



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 133(N) OF 2008

(Before Hon. Lady Justice Maureen Onyango)

- 1. ALPHONSE MWANGEMI MUNGA**
- 2. PETER MUCHIRI MURIUNGI**
- 3. MICHAEL ONYANGO OCHIENG**
- 4. PETER MAKAU**
- 5. CHIVATSI KATAMA**
- 6. MARICOS NYAMWANGA OKONGO**
- 7. STEPHEN NZIOKA KASINA**
- 8. SHADRACK C. LEWA**
- 9. BENEDICT ORWARU**
- 10. NICHOLAS MUOKI**
- 11. JAMES KINGELE(suing on their behalf and
on behalf of 367 Employees of
AFRICAN SAFARI CLUB LIMITED.....CLAIMANTS**

VERSUS

AFRICAN SAFARI CLUB LIMITED (in Liq).....RESPONDENT

AND

- 1. SHEILA NKATHA MUTHEE (As Administrator of the Estate of
Karl Jacobs Ruedin - deceased)**
- 2. HANSPETER RUEDIN**
- 3. ROLAND RUEDIN..... APPLICANTS**

AND

- 1. ERDEMANN PROPERTY LIMITED**

2. STEPHEN KIMANI KARUU t/a Kiriiyu Merchants Auctioneers

3. FRANK NEUGEBAUER..... AFFECTED/INTERESTED PARTIES

RULING

1. Before me for determination is an application dated 27th February 2020 seeking the following orders:-

a) Spent

b) Spent

c) Spent

d) Spent

e) *That the Consent orders recorded by this Court and adopted as orders of the Court on 2.12.2013 be declared to have been procured without jurisdiction, have been obtained by fraud and collusion, have been made in violation of Articles 25(c), 40, 48, 50(1), 159 (2) (e) and 160(1) of the Constitution of Kenya, to have been made criminally, illegally and unlawfully, be declared as null and void ab initio and as a result be set aside as a matter of right.*

f) *That all orders given and all steps and proceedings of any nature and description taken consequent upon the orders recorded on 2.12.2013 be set aside as a matter of right.*

g) *That the purported auction sale of the suit premises by Stephen Kimani Karuu t/a Kiriiyu Merchants Auctioneers, the 2nd Affected/Interested Party to Erdemann Property Limited, the 1st Affected Party at a fictitious auction sale allegedly held on 8.4.2014 be declared to have been conducted against the terms and conditions of sale approved by the Court, to have been conducted fraudulently, incompetently, criminally and illegally and therefore null and void and be set aside as a matter of right.*

h) *That any certificate of sale, vesting order and transfer of the suit premises to the 1st Affected/ Interested Party as the purchaser be declared to be incompetent and null and void having been procured fraudulently, unconstitutionally and without jurisdiction and be set aside as a matter of right.*

i) *That the registration of Erdemann Property Limited, the 1st Affected/Interested Party as the proprietor of the suit premises be nullified and cancelled and its certificate of title in the suit premises be declared to be null and void.*

j) *That Erdemann Property Limited, the 1st Affected/Interested Party be removed and evicted from the suit premises.*

k) *That the Applicants be restored to the suit premises and ownership and possession of the suit premises be reinstated or restored to the Applicants.*

l) *That costs of this application be provided for.*

2. The grounds in support of the application as set out on the face of the application and are summarized as follows:

(i) *That the suit premises were registered in the names of **Karl Jacobs Ruedin (deceased)** from 1975 until they were fraudulently sold and transferred in a fictitious auction to the 1st Interested Party by the 2nd Interested Party pursuant to fraudulent consent orders recorded and endorsed by this Court on 2.12.2013.*

(ii) *That Karl Jacobs Ruedin died on 19.3.2013 after which he ceased being a director of the Respondent and that following his death, this Court had no jurisdiction to hear those applications.*

