



Mbugua v Mbugua & 2 others; Mbugua & 2 others (Interested Parties) (Commercial Case 11 of 2019) [2024] KEHC 6424 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 11 OF 2019**

MN MWANGI, J

MAY 24, 2024

BETWEEN

DANIEL MWANGI MBUGUA PLAINTIFF

AND

ISAAC GICHIA MBUGUA 1ST DEFENDANT

JOSEPH MBAI MBUGUA 2ND DEFENDANT

NDUNDE INVESTMENTS LIMITED 3RD DEFENDANT

AND

ELIZABETH WANJIKU MBUGUA INTERESTED PARTY

CATHERINE WANJIRU MBUGUA INTERESTED PARTY

GLADYS WANGARE MBUGUA NDOLO INTERESTED PARTY

RULING

1. The plaintiff filed a Notice of Motion application dated 22nd August, 2023 pursuant to the provisions of Articles 1, 19 (2, 3 (a) & (c)), 20 (1, 2, 3 (b), 4 (a) & (b)), 21(1, & 3) 22(1, 2, 3(c) & (d) & 4), 23 (1, 3 (a),(b) ,(c) ,(d), (e) & (f)), 47, 60, 61, 64 (b), 65, 70, 159, 162, & 165 of *the Constitution* of Kenya, 2010, Sections 43, 45, 46, 49 ((a), (b), (c) & (d)), 51 ((1) & (2)) of the *Advocates Act*, Sections 1A, 1B, 2 (1, 2 & 3), 2A, 3 (1, 2, 3, & 4), 3A, 7(3), 9 (2a), 13, 14, 15 (1(a), (b), & (c), 2, 3, 4, & 5), 17,18, 22, 23, 24, 25, 26, 31, 52, 81(4, 9, & 10), 91, 94 (1, 2, & 4) of the *Civil Procedure Act*, Order 2 Rules 1 (1, 2, & 3) & 2 (2), Order 7, Order 9 Rule 2, Order 18 Rules 1, 3, & 11, Order 20 Rules 2, 3, & 4, Order 21 Rules 13, 14, 15, & 16, Order 22 Rules 22, 26, 28, & 39, Order 31, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3 (1)(b) of the *Companies Act*, the *Land Act* 2012, Sections 108, 110, 113, 114, 117, 345, 346, 347, 348, 349, 351, 353, 354, 357, 358, 382, 383, 388, 389, 392, 393, 394, 395, & 396



of the Penal Code, the Laws of Succession Act, Sections 3, 4, 5, 8, 9, 11, 23, 25, 26 (1, & 2), 27 (b, c, d, f, h, j, k), 28, & 29 of the Contempt of Court Act, and all other laws prescribed and enshrined under the Constitution of Kenya, 2010. The plaintiff seeks the following orders –

