



**Maalim & 4 others v Jarha & 16 others (Environment & Land Case  
182 of 2018) [2023] KEELC 17502 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17502 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 182 OF 2018**

**MAO ODENY, J  
MAY 23, 2023**

**BETWEEN**

**AKARE KOMORA MAALIM AND 4 OTHERS ..... PLAINTIFF**

**AND**

**AYUB JARHA AND 16 OTHERS ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated September 19, 2018, the Plaintiff sought judgment against the Defendants for; -
  - a. An order of permanent injunction restraining the Defendants by themselves, their Malindi Ya Ngwena Land Committee members, agents, servants and any person claiming through them from selling, alienating and demarcating any portions within the suit property and from carrying out any construction thereon.
  - b. An order of vacant possession of the suit property and demolition of any structures erected by the Defendants within the suit property and their eviction therefrom.
  - c. Costs of this suit and interests thereon at court rates.
  - d. Any other relief that this Honourable Court shall deem just to grant.
2. The Plaintiffs' case is based on approximately 40 acres of unregistered land situated at an area referred to as Ghavia within Chewani Location, Hola, in Tana River County. The suit property was said to be geographically located near an area called Malindi Ya Ngwena.

**Plaintiffs' case**

3. PW1 Akare Komora adopted his written statement dated September 19, 2018 as evidence in chief and produced PEXH-1 and 2 documents in the list of documents. It was his testimony that the suit property was at all material times utilized as ancestral land by members of the Jarha and Kinaghasere



clans which they were part of but sometime around April 2017, the two clans had a boundary dispute but before the dispute could be resolved, the 1<sup>st</sup> to 4<sup>th</sup> Defendants in conjunction with the Tana River County Land Administrator, declared the suit property Malindi Ya Ngwena Community Land and proceeded to allocate various portions to the 5<sup>th</sup> – 17<sup>th</sup> Defendants.

4. PW1 stated that the Defendants entered the suit property denying the Plaintiffs use and that the suit property was not a part of the Malindi Ya Ngwena area and the decision to declare it community land was erroneous. He stated that he did not have any relations with the Defendants and that they resided far from the suit property.
5. On cross-examination, PW1 told the court that the suit property was in Wachakone area in Ghavia village and that he was not aware of any previous case on Lake Ghavia area where he had always cultivated.
6. PW2 Elijah Barisa Galido also adopted his written statement dated September 19, 2018 and PW1's evidence and stated that the suit property belonged to three clans. It was further his testimony that the suit property was the same property in ELC 26 of 2014 but the Defendants had increased the size of their portion.
7. On cross examination, PW2 told the court that the Defendants lived 20kms away from the suit property and that there was a decision by the Land Disputes Tribunal of which despite their dissatisfaction, they did not appeal.
8. PW3 Chekea Dhadho equally adopted his written statement dated October 4, 2021 and told the court on cross examination that the suit property belonged to PW1 who got it from his grand-parents.
9. PW4 Samuel Hirbae-PW4, also adopted his written statement dated October 4, 2021 and stated that he was PW1's neighbor and that the suit property belonged to PW1.
10. On cross examination, the witness testified that the Defendants and himself stay at Malindi Ya Ngwena and that PW1 inherited the suit property from his father and that there was no boundary dispute.

#### **Defendants' case**

11. Ayub Jarha –DW1, adopted his written statement dated August 30, 2019 as evidence in chief and stated that in their community, land was divided into two portions, one for construction and another for farming.
12. It was DW1's evidence that each clan had its own portion for farming and the boundaries were known and that there was a decision, by the community elders, adopted as an order of the court which had not been set aside.
13. On cross examination DW1 told the court that that as a member of the area Land Committee, their duty was to resolve land disputes and that he was not a party in any previous case.
14. DW2 Amos Karhayu testified that the dispute herein was about Gaviya and that the Plaintiffs' intention was to cross the dry river to occupy the residential area reserved as a village. He stated that the dispute was heard and determined by the elders at the Tribunal and the award adopted by this court.
15. On cross-examination, DW2 confirmed that he was not a party to the previous cases and that the suit property was in Ghavia. He also stated that the Malindi Ya Ngweya and Ghavia were separate areas, one for residential and another for farming.



16. DW3 Amon Petro Buya adopted his statement dated August 30, 2019 as evidence in chief and testified that they have been on the suit land for many years and that the Plaintiffs have been unsuccessfully filing cases against the Defendants. He further stated that the dispute herein had been determined by the Galole Land Disputes Tribunal and no appeal was preferred by the Plaintiffs.
17. DW3 stated that in the previous case in which he testified, he had sued on behalf of his family and on cross-examination, the ruling was that DW3 takes the west side of the dried river and Fares Jillo, the Respondent therein, the portion on the east side. He further stated that out of the 17 defendants, he was related to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who were his son and brother respectively.
18. DW4 Buya Ade equally adopted his written statement dated September 30, 2019 and testified that the suit property was on the west side and the Plaintiffs resided on the east side which was what the Tribunal ordered for both parties to stay east and west of the dry river bed.

### **Plaintiffs' submissions**

19. Counsel for the Plaintiffs identified three issues for determination namely, whether the suit property is Malindi Ya Ngwena community land; whether the 1<sup>st</sup> to 4<sup>th</sup> Defendants had the mandate to deal with the suit property; and finally whether the suit is res judicata.
20. Counsel submitted that the sketch map produced as PEXH2 was not challenged and that it shows the location of the dry river and Malindi Ya Ngwena Community Land. It was Mr Shujaa's submission that given that the Defendants' witnesses admitted that the suit property did not lie within Malindi Ya Ngwena, the 1<sup>st</sup> -4<sup>th</sup> Defendants had no mandate to deal with the suit property.
21. On whether the suit is res-judicata, counsel relied on the case of *Independent Electoral and Boundaries Commission -V- Maina Kiai and 5 others [2017] eKLR* which established the elements to be met for the doctrine of res judicata succeed in defence. Counsel argued that the parties herein were different from those in the former cases exhibited by the Defendants and that the issues were not directly or substantially the same.
22. Counsel further submitted that the cases in the Tribunal were in respect of a boundary dispute which were heard determined and fixed and that the present case is that the Defendants have taken possession of the parcels of land in the dry river bed belonging to the Plaintiffs.