(iii) *That the Court then hearing post judgment and decree applications together with the Claimants' and 3rd Interested Party's advocates knew of the death of Karl Jacobs Ruedin as the fact of that death was recorded by the Court.*

(iv) *That the deceased had not been found liable under the decree in his lifetime and that all applications made for his examination as a director of the Respondent had not been prosecuted or fixed for hearing in his lifetime.*

(v) *That the estate of the deceased had not been found liable under the decree that had been passed against the Respondents and the deceased was not a party or a Respondent to the Claim.*

(vi) *That the orders recorded on 2.12.2013 for the sale of the suit premises belonging to the deceased were recorded and adopted without hearing the deceased or his estate. Further that any final orders recorded by any Court against persons not before the Court and against dead persons without hearing representatives of their estates is null and void.*

(vii) *That as the Court and the said advocates knew of the death of the deceased and the estate of the deceased was not represented*

on 2.12.2013 the consent orders were null and void having been procured by fraud and collusion. That the Court therefore violated the Principle Objective to facilitate justice under Section 3 of the Employment and Labour Relations Court Act, No. 20 of 2011 (herein after referred to as the Act).

(viii) That despite the fact that the Court and the said advocates knew that the deceased was survived by the 2nd and 3rd Applicants they did not notify, serve, consult or involve the Applicants before recording, endorsing and enforcing the said consent.

(ix) That the judge handling the matter on 2.12.2013 was not a judge of the High Court of Kenya and therefore had no jurisdiction to record a consent order purporting to give judgment and decree in favour of the 3rd Interested Party in a suit between the 3rd Interested Party as Plaintiff and the deceased as Defendant then pending in Mombasa HCCC No. 15 of 2012 and as such, the order recorded by the judge of Employment and Labour Relations Court was issued without jurisdiction and was made fraudulently rendering it null and void.

(x) That any final orders given against a person not before the Court is a contravention of the inviolable right to be heard guaranteed under article 25(c) and 50(1) of the Constitution of the Republic of Kenya and is therefore unconstitutional and null and void.

(xi) That the Consent orders for the sale of the suit premises recorded and endorsed on 2.12.2013 constituted intermeddling and were meant to intermeddle with property of a dead person and are therefore evidence of a criminal offence under section 45 of the Law of Succession Act, Cap 160 Laws of Kenya and are null and void as they were not based on any decree or order against the deceased requiring the deceased or his estate to satisfy the decree.

(xii) That the veil of the incorporation of the Respondent had not been lifted or pierced so as to require the deceased or his estate to satisfy any part of the decree earlier passed against the Respondent and has not subsequently been lifted.

(xiii) That there was no professional valuation report before the prohibitory order for the sale of the suit premises was given and before the 2nd Interested Party was instructed to sell the suit premises by auction and as a result of proceeding with the purported auction sale without a valuation report and without setting any reserve price, the suit premises then valued at Kshs.420 million was sold and transferred to the 1st Interested Party at Kshs.120 million.

(xiv) That the conditions of sale of the suit premises issued by this Court required that the auction sale be advertised for 30 days in the Daily Nation, 25% of the bid price be paid on the fall of the hammer and the balance within 15 days but in breach of those terms the suit premises were advertised in the people giving a notice of 21 days and the deposit paid more than 1 month after the date of the purported auction.

(xv) That there was no auction sale of the suit premises on 8.4.2014 or on any other date as the purported sale was a private treaty between the 1st and 2nd Interested Parties.

(xvi) That the Court was aware that the suit premises were protected by various orders issued by the High Court, a Court of concurrent jurisdiction, in Petition No. 24 of 2014 before it compelled the registration of the transfer in favour of the 1st Affected/Interested Party.

(xvii) That the Court has a duty to remedy the loss occasioned by those fraudulent consent orders.

(xviii) That the Court has jurisdiction to set aside the fraudulent sale of the suit premises in execution of a money decree against a person not bound by the decree.