- i. Pending the hearing and determination of my main plaint (sic) dated 17th December, 2018 and its supplementary affidavits thereafter this Honourable Court be hereby pleased to set aside the ruling dated in its entirety and 18th August 2022 (sic);
- ii. This Honourable Court hereby stay/suspend (sic) any and all execution of the consent dated 21st or 23rd September, 2020;
- iii. This Honourable Court hereby transfers the matters touching on land to its competent Court of jurisdiction (sic) the Environmental & Land Court including the application dated 4th April, 2022;
- iv. This application be heard together with my main plaint application dated 17th December, 2018 its supplementary affidavits thereafter (sic);
- v. Interim Orders a Mareva Injunction (sic) be granted to freeze the personal accounts of the 1st defendant Isaac Gichia Mbugua - ID No. 81744531, the 2nd Joseph Mbai Mbugua - ID No. 8518830 & the 3rd defendant Ndunde Investments Limited pending the hearing and determination of this suit;
- vi. This Honorable Court gives an order for an escrow account in the names of Daniel Mwangi Mbugua, Isaac Gichia Mbugua & Joseph Mbai Mbugua opened to collected all revenue (sic) until this matter is heard and determined;
- vii. This Honourable Court hears all our applications in person and our trial date set at the nearest date possible(sic);
- viii. The Central Bank of Kenya be ordered to give a list and share personal accounts and Mpesa accounts and any buy goods or pay bills in association of Isaac Gichia Mbugua - ID No. 81744531 & Joseph Mbai Mbugua - ID No. 8518830, Ndunde Investments Limited within 7 days;
- ix. This Honorable Court gives an order to the Director of Criminal Investigations to provide its findings to the consent dated 21st or 23rd September, 2020 reported by Daniel Mwangi Mbugua and all other police reports made including those by Wanjiru Mwangi;
- x. Leave is hereby granted to Wanjiru Mwangi to act in person for the plaintiff as she holds the plaintiff power of attorney (sic) from 2018;
- xi. This Honorable Court grants leave to plaintiff (sic) to file a Miscellaneous Application for the disbarment and compensation against the following Advocates and law firms Ahmednasir Abdikadi (sic) Advocates LLP, Admednasir Abdullahi Advocates LLP, W. G Wambugu & Company Advocates - Ms. Wanja Wambugua. Munysya & Co. Advocates (sic) - Caroline Munysya (sic), Walker Kontos - Greg Karunga and Pearlyn Omamo, S. Keyonzo & J. K. Kibicho, Mongeni & Co Advocates (sic) & Ndungu Njoroge & Kwatch and Mongeni & Company Advocates (sic);
- xii. In the alternative to Prayer 11 hereinabove the Court allows the parties listed above to be enjoined in this suit together with one Anthony Munyalo & Thomas Gathome;



- xiii. This application be heard on a priority basis with consecutive dates in order to dispense with justice in a fair and efficient manner;
 - xiv. The Honourable Court gives an order to the Advocates Complaint Commission & the Office of the Attorney General to produce its finding on the complaints lodged against Ahmednasir Abdikadir LLP Advocates, W. G Wambugu & munysya & Co Advocates(sic);
 - xv. The Honourable Court holds in contempt Isaac Gichia Mbugua. Joseph Mbai Mbugua, Mongeni & Co Advocates (sic) together with Ndungu Njoroge & Kwach for their continued misrepresentation of the position of Ndunde Investments Limited in other Court rooms;
 - xvi. This Honorable Court gives an order to the lands office to provide records on the status of Ndunde Investments Limited titles to ascertain if any of them have been charged (sic);
 - xvii. This Honorable Court gives an order to remove Isaac Gichia Mbugua and Joseph Mbai Mbugua as Directors of Ndunde Investments Limited;
 - xviii. This Honorable Court gives an order that matters touching on criminality be transferred to the competent Court of jurisdiction; and
 - xix. Costs be awarded in favour of the plaintiff.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Daniel Mwangi Mbugua, the plaintiff herein. From the outset, I must state that what has been filed by the plaintiff is an omnibus application that encompasses very many prayers and cuts across vey many laws. Such applications are strongly discouraged in legal circles as they have the tendency of obfuscating issues. I will come back to that issue later.
3. In opposition to the application, the 1st & 2nd defendants filed a Notice of Preliminary Objection dated 27th November, 2023 raising the following grounds-
- i. That the application is bad in law and an abuse of the Court process;
 - ii. That the application is res judicata as the issues raised have been heard and determined by this Honorable Court vide a ruling dated 18th August, 2023; and
 - iii. That this Honourable court is functus officio.
4. The 1st interested party filed a Notice of Preliminary Objection dated 30th November, 2023 raising the following grounds –
- i. The application is incurably defective for the reasons that it was brought by an unqualified person contrary to Sections 31 and 34(1) of the *Advocates Act*;
 - ii. That by bringing the application the Donee of the power of attorney has mischievously overstepped the bounds of law and in essence masqueraded as an Advocate of the High Court in the matter;
 - iii. That this Honourable Court does not have jurisdiction to grant the orders sought in this application;
 - iv. That this Honourable Court is functus officio having delivered its ruling on 22nd August, 2022; and
 - v. That the application dated 22nd September, 2023 is fatally defective in form and substance, an abuse of the Court process and should be struck out with costs.



