeal beforehand is meritorious. In this regard, the court proceeds to and makes the following orders:
 - i. That the appeal be and is hereby allowed.
 - ii. That the suit that was filed by and on behalf of the Plaintiff [now 2nd Respondent] be and is hereby deemed to have been struck out.
 - iii. That the counter-claim by the and on behalf of the Defendant [now 1st Respondent herein] be and is hereby struck out for want of jurisdiction.
 - iv. That the entire proceedings and consequential orders that were taken/granted by the Chief Magistrate's Court be and are hereby declared a nullity.
 - v. Furthermore, the orders of status quo which were issued at the foot of the Ruling rendered on the 31st May 2023 and 6th of November 2023, respectively, be and are hereby vacated.



67. Costs ordinarily follow the event. In this case, the event is that the appeal has succeeded and hence the Appellant is entitled to costs of the appeal unless there be peculiar/exceptional circumstances to warrant the exercise of the discretion of the court to the contrary. However, in this case no exceptional and/or peculiar circumstance arise and hence the Appellant be and is hereby awarded costs of the appeal. Same shall be borne by the 1st Respondent.
68. As concerns the costs of the proceedings before the Chief Magistrate's Court, it suffices to state that the application by the Appellant herein, which essentially sought for the joinder of the Appellant as a party, was technically allowed. In this regard, the order that finds favour with the court as pertains to costs in the subordinate court is to the effect that each party shall bear own costs.
69. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant

Mr. Peter Muchoki for the Appellant

Mr. S. Nyaberi for the 1st Respondent

Mr. Duncan Muge h/b for Mr. Elizabeth Wanjiru for the 2nd Respondent