(xix) The Claimants are still pursuing the Applicants in execution of the decree even though the Claimants' advocates had informed this Court on 10.8.2012 that the movable assets already attached exceeded the decretal amount then standing at Kshs.137,400,025/=. No account was given by the Claimants of more than Kshs.137 million prior to recording the fraudulent consent orders on 2.12.2013, prior to the fraudulent auction of the suit premises in 2014 and prior to the registration of the transfer of the suit premises in favour of the 1st Interested Party. Before endorsing the consent for the sale and transfer of the suit premises this Court did not call for an account of the proceeds of sale of those movable assets earlier attached and sold. It had a duty to do so.

(xx) That the 1st Interested Party and the Claimants did not obtain any order requiring the deceased to satisfy the decree or any part thereof and as the Court did not lift the veil of incorporation of the Respondent and as such the 1st Interested Party did not obtain a clean title and will not suffer any prejudice if this Application is allowed.

(xxi) That the Court failed in its duty to satisfy itself that any part of the decree remained to be satisfied after the sale of movable assets of a value exceeding the decretal amount before it ordered and presided over sale and transfer of the suit premises.

(xxii) This Court has jurisdiction to set aside any order obtained fraudulently and any order given without jurisdiction and without hearing the person affected by such an order. The Court has a duty to set aside all orders that erode its dignity, expose the Court to ridicule and that are null and void and that in the circumstances the orders sought are not discretionally.

(xxiii) That the Applicants have suffered severe loss by reason of collusion and fraud in these proceedings and seek to set aside the orders of 2.12.2013 and the purported auction sale and transfer of the suit premises.

(xxiv) That it is fair, just and equitable that this application be allowed as prayed. The Applicants humbly request this Court to finally determine this application on the merits and not on the basis of any procedural technicalities as such reliance would amount to the Court giving its blessings to the fraud already committed against the Applicants.

3. The same grounds were reiterated in the Applicant's supporting affidavit sworn by Sheila Nkatha Muthee, the 1st Applicant on 27th February 2020. The Application was opposed via grounds of opposition dated 5th May 2021. The Respondents in the said grounds of opposition oppose the Notice of Motion dated 27th February, 2020 on the following grounds:-

i) *That the Applicants' Application is incompetent lacks merits, frivolous, fatally defective and tantamount to gross abuse of the Court process and that it offends the Provisions of Order 45 Rule 1(1)(a) of the Civil Procedure rules.*

ii) *The Applicants' Application for review is inappropriate because they have applied for review after inordinate and unreasonable delay and their right to apply for review was defeated by reason of instituting C.A No. 314 of 2014 (Nairobi) in the Court of Appeal.*

iii) *That the Applicants are in gross abuse of the Court process because they are guilty of abusing the Court process by instituting multiple applications and suits in pursuit of similar orders in respect of the same subject matter and in blatant contempt have concealed material facts before this Honourable Court hereof.*

iv) *That the Applicants and their Advocates have failed, negligently and refused to purge Contempt of Court apparent on record as per the Ruling by Hon. Lady Justice Onyango dated 29th January, 2021.*

v) *That this matter was fully determined and closed by the Honourable Court and there is no pending suit save for purposes of costs granted by Courts hereof.*

vi) *That the Applicants are purporting to revive a dispute that has been handled by the Court of Appeal.*

vii) *The Applicants' Application is res Judicata because the issues raised were conclusively dealt with in Court of Appeal in Appeal No. 314 of 2014 (Nairobi) where the Court of appeal upheld this Court's verdict. Further that the issues raised herein were fully determined in ELC Petition No. 17 of 2017 (Mombasa).*

viii) *That the Employment Labour Relations Court was justified to order sale of the deceased land to pay terminal benefits of his employees as the rights of the petitioners cannot override the rights of the employees/Applicants who have priority to payment of their terminal benefits.*

ix) *That the application ought to be dismissed with costs to the Respondents/Claimants.*

4. The Application was disposed of by way of written submissions.

Applicant's Submissions

5. The Applicants through their Counsel on record filed their submissions and indicated that they would rely on each of the 48 grounds on the face of their Application, the Supporting Affidavit and the annexures thereto. Counsel then extensively laid down the evidence relied on by the Applicants.