5. The 3rd interested party, Gladys Wangare Mbugua, in opposition to the instant application filed a replying affidavit sworn by herself on 24th November, 2023.
6. The 1st & 3rd interested parties filed a Notice of Preliminary Objection dated 24th November, 2023, raising the following grounds –
 - i. That the Court herein is functus officio having adopted as Order of the Court a Consent Order by the Parties dated 23rd September, 2020 which concluded this matter and having dismissed via Ruling dated 18th August, 2023, the plaintiff's application seeking to set aside the said Consent Order (sic);
 - ii. That the application dated 22nd September 2023 is fatally defective for having been filed by one Ivy Wanjiru Mwangi who is not an Advocate of the High Court of Kenya contrary to Section 34(I) of the [Advocates Act](#);
 - iii. That the application is fatally defective and incompetent for being supported by the supporting affidavit that is not in compliance with the requirements of the Oaths and Statutory Declarations Rules;
 - iv. That this Honourable Court lacks jurisdiction to transfer the current suit to the Environment and Land Court as sought;
 - v. That the application dated 22nd September, 2023 is grossly incompetent and a blatant abuse of Court process; and
 - vi. That the application ought to be struck out with costs to the 1st & 3rd Interested Parties.
7. On 30th November, 2023, this Court gave directions that the three Preliminary Objections shall be heard first by way of written submissions. The plaintiff's submissions were filed on 1st February, 2024 by Wanjiru Mwangi, the 1st, 2nd, & 3rd defendants' submissions were filed by the law firm of W. G. Wambugu & Company Advocates on 18th January, 2024, the 1st interested party's submissions were filed by the law firm of J. K. Kibicho & Co. Advocates on 2nd February, 2024, and the 2nd & 3rd interested parties' submissions were filed on 19th December, 2023 by the law firm of Munyasya & Company Advocates.
8. Ms. Wambugu, learned Counsel for the 1st, 2nd, & 3rd defendants relied on the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and submitted that the Preliminary Objections filed by the defendants and interested parties herein meet the threshold set out in law. She referred to the provisions of Section 7 of the [Civil Procedure Act](#), and the definition of res judicata in Black's Law Dictionary, 10th Edition and submitted that the instant application is res judicata, for the reason that the plaintiff filed a derivative suit in the year 2019, which suit was compromised by a consent entered into by the parties herein, which consent was subsequently adopted by the Court and orders issued therefrom.
9. Counsel contended that the plaintiff vide an application dated 18th December, 2020 sought to discharge and set aside the aforesaid consent, but the Court in a ruling delivered on 22nd August, 2022 dismissed the said application. She relied on the Court of Appeal case of Siri Ram Kaura v M.J.E. Morgan, CA 71/1960 [1961] EA 462 and the case of [Maumbwa & 3 others v Kisemei \(Civil Appeal E009 of 2021\)](#) [2022] KEHC 10416 (KLR), to bolster her argument that having rendered itself on the matters in issue, this Court is functus officio.