### **Defendants' submissions**

23. Counsel for the Defendants argued that the Plaintiff did not disclose with clarity the area of dispute and due to that ambiguity, the prayers could not be granted. It was counsel's submission that the Tribunal made its verdict that none of the parties who represented their respective clans should leave the place and Ghavia area was divided into two and each clan was to respect such boundaries for the sake of peace. That this Award culminated into adoption of the decision by HOLA Magistrates Court vide case No 11 of 2011.
24. Mr Magiya also submitted that although the parties were different in the former case, they represented their respective clans and that the dispute was substantially the same. Counsel argued that mere addition of parties did not necessarily render the doctrine of res judicata inapplicable and relied on the explanation 6 under Section 7 of the *Civil Procedure Act*, and the cases of *Mburu Kinyua v Gachini Tuti [1978] KLR 69[1976-80] 1 KLR 790*; *Churanji Lal and Co vs Bhaijee [1932] 14 KLR 28*; *Nancy Mwangi t/a Worthlin Marketers v Airtel Networks K Ltd and 2 others [2014] eKLR* and *ET v Attorney General and another [2012] eKLR*.



25. On whether the court should grant a permanent injunction, counsel relied on the case of *Nguruman Limited v John Bonde Nielsen and 2 others [2014] eKLR* and submitted that the Plaintiffs have failed to satisfy the three conditions relevant to granting an injunction.

### **Analysis And Determination**

26. The issue for determination is whether this suit is res judicata and whether the Plaintiffs are entitled to an order of permanent injunction and an order of vacant possession.
27. The Defendants raised the issue of res judicata in a notice of Preliminary Objection dated August 30, 2019 but the objection was dismissed in the ruling delivered on January 22, 2021. In dismissing the Preliminary Objection the court observed that;-

'Arising from the circumstances herein, it was clear to me that certain facts would still require to be ascertained if one was to conclude that the subject parcel of land is the same and that the parties are claiming under the same titles in the previous suits.'

In the premises, I did find that the preliminary objection is premature'

28. It is not disputed that the Galole Land Dispute Tribunal heard a dispute between the parties who are members of different clans who are represented in this suit. It is further not disputed that the decision was adopted by the Magistrates Court in Hola Case No 1 of 1969, and Malindi ELC No 26 of 2014, having in mind that parties gave evidence and canvassed the same in their respective submissions.
29. The parties also admitted that the dispute was in respect of a boundary dispute which was heard and determined and adopted by the court as a judgment of the court. PW2 on cross examination stated that Case No 24 of 2014 was in respect of the same parcel of land and that they were dissatisfied with the decision of the tribunal but did not file an appeal
30. The doctrine of res judicata is anchored under Section 7 of the *Civil Procedure Act* whereby it ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
31. A party raising the doctrine of res judicata must satisfy the doctrine's five essential elements which are stipulated as follows: -
- i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.
  - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

32. A perusal of the decisions of the Tribunal, and the Magistrates' court, the parties therein were one Amon Petro Buya and Fares Dhadho Jillo; while those in ELC No 26 of 2014 were Elijah Barisa Galido [the 5<sup>th</sup> Plaintiff herein] and Amon Petro Buya. It is evident that the parties are not the same. However, I note that the dispute is between members of three clans. In their plaint, the Plaintiffs under paragraph 4 indicated that they filed the suit in their capacity as members of the Javha and Kinaghasere clans.



33. The Plaintiffs also stated that the 4<sup>th</sup> -17<sup>th</sup> Defendants bought portions of the suit property from some other people allocated the land by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. It appears that the persons referred to by the Plaintiffs whom it was said that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants allocated the suit property Amon Petero Buya. A perusal of the former judgments, it is evident that the suit property is owned by the same clans mentioned herein. It is therefore safe to conclude that the parties herein are claiming under the same parties as in the former suits, and in the same Defendants.
34. The Plaintiffs averred that the suit property was not the same, yet their evidence was contradictory. PW2, the 5<sup>th</sup> Plaintiff confirmed that the suit property was the same land in dispute in the former cases that were heard and determined by a court of competent jurisdiction.
35. Parties should not file cases in instalments but pursue their claim fully PW2 stated that they were dissatisfied with the decision of the Tribunal but they did not file any appeal. There are set down procedures on the steps to be taken when a party is dissatisfied with the award of the land Disputes Tribunal. The Plaintiffs did not use the options provided but decided to file numerous cases including this one.
36. Section 8(1) provides that:
- ' Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.'
37. The Act provided section 8(8-9) allows for a further appeal to the High Court on issues of law but not on issues of fact. Under Section 8(8) of the Land Disputes Tribunals Act(Repealed), the decision of the Appeals Committee was deemed to be final on any issue of fact and no appeal was allowed thereof to any Court. The section provides as follows:
- ' Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the high Court unless a judge of that Court certified that an issue of law (other than customary law) is involved.' A question of customary law shall for all purposes under this Act be deemed to be a question of fact.'
38. The parties alluded to their traditions in respect to how they occupy and use the suit parcels which essentially are based on customary law which are matters of fact. This is not an appeal to the court as provided for.
39. I have considered the pleadings, the evidence and the submissions by counsel and find that the case is res judicata and is therefore dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF MAY, 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