6. Counsel relies on **Articles 3, 10, 25(c), 40, 48, 50(1), 159(2) and 160(1) & (5) of the Constitution of Kenya**. That the articles provide that the right to a fair trial is one of the most sacred rights in the Bill of Rights that cannot be taken away. Counsel submits that the Applicant's rights were violated. Counsel also cites Article 10(2)(a) and (b) of the Constitution of Kenya, 2010 which provide the national values and principles of governance to include the rule of law and equity.

7. He submits that there cannot be rule of law or equitable considerations when consent orders to defraud parties not before the Court are recorded and enforced. That the sale of a stranger's property upon orders of the Court constitutes arbitrary deprivation of property and is therefore an affront to and a violation of the right to property under Article 40 of the Constitution.

8. Counsel also submits that **Sections 2, 3, 12(3) (i) (iv) & (viii), 16, 20 and 29 of the Employment and Labour Relations Court Act No. 20 of 2011** do not confer the Employment and Labour Relations Court jurisdiction to record and enforce fraudulent consent orders or agreements in the absence of the person most affected by those orders. Counsel also cites sections 1A, 1B, 3A, 63 (e), 80 and 91 of the Civil Procedure Act which provide for just resolution of disputes.

9. Counsel further relies on **Sections 21(1) and (3) of the Auctioneers Act, No. 5 of 1996 and Rules 11(1)(a) (i-v) and 11(b), 15(c) and (d), 16(1)(f) and 17(4) of the Auctioneers Rules, 1997 as read with Section 30 of the Auctioneers Act No. 5 of 1996**. He submits that a Court order or proclamation for the auction sale of immovable property in execution of a money decree must be based on a reserve price which in turn must be determined or set from the value of the property. That the value of the property is not subjective or dependent on the discretion of the Court, the parties or the auctioneer but must be determined from a professional valuation report prepared by a competent, registered and practicing valuer.

10. To buttress the issue of jurisdiction, Counsel urges the Court to be guided by the case of The Supreme Court **Republic v Karisa Chengo & 2 Others (2017) eKLR** where the Supreme Court held that where proceedings have been declared a nullity every proceeding

which is founded on it is also null and void. Counsel also relied on **Petition No. 3 of 2016 in Albert Chaurembo Mumba & 7 Others v Maurice Munyau & 148 Others [2019] eKLR** where the Supreme Court declared the proceedings in the Labour Relations Court as null and void after finding that the Court had no jurisdiction to hear and determine a dispute between a Pension Scheme and its members. That the relevance of that decision is that when a Court steps out of its mandate as happened in the instant case, all its decisions are null and void and

11. Counsel submits that The Application dated 27th February 2020 is merited. That the Court was misled on multiple occasions in the violations and the fraud described in the application and the affidavit but the Court now has a golden opportunity to help reverse the consequences of that fraud and restore the property to the estate. He prays that the application be allowed as prayed.

1st Interested Party Submissions

12. The Interested Party proposes the following issues for determination:

i) *Whether Applicants Application dated 27th February 2020 seeking to annul Consent Orders issued on 11th December 2013 and the registration of 1st Interested Party herein as the Proprietor of Land Parcel LR. NO. 1515/1/MN (hereinafter "the Suit Property") has any basis in law?*

ii) *Whether the 1st Interested Party herein is an innocent purchaser for value of "the Suit Property" LR. NO. 1515/1/MN without notice.*