10. Ms. Njagi, learned Counsel for the 1st interested party submitted that the said party was joined to this case by consent of the parties herein that is why the 1st interested party is referred to as the 4th respondent in the application dated 18th August, 2022. In addition, the plaintiff has never raised an objection claiming that the 1st interested party is not a party to this case. Counsel relied on the provisions of Sections 31 and 34 of the *Advocates Act*, and the case of Geoffrey Ndungu Theuri v Republic [1990] eKLR. She contended that the instant application has been brought by an unqualified person as the power of attorney donated to Ms. Wanjiru Mwangi by the plaintiff to represent him in this matter does not give her the right as an unqualified person to act as the plaintiff's Advocate.
11. Counsel cited the case of Jack J. Khanjira & another v Safaricom Limited [2012] eKLR, where the Court enumerated functions of a donee of a power of Attorney and asserted that Ms. Wanjiru Mwangi is not qualified to draw, sign or file pleadings or act in these proceedings. She contended that the pleadings drawn and filed by the said Ms. Wanjiru Mwangi are incompetent for being drawn by an unqualified person hence they should be struck out. Ms. Njagi referred to the Court of Appeal case of Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, and submitted that vide an application dated 12th October, 2021, the plaintiff sought orders inter alia for the consent dated 23rd September, 2020 to be set aside.
12. That the Court considered the aforesaid application on its merits and found that it was not merited and it was dismissed vide a ruling delivered on 18th August, 2022. Ms. Njagi stated that the plaintiff's instant application also seeks to set aside the said consent dated 23rd September, 2020, Therefore, this issue having been conclusively dealt with by the Court in its ruling delivered on 18th August 2022, and the fact that the application herein does not raise any new issues that have not previously been adjudicated upon, this Court is functus officio.
13. Ms. Mwebi, learned Counsel for the 2nd & 3rd interested parties stated that the application for joinder of the said parties to this suit was compromised by a consent dated 23rd October, 2022. She relied on the provisions of Section 7 of the *Civil Procedure Act*, and the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR where the Court explained the doctrine of res judicata. She submitted that the plaintiff's application dated 6th October, 2021, which raised similar issues as in the instant application having been dismissed vide a ruling dated 18th August 2020, this Court has no jurisdiction to entertain the instant application.
14. Counsel asserted that the affidavit in support of the plaintiff's application has not been commissioned by a Commissioner of Oaths as provided for under Section 4 of Cap. 15. She relied on the decisions in Rajput v Barclays Bank of Kenya Ltd & 3 others [2004] KLR and Ismael Suleiman & 5 others v IEBC E.P. 31/2013 and submitted that the instant application is defective for being supported by an improper affidavit and should therefore be struck out.
15. Ms. Wanjiru Mwangi for the plaintiff relied on the provisions of Order 9 Rule 2 of the Civil Procedure Rules 2010 and stated that it provides that a party can come to Court acting in person or under power of attorney.

ANALYSIS AND DETERMINATION.

16. On consideration of the Notices of Preliminary Objection by the defendants and the interested parties, and the written submissions by Counsel for parties, the issues that arise for determination are –
 - i. If the application is fatally defective as the plaintiff's affidavit was not commissioned;



- ii. Whether the application herein has been filed by an unqualified person;
 - iii. Whether this application is res judicata;
 - iv. Whether this Court is functus officio; and
 - v. Whether the application herein is merited.
17. The locus classicus on Preliminary Objections is the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra). The Court in the case of Oraro v Mbaja [2005] 1KLR 141 expressed itself with regards to Preliminary Objections as hereunder -
- “The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
18. From the above decisions, it is evidently clear that a Preliminary Objection ought to raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
- If the application is fatally defective as the plaintiff’s affidavit was not commissioned.
19. Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya provides that -
- “Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
20. In the case of In re MWO (Minor) [2021] eKLR the Court held thus-
- “It is a legal requirement that an affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public. An affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an affidavit must be executed on oath by the deponent. An affidavit which has not been properly commissioned is at best a mere signed statement of facts. It is the commissioning of the affidavit by an authorised officer which elevates the signed statement to the status of an affidavit. Therefore, commissioning of the document is a crucial step without which the statement cannot be deemed to be an affidavit. Failure to commission an affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.” (Emphasis added).
21. On perusal of the affidavit in support of the instant application, it is evident that the affidavit has not been commissioned by a Commissioner of Oaths. The said affidavit reads at the very end that it has been “signed by the plaintiff” as opposed to being sworn by him before a Commissioner of Oaths.