13. Counsel submits that the instant application offends the principles of res judicata. That it raises the same issues that were adjudicated upon with finality by courts of competent jurisdiction in the following cases;

i) Constitutional and Judicial Review division of the High Court in Mombasa **Petition No. 24 of 2014-** Dismissed for want of prosecution.

ii) Review Application dated 30th January 2014 in the **Industrial Court (Nairobi) Cause Number 133N of 2008.**

iii) Court of Appeal (Nairobi) in **Civil Appeal No. 314 of 2014.**

iv) **Petition No. 17 of 2017 at Environment and Land Court in Mombasa** dated 18th December 2017. **Petition No. 17 of 2017** was dismissed on 27th September 2019 by the Court for want of Jurisdiction.

14. Counsel cites Section 7 of the *Civil Procedure Act* which stipulates that 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 . Counsel relies on the case of **Josephat Ndirangu Waweru T/A Mooreland Mercantile Co. v Hill Work Furniture Limited (C.A No. 36 of 2012 [2015] eKLR** where the Court held;

"The Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow judge of concurrent jurisdiction. If the Respondent was aggrieved by the ruling and preliminary decree its recourse was in appealing the same"

15. It was further submitted that the instant Application has no basis in law. That the Applicants have failed to comply with these mandatory provisions of the law in respect of a review. Counsel cites Section 80 the Civil Procedure Act Cap 21 which gives the substantive right of review in certain circumstances, while Order 45 provides the procedure thereof. That the application is an abuse of the Court process in so far as it has the characteristics of forum shopping, it's frivolous, it is vexatious and scandalous. Counsel relies on the case of **Republic v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR** where the Court held that

"It is common ground that the applicant has already lodged a Notice of Appeal dated 31st October 2019, a copy of which is annexed to the ex parte applicant's Replying Affidavit. A reading of section 80 and Order 45 Rule 1 leaves me with no doubt that a litigant cannot prefer an appeal and at the same time apply for review. To the extent that the Respondent lodged a Notice of Appeal and at the same time applied for review, the instant application offends the above provisions. On this ground alone, the instant application collapse."

16. Counsel submits that the Application falls short of the mandatory legal requirements for a review as it is not based on discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced at the time the decree or order was made. That there is no material discovery of new and important matter or evidence adduced by the Applicants herein.

17. Counsel further submits that the Applicants herein lack the requisite *locus standi* as they do not possess any grant of letters of administration to purport to represent the estate of *Karl Jacobs Ruedin* (deceased).

18. On whether the 1st Interested Party is an innocent purchaser for value and without notice, Counsel urges the Court should to note the following;

- i) That the 1st Interested Party herein was never part of the impugned consent order at any material time.
- ii) That none of the litigants in this case has demonstrated that the 1st Interested Party had reason to know that there was a consent order that may have been irregularly or illegally been obtained as alleged by the Applicants.
- iii) That the Public Auction of 8th April 2014, conducted by Kiiriyu Merchants was not challenged, stopped or otherwise not allowed to proceed despite Ms, Sheila Nkatha Muthee, the Administrator of the Estate of Mr. Karl Jacobs Ruedin (deceased) being aware of the intended sale, the 1st Interested Party should be made to suffer for actions of other parties.
- iv) That it was not a mandatory requirement for the 1st Interested Party to interrogate all the processes that existed between the Applicants and the Respondents for it to exercise its right to purchase a property that had been advertised for sale by Public Auction.
- v) That the 1st Interested Party not only paid the full purchase price but also paid a substantial sum Kshs. 1,340,000/= as arrears of rates and outstanding land rent on the Suit Property besides the sum of Kshs. 4,800,000/= paid as stamp duty to effect the transfer of the property into the 1st Interested Party's name.
- vi) The payment of the arrears of Land rent and rates which ought to have been paid by the Applicants especially Ms. Sheila Nkatha Muthee who was already alleging to be an Administrator of the Estate of Mt. Ruedin but were not paid, clearly demonstrate that the Applicants were never really keen to ensure compliance to the law protecting the Suit Property.