Consequently, in view of the fact that the plaintiff's affidavit in support of the instant application has not been sworn before an Advocate who qualifies to practice as a Commissioner of Oaths, neither does it bear the stamp, name and address of a Commissioner of Oaths, I find that it is defective. It is also my finding that failure to commission an affidavit reduces it to a mere statement of facts thus rendering an application such as the one before this Court defective for want of evidentiary foundation. That being the case, the annexures attached to the said affidavit become useless documents which cannot be relied on in the absence of a properly executed affidavit to support the application.

Whether the application herein has been filed by an unqualified person.

22. The defendants and interested parties contend that the application herein has been filed by an unqualified person contrary to the provisions of Sections 31 and 34(1) of the Advocates Act, thus it is fatally defective. The said Sections state as hereunder –

“

“ 31. Unqualified person not to act as advocate

1. Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

34. Unqualified person not to prepare certain documents or instruments

1. No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument -
 - a. relating to the conveyancing of property; or
 - b. for, or in relation to, the formation of any limited liability company, whether private or public; or
 - c. for, or in relation to, an agreement of partnership or the dissolution thereof; or
 - d. for the purpose of filing or opposing a grant of probate or letters of administration; or
 - e. for which a fee is prescribed by any order made by the Chief Justice under section 44; or
 - f. relating to any other legal proceedings;
- nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to -

- i. any public officer drawing or preparing documents or instruments in the course of his duty; or
- ii. any person employed by an advocate and acting within the scope of that employment; or



- iii. any person employed merely to engross any document or instrument.”
23. The provisions of Section 31(1) of the *Advocates Act* are only applicable subject to the provisions of Section 83 of the *Advocates Act* which states that –
- “Nothing in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.”
24. The plaintiff submitted that the instant application has not been filed by an unqualified person since Ms. Ivy Wanjiru Mwangi who drew the said application and is also prosecuting it on behalf of the plaintiff is duly empowered to do so under Order 9 Rule 2 of the Civil Procedure Rules, 2010 in light of the Power of Attorney donated to her by the plaintiff. The plaintiff via a Power of Attorney registered on 4th December, 2018 and filed in Court on 21st July, 2023, the plaintiff appointed Ms. Ivy Wanjiru Mwangi as his attorney and agent in respect of all Court matters arising from and in respect of Mbumi Coffee Estate Mills, Ndunde Investments Limited, Succession matters and incidental Court matters thereof. Thereafter, on 29th May, 2023, the plaintiff filed a Notice of Change of representation pursuant to the provisions of Order 9 Rule 2 of the Civil Procedure Rules, 2010 appointing the said Ms. Ivy Wanjiru Mwangi as his legal representative in these legal proceedings.
25. Order 9 Rule 2 of the Civil Procedure Rules, 2010 which the plaintiff heavily relies on provides that –
- “The recognized agents of parties by whom such appearances, applications and acts may be made or done are -
- a. subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
 - b. persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
 - c. in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.” (Emphasis added).
26. From the above provisions, Ms. Ivy Wanjiru Mwangi can only be deemed to be properly on record for the plaintiff after obtaining leave and/or permission from Court to act in such capacity as his recognized agent. It is not disputed that Ms. Ivy Wanjiru Mwangi has not been granted permission by this Court to represent the plaintiff and draw and files pleadings for the plaintiff in these proceedings. In the case of *Jack J. Khanjira & Another v Safaricom Limited* (supra) the Court in determining who a recognized agent is, acting pursuant to a donated power of attorney on behalf of a litigant acting in person under Order 9 of the Civil Procedure Rules, 2010, held as follows-
- “In *Theuri vs Republic* the rule is clearly discussed as not intended to violate the provisions of any other law. There, the court stated that if there was a contradiction between the Civil Procedure Rules and the *Advocates Act*, the *Advocates Act* would prevail. This is consistent with Section 31 (b) of the *interpretation and General Provisions Act* (Cap 2) which provides that:



"No subsidiary legislation shall be inconsistent with the provisions of an Act."

The Civil Procedure Rules do not and cannot therefore confer upon any person any substantive legal rights which he otherwise does not have or grant such rights as are denied that person by other laws.