19. Counsel relies on the case of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR (Civil Appeal 411 of 2018) where the Court held:

"The respondent also proved that he paid Kshs. 7 Million as the purchase price for the suit land. The respondent thus had no knowledge of any fraud and was not a party to any fraud having followed due process as was required of him under the law and obtained a valid title deed to the suit land. We are therefore satisfied that the respondent who holds a title deed to the suit land exercised due diligence in acquiring the suit land and is a bona fide purchaser or innocent purchaser for value and without notice."

Claimants' Submissions

20. The Claimants through their Counsel on record submit that the instant application is **res judicata**. That it is superfluous, belated, frivolous and overtaken by events. That the matter in question was heard and determined by a Court of competent jurisdiction vide a similar Application dated 30th January, 2014 that was dismissed by this Court. The 1st Applicant filed an Appeal No. **C.A No. 314 of 2014 (Nairobi)** in the Court of Appeal which was also dismissed with costs. The Applicants also lodged a suit **ELC No. 17 of 2017 (Mombasa)**, which was also dismissed with for want of prosecution.

21. Counsel submits that the instant application offends the Provisions of **Order 45 rule 1(1)(a)** which provides that Application for review of decree or order, by a decree or order from which no appeal is allowed, but from which no appeal has been preferred may apply for a review of judgment or order without unreasonable delay.

22. Counsel invites the Court to take note the Applicants are in contempt of Court orders, have abused Court process and have no respect to Rule of Law. That this Court has cited the Applicants as contemnors and that the Applicants have not attempted to purge the contempt or tender an apology thereof. Counsel relies on, inter alia, the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR** where it was held:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

23. Counsel further submits that the 1st Applicant lacks locus standi to institute this petition in respect of a private property because she lacks letters of Administration and the Application is therefore incompetent. That in the Court of Appeal in **C.A No. 314 of 2014 (Nairobi)** between **Sheilla Nkatha Advocate (the 1st Applicant)** held that the Petitioner herein lacks locus and had no capacity to file the application in the Industrial Court. The Court further held that Locus Standi is a primary point of law almost similar to that of jurisdiction since lack of capacity to sue renders the suit incompetent. The Court referred to several authorities including the case of **Virginia Edith Wamboi Otieno v Joash Ochienq Ouqo & Another (1982-99) 1 KAR** among others.

24. Counsel submits that the Application lacks merits, is a gross abuse of Court process and lacks meritorious and should be dismissed with costs. Counsel prays for the following orders, **suo moto**;

- a) *The Applicants must purge Contempt of Court on as earlier cited within Fourteen (14) days from the date hereof*
- b) *The Applicants' scandalous pleadings be purged from record forthwith*
- c) *The Applicants be and are hereby declared as vexatious litigants.*

- d) *The Applicants' Advocates do bear the costs of this Application personally*
- e) *The Applicants do pay the Claimants the outstanding amount of judgment.*

Determination

25. From the foregoing appreciation of the pleadings of the respective applicants, Respondents and Interested Parties, the submissions and decisions relied on the following issues arise for determination:

- a) Whether the Application offends the **res judicata** rule;
- b) Whether the application has met the threshold for granting the review orders sought;
- c) Whether the Applicants are entitled to the orders sought.

Whether the Application offends the res judicata rule

26. The issue of *resjudicata* is a jurisdictional issue that goes to the root of the dispute and must therefore be considered at the earliest opportunity.