Order 9 Rule 1 is almost in pari materia with Order III rule 1 of the Indian Code of Civil Procedure. Mulla on the Code of Civil Procedure, in a commentary on Order III Rule 1 as discussed in the Theuri case states, states:

"The right of audience in court, the right to address the court, the right to examine and cross examine witnesses are all parts of pleading and that is not included in the expression 'appearance application or act in or to any court.' The word 'act' in juxtaposition with the words 'appearance' and 'application' is used in a technical sense and not in its ordinary sense as being referable to any action by any party."

The judges in Theuri concluded that it could never have been the intention of the Rules Committee, by making Order III Rule 1 (current Order 9 Rule 1), to authorise holders of powers of attorney to appear or make applications or act otherwise than in the technical sense.

I think that Order 9 Rule 2(a) gives instructive guidance as to who is a person appointed as an attorney. And such persons would do well to keep mind the guidance given in Order 9 Rule 2, which provides:

"2 The recognized agent of parties by whom such appearances, applications and acts may be made or done are -

- (a) Subject to the approval by the court in any particular suit persons holding powers of attorney authorising them to make such acts on behalf of parties." (underlining mine)

Clearly, the essential characteristic of a person acting as a recognised agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court.

The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable ... In my view, it is not the fact of being an agent that renders a donee of a power as recognised; it is the extent or scope of their agency that is recognised. That is to say, a recognised agent can perform only that which he is recognised or authorised to do in law."

27. This Court concurs with the Court's holding in the abovementioned case and finds that the actions of Ms. Ivy Wanjiru Mwangi in drawing and/or signing pleadings and submissions, and assuming audience before this Court are contrary to the provisions of Sections 31(1) & 34(1) of the Advocates Act. For this reason, this Court declines to give approval to Ms. Ivy Wanjiru Mwangi to act on behalf of and/or represent the plaintiff in these proceedings. The first step she should have taken from the outset was to seek leave to come on record as the recognized agent of the plaintiff and thereafter file the pleadings and/or applications. Consequently, the instant application is fatally defective for having been filed by an unqualified person.



Whether the application dated 22nd August, 2023 is *res judicata*.

28. It was submitted by the 1st & 2nd defendants that the application herein is *res judicata* since the orders sought by the plaintiff in this application were previously sought in an application dated 6th October, 2021 which application was dismissed in a ruling delivered on 18th August, 2022. The doctrine of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#) which states as hereunder -

“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 can 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.”

29. The [Civil Procedure Act](#) also provides explanations with respect to the application of the *res judicata* doctrine. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

30. This Court has perused the Court record and the pleadings filed on the CTS and has not come across an application dated 6th October, 2021. However, upon perusal of the ruling dated 18th August, 2022, I note that it was in respect to an application dated 12th October, 2021. On perusal of the said application, I note that the plaintiff sought orders *inter alia* for the Court to discharge, set aside and/or review in its entirety the consent date 23rd September, 2020, set aside, nullify and void any transactions pursuant to the consent dated 23rd September, 2020, for the firm of Munyasya & Company Advocates to be disqualified from representing the defendants or any other party in this matter, and for the firm of W. C. Wambugu & Company Advocates to be disqualified from acting for the interested parties or any other party in this matter.

31. In the present application, the plaintiff is seeking several orders *inter alia* that the ruling dated 18th August, 2022 be set aside, that this Court stays/suspends any and all execution of the consent dated 21st or 23rd September, 2020, transfers of matters touching on land to the Environment & Land Court, a Mareva injunction against the 1st, 2nd & 3rd defendants, an order for an escrow account in the names of the plaintiff and the 1st & 2nd defendants to be opened to collect all revenue until this matter is heard and determined, and an order directing the Director of Criminal Investigations to provide its findings to the consent dated 21st or 23rd September, 2020 reported by Daniel Mwangi Mbugua and all other police reports made including those by Ms Wanjiru Mwangi.

32. From the above excerpt of the prayers that are being sought in the present application *vis a vis* the prayers that were sought in the application dated 12th October, 2021, it is evident that the only issue that was fully determined on merits by the Court in its ruling delivered on 18th August, 2022 was in regard to the stay/suspension of any and all execution of the consent dated 21st or 23rd September, 2020. The said issue was fully addressed by the Court in its ruling dated 18th August 2022 from paragraphs 15 to 21, thereafter at paragraph 22, the Court held that the applicant who is the plaintiff in this case had



not made out a case for being granted the orders sought in the application dated 12th October, 2021. In view of the fact that all the other issues arising in the instant application have neither been raised before in this suit nor determined by a Court of competent jurisdiction in a suit between similar parties as the ones before this Court, I am not persuaded that the instant application offends the doctrine of res judicata as provided for under Section 7 of the Civil Procedure Act, save for the one issue that I have singled out.

33. In paragraph 2 of this ruling, I did point out that the applicant filed an omnibus application, an issue that is strongly discouraged in legal circles when it comes to matters of drafting. The issue of omnibus applications has been addressed by Courts in numerous cases as a pointer of what should not be done in drafting of pleadings or applications. In the case of *Pyaralal Mhand Bheru Rajput vs Barclays Bank & others Civil Case No. 38 of 2004* the Court stated thus-

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff’s application incurably defective, and a candidate for striking out.”

34. Even if this Court had found that the instant application was filed by a person who had been granted leave of the Court to represent the applicant as his recognized agent, the said application would have been for striking out for being heavily loaded with issues traversing different aspects of the law and would no doubt only obfuscate issues instead of having the real issues in controversy being brought out with clarity.

Whether this Court is *functus officio*.

35. The doctrine of *functus officio* is one of the expressions in law that seeks to achieve finality in litigation. In the case of *Telkom Kenya Limited v John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR the Court of Appeal held that:

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

36. Further, in *Mohmed Dagane Falir v Alfonse Mutuku Muli & another* [2020] eKLR, Odunga J., on the doctrine of *functus officio* held as follows-

“I associate myself with the position adopted by the Supreme Court decision in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR where the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 to the effect that:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

That position however clearly applies to a situation where the Court has pronounced itself on merits. It cannot once more revisit the same decision with a view to arriving at a different decision. However, the court is not barred from dealing with the matter in order to facilitate its decision.”

37. The suit was compromised vide a consent dated 23rd September, 2020 entered into by the parties herein and subsequently adopted as an order of the Court. It is evident from the record that the plaintiff vide an application dated 12th October, 2021 sought to inter alia set aside and/or have the said consent reviewed, but this Court differently constituted vide its ruling delivered on 18th August, 2022 found the said application to have no merit and dismissed it. The said ruling has neither been varied and/or set aside by a Court of competent jurisdiction nor has the plaintiff or any other dissatisfied party lodged an appeal against it. For this reason, the Consent dated 23rd September, 2020 and the orders emanating therefrom are still binding to the parties herein and to this Court.

38. The Court of Appeal in the case of Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others [2013] eKLR when dealing with the issue of functus officio held that –

“...we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made (Emphasis added). We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings...”

39. Bound by the aforementioned Court of Appeal holding, and in view of the fact that the consent dated 23rd September, 2020 entered into by the parties herein and subsequently adopted as an order of the Court thus compromising this suit is still binding on the parties, this Court finds that it is functus officio.

40. In the end, this Court finds that the application dated 22nd August, 2023 is bereft of merits. It is hereby dismissed with costs to the defendants and the interested parties. Costs of the Notices of Preliminary Objection are awarded to the 1st & 2nd defendants, the 1st, 2nd & 3rd interested parties.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 24th day of May, 2024. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Wanjiru Mwangi representing the Plaintiff vide a Power of Attorney – applicant

Ms Njari for the 1st interested party

Ms Kiage h/b for Ms Munyasya for the 2nd & 3rd interested parties/respondents



Ms B. Wokabi – Court Assistant.

Page 8 of 8 NJOKI MWANGI, J.