27. The doctrine of *Resjudicata* is not novel in our Courts. It is a subject which the superior courts have sufficiently expressed themselves on. In **Independent Electoral & Boundaries Commission v MainaKiai & 5 Others [2017] eKLR**, the Supreme Court held that **all the elements outlined thereunder** must be satisfied conjunctively for the doctrine to be invoked. That is:

- (a) *The suit or issue was directly and substantially in issue in the former suit.*
- (b) *That former suit was between the same parties or parties under whom they or any of them claim.*
- (c) *Those parties were litigating under the same title.*
- (d) *The issue was heard and finally determined in the former suit.*
- (e) *The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

28. In order to determine whether the elements outlined above have been satisfied conjunctively the Court must consider the issues in the instant suit vis avis the issues Constitutional and Judicial Review division of the High Court in Mombasa **Petition No. 24 of 2014-Dismissed for want of prosecution**, issues in the review Application dated 30th January 2014 in the **Industrial Court (Nairobi) Cause Number 133N of 2008** , the Court of Appeal (Nairobi) in **Civil Appeal No. 314 of 2014** and the bedrock of the other cases was summarized in the decision of the Court of Appeal (Nairobi) in **Civil Appeal No. 314** as follows:

“...That application was in Court on 11th December, 2013 where Karl J. Ruedin (who had since died) was not represented. An advocate appeared for the 1st respondent and his colleagues and the 2nd respondent was also represented by an advocate. The advocates present informed the Court that they had discussed the matter and reached a consent. That consent was adopted by the Court to the following effect:

"THIS MATTER coming up for mention on the 11th day of December, 2013 before Hon. Justice J. Nduma Nderi in the absence of the parties.

“AND by consent recorded by advocates for the claimant and advocates for the named director and adopted by this Court as an order of the Court;

IT IS HEREBY ORDERED BY CONSENT:

1. THAT by consent pursuant to the search dated 27th November, 2013 and filed in Court on 28th November, 2013 a prohibitory order do issue for sale by way of public auction of plot No. MN/1/1515 CR. NO. 13371.
2. THAT the Court Registrar do issue notification of sale and execute all necessary documents to facilitate the sale.

GIVEN UNDER my hand and seal of the Court at Nairobi this

11th of December, 2013.

ISSUED at Nairobi this 16th day of December, 2013.

DEPUTY REGISTRAR

INDUSTRIAL COURT“

*Aggrieved by those orders that were entered by consent set out herein the appellant **Sheila Nkatha Muthee** filed **Succession Cause No. 305 of 2013** where on 24th January, 2014 she obtained grant of letters of administration, *ad colligenda bona* which was limited to only taking legal steps to preserve parcel of land No. **M.N./1/515** grant no. **CR 13371**. The appellant also filed a suit being **Petition No. 24 of 2014** at the High Court where on 2nd of May, 2014 she obtained an injunction to restrain the respondents from selling or purporting to effect the sale of the said parcel of land and barred the **Registrar of Lands Mombasa** from registering any transfer, lease, vesting order or any other transaction purporting to dispose of the subject property pending the hearing and determination of the application.*

Before obtaining the said orders the appellant had filed an application in the Industrial Court dated 30th January, 2014 to review or set aside the said consent issued on 11th December, 2013. That was the application whose ruling is the subject of this appeal.”

30. From above, it is clear that the substratum in the review Application dated 30th January 2014 in the **Industrial Court (Nairobi) Cause Number 133N of 2008**, the Court of Appeal (Nairobi) in **Civil Appeal No. 314 of 2014** and **Petition No. 17 of 2017 at Environment and Land Court in Mombasa** dated 18th December 2017 is the issue of execution of the impugned consent.

31. It is not in dispute that the three suits are between the same parties. It is also not in dispute that the Court of Appeal that determined **Civil Appeal No. 314 of 2014** was competent and had jurisdiction to entertain the appeal.

32. The only pending element that must be weighed before determining whether the doctrine should be invoked is the question whether the issue was heard and finally determined. It is not in dispute that the Court of Appeal upheld the decision of the Employment and Labour Court thereby finally determining the issue.

33. As such the instant application offends the principle of *res-judicata*.

34. Having so determined, the Court needs not delve into the remaining issues for determination. The upshot is that the instant application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE