Pasi and Ponda (Suing and legal representatives of the Estate of Charles Pasi Ponda) & 3 others v Kambi & 11 others (Environment & Land Case E097 of 2024) [2025] KEELC 1455 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE E097 OF 2024

EK MAKORI, J

MARCH 20, 2025

BETWEEN

JAPHET KELLY PASI AND ERICK KALUME PONDA (SUING AND LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES PASI PONDA) ..... 1ST PLAINTIFF

JOSHUA RADHI ..... 2ND PLAINTIFF

AGNES KIBIBI PONDA & COLLINS CHOME NGONYO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES NGONYO KAMBI NZOLA) ..... 3RD PLAINTIFF

THE ESTATE OF KAHINDI NZOLA ..... 4TH PLAINTIFF

AND

ESTHER KADZITU KAMBI ..... 1ST DEFENDANT

ELIZABETH POLA KAMBI ..... 2ND DEFENDANT

KANZE KAMBI ..... 3RD DEFENDANT

MAPENZI KAMBI ..... 4TH DEFENDANT

JUMWA KAMBI ..... 5TH DEFENDANT

GIBSON CHOME ..... 6TH DEFENDANT

CHRISTOPHER KAMBI ..... 7TH DEFENDANT

KENNEDY MADARAKA ..... 8TH DEFENDANT

DAVIS NGALA KAMBI ..... 9TH DEFENDANT

BENARD RUHUSA KAMBI ..... 10TH DEFENDANT

ROMI KAMBI ..... 11TH DEFENDANT

GHARAMA KIPONDA ..... 12TH DEFENDANT

RULING

1. Notice of motion application dated 19th September 2024 sought, among other reliefs, an order of status quo pending the hearing of the main suit regarding land parcels No. Kilifi/Roka/930, 932, 943, and 944. Simultaneously, a preliminary objection dated 25th November 2024 was raised by the defendants herein seeking to strike out this claim on two grounds; namely, the 1st plaintiffs have no authority to file the current suit on behalf of the Estate of Charles Pasi Ponda, and this suit is res judicata.

2. The court directed that the application and the preliminary objection be heard together and that the parties file written submissions. They complied.

3. The brief background of the matter is that in or about 1965, the Government of Kenya intended to settle the people within Tezo in Kilifi County through a settlement scheme by sub-dividing parcels of land within the Tezo locality. The 1st plaintiff, as well as the patriarch of the 1st plaintiff's family at the time, one late Mzee Paul Kambi Ngala, identified parcels of land, commenced bush clearing, and waited for the official adjudication process so that titles would be issued, having met the requirements. The due process required by the government was followed, and the following titles were issued:

    i. Kilifi/Roka/930 to Kahindi Nzola (4th plaintiff)

    ii. Kilifi/Roka/931 to Paul Kambi;

    iii. Kilifi/Roka/932 to James Ngonyo (whose estate the 3rd plaintiff represents);

    iv. Kilifi/Roka/943 to Charles Pasi Kambi (the 1st plaintiff herein);

    v. Kilifi/Roka/944 to Joshua Radhi Kambi (2nd plaintiff herein); and

    vi. Kilifi/Roka/945 to Elisha Kazungu Kambi.

4. The proprietors of the above-noted titles lived harmoniously until the passing of Mzee Paul Kambi Ngala when family feuds began. Several complaints were lodged and determined as follows:

    i. A complaint made to the then-District Land Adjudication Settlement Officer, Kilifi, given through a letter dated 4th May 2005, in which the said officer concluded that the plots legally belonged to those registered in their records.

    ii. A complaint was made at the Bahari Land Disputes Tribunal - Claim No. 17 of 2004, which decided on 22nd August 2005 that the six plots should be divided equally among the eight wives of the late Mzee Paul Kambi Ngala.

    iii. The decision was appealed to the Provincial Land Disputes Appeal Committee Coast—Appeal Case No. 382 of 2005, which, in a decision dated 29th April 2009, upheld the decision by the Bahari Land Disputes Tribunal.

    iv. The plaintiffs lodged an appeal at the High Court at Malindi against the said decision; however, they did not pursue the same as the extended family members decided to settle the matter out of court. Negotiations began and went well for a while, but a conclusion was not reached.

v. The plaintiffs then instituted a claim at the Environment and Land Court at Malindi - ELC 54 of 2019; Odeny J. dismissed both the plaintiffs' suit and the defendants' counterclaim as the court held that it had no jurisdiction to deal with the matter as there still existed the Tribunal orders above.

6. The plaintiffs are asking this court to note that the orders sought in Malindi ELC 54 of 2019 were regarding the declaration of proprietary rights to the properties listed above. This matter seeks orders to have the Tribunal orders declared null and void for being stale and time-barred, the same having not been enforced within the statutory time limit under the *Limitation of Actions Act*.

7. I have considered the materials and submissions concerning the preliminary objection and the pending application. This court must determine whether the preliminary objection is sustainable on two fronts: the 1st plaintiff's capacity to sue and the res judicata doctrine, and whether to grant status quo orders pending the determination of the suit as sought in the application and who should bear costs.

8. The parties extensively submitted on the issues at hand and cited judicial authorities to guide the court in reaching a fair verdict.

9. For order, the court will start with the preliminary objection; the principles upon which this court is invited to determine the merit of a notice of preliminary objection were set out in the oft-cited case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. This case established the criteria for a preliminary objection, and the court will adhere to these principles in its ruling.

10. The Court of Appeal in Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR) reiterated the same position on what would constitute a preliminary objection and held as follows:

> " The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained."

6. The thrust of a preliminary objection in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A, in Owners of the motor vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

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

7. Regarding the capacity to sue, the plaintiffs submit that locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as:

> " the right to bring an action or to be heard in a given forum."

In the case of Alfred Njau and others v City Council of Nairobi [1983] KECA 56 (KLR), the court held that:

> " ...the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings...."

5. It is submitted that the 1st plaintiffs instituted this suit by virtue of the Grant of Letters of Administration ad litem dated 6th August 2024, which gives them the authority to sue. The Letters of Administration ad litem took effect from the said date as provided for by the provision of Section 80(2) of the *Law of Succession Act*, and the Grant was duly presented before this court as part of the supporting documents of the plaintiffs' case. Having established that the Letters of Administration ad litem were taken out before filing this suit, I agree that the 1st plaintiffs herein are correctly before the court. Therefore, the preliminary objection on this limb cannot be sustained.

6. On the doctrine of res judicata, the defendants aver that It is evident from the pleadings thereon that before this court, there exists an unchallenged authentic Order from a Court of competent jurisdiction from the Senior Resident Magistrate's Court Land Dispute No. 37 Of 2005 Kilifi dated 30th March 2006 - Hon. C. Obulutsa (SRM), arising from the Bahari Land Disputes Tribunal - Claim No. 17 of 2004.

7. The said Order was delivered in open court in the presence of the plaintiffs and their advocate on record; hence, the plaintiff has known the Order of the court dated 30th March 2006 ever since. The plaintiffs, being aggrieved by the said Order of 30th March 2006, filed an Appeal to the Provincial Land Appeals Committee—Coast sitting at Mombasa, which pronounced its Ruling on 29th April 2009 in Appeal Case No. 382 of 2005 in favor of the defendants.

8. Unsatisfied with the Provincial Land Appeals Committee's ruling, the plaintiffs moved to the High Court in HCCA No. 28 of 2009 Malindi, where they failed to take steps to prosecute the appeal.

9. The defendants opine that there are orders in place that have not been vacated, set aside by a court of competent jurisdiction, complied with, or challenged in any way by the plaintiffs.

10. The defendants contend that the plaintiffs filed a fresh suit over the same subject matter, litigating under the same title, between the same parties, Malindi ELC NO. 54 of 2019 Charles Pasi & 3 others v Gibson Chome & 9 others dated 10th June 2019 for injunctive relief over ten years after abandoning their Appeal, and the same was dismissed due to the pendency of a valid Court Order that has not been set aside.

11. The plaintiffs, on the other hand, submit that when dealing with the issue of res judicata, the court should consider that:

    i. The issues raised must be directly and substantially in issue in the former suit;

    ii. The court trying those issues must be competent – in other words, the court must have competent jurisdiction; and;

    iii. The issues must have been heard and decided upon to finality.

iv. The plaintiffs are of the view that this matter is not res judicata:

12. It is uncontested that both Malindi ELC 54 of 2019—the former and current suit—involve the same parties, as the issues raised in this matter affect the same parties. Although the subject matter is the properties described under paragraph *1*, which are the same as those in the former suit, the issues raised differ. The former suit sought to have the proprietorship of the described suit properties determined. However, the current suit aims to have the various tribunal decisions regarding the suit properties declared null and void in line with the *Limitation of Actions Act*. The issues sought herein are clearly different; therefore, the current suit is not res-judicata. The judge dismissed the former suit and stated:

> " .... In view of the above, I find that the court has no jurisdiction with this matter. The upshot is that both the plaintiff's and the defendants' cases are dismissed".

13. Therefore, if the court in the former suit declared itself to have no jurisdiction, it is also clear that even the issues presented in that matter (as different as they were from the issues currently before this Court) were never conclusively determined on merit.

14. The judgment above states that the former suit was dismissed on the point of law. The court did not delve into the issues involved, so the judgment was not on the merits of the case but on a point of law.

15. As submitted above, the former suit was not heard on its merits, and the court 'recused' itself on a point of law. It is, therefore, correct to conclude that the former suit was not heard and decided in finality, and even so, the issues between the two matters remain distinctively different.

16. I have evaluated the submissions raised by the parties and the authorities cited. I will agree with the defendants in this matter that the issues raised in this action are similar to what has been raised in the former actions significantly in Malindi ELC 54 of 2019, reported as Kambi & 3 others v Chome & 9 others [2023] KEELC 494 (KLR), this Court (Odeny J.) in the judgment delivered on 30th of January 2023 extensively discussed the issues raised in the current matter vis-a-vis other former actions on same parties and similar issues, in dismissing the suit she rightly held:

> " The Award of the Land Disputes Tribunal which was upheld by the Provincial Land Appeal's Committee and adopted as a Judgment of the Court has not been set aside. It is still subsisting; therefore, it follows that it is a valid order until it is set aside.
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> 41. The Plaintiffs' argument was that the Tribunal did not have the jurisdiction to hear and determine the matter hence the award was null and void. These are the issues that were supposed to be determine in the Appeal which the Plaintiff filed in the High Court but abandoned. That was the right process and forum to impeach the award on the ground that the Tribunal lacked the requisite jurisdiction.
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> 42. In the case of Munga Mbodi Mwenda v Muguza Jangwata Jindwa & another [2014] eKLR Angote J held that: -
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> "I hold the view that in instances where the Land Disputes Tribunal had already delivered its award, and the award was duly adopted by the subordinate court, such an award remains valid even where an appeal was pending before the Appeals Committee. Upon the repeal of the Act, all the appeals which were pending before the Appeals Committee should be transferred to the Environment and Land Court and dealt with in that court in its appellate jurisdiction. In situations where, fresh matters are filed in this court if a party

shows that the same issues had been dealt with and decided by the Land Disputes Tribunal and the subordinate court, then this court can only deal with those issues as an appellate court and not otherwise.

43. It is on record that an award was adopted as an order of the court and that there is an appeal that was filed challenging the award in the High Court and; therefore, this court cannot deal with a fresh matter which is not an appeal."

17. In an application for contempt in the same file, Njoroge J. dismissed the application vide ruling delivered on 6th February 2025, reported as Kambi & 3 others v Chome & 9 others [2025] KEELC 421 (KLR) he held as follows:

> " The first issue to be dealt with is whether there is an order of the court and what its terms are. It is not in dispute that a judgment was entered in this case which dismissed both the plaintiff's claim and the defendant's counterclaim on the basis that this court could not deal with a fresh matter which is not an appeal. It has not been demonstrated by the plaintiffs that an appeal has been successfully lodged against the judgment of the lower court. That judgment is therefore still in force unless it is overturned in an appeal."

18. The plaintiffs appealed against the substantive decision of this court(Odeny J.) to the Superior Court; the appeal did not see the light of the day it is reported as Kambi & 3 others v Chome & 9 others [2024] KECA 738 (KLR), Laibuta JA. held as follows:

> " To my mind, the applicants have failed to surmount the and pre-requisite first hurdle for extension of time to lodge an appeal, namely whether they have an arguable appeal with the likelihood of success, and conditional to which I would be bound to exercise the discretion to consider the remaining factors for grant of orders under rule 4. Having found that the suit and counterclaim in the ELC as well as the intended appeal go against the grain of the law and procedure in land adjudication, I need not go further. Accordingly, I find that the applicant's Motion does not satisfy the requirements for grant of orders under rule 4 of this Court's Rules. The same fails and is hereby dismissed with no order as to costs."

19. Upon reviewing the previous and current lawsuit, the pending appeal related to the contested orders, which the High Court should have addressed after the Provincial Appeals Committee decision, remains unresolved, similar to the situation in Malindi ELC 54 of 2019. The plaintiffs now wish this court to declare those orders stale, obsolete, and unenforceable. However, I cannot address this issue as it has been established that the plaintiffs filed an appeal and subsequently abandoned it, involving the same parties and subject matter. They are now pursuing a series of cases to evade enforcement of those orders, as highlighted by the defendants. This constitutes an abuse of the court process. This matter and Malindi ELC NO. 54 of 2019 are congruent; therefore, the doctrine of res judicata crops in.

20. In conclusion, I think a passage by Olola J. in Dysara Investments Limited & another v Woburn Estate Limited & another [2021] KEHC 4822 (KLR) will resonate well with this matter:

> " That being the case, pleading a Constitutional infringement now is to abuse the process of the Court with a view to subverting the decision of the Court of Appeal, which is a decision binding upon this Court. If indeed the Petitioners honestly believed that the dispute on service charge had constitutional connotations, they should have invoked this right from the outset. Otherwise, it is evident that they only want to pursue that path because the Supreme Court in its Ruling rendered on 24th January 2020 declined to entertain their Appeal on

account that they had neither raised any Constitutional issues in the Environmental and Land Court nor in the Court of Appeal.

23. As Majanja J., cautioned in E.T. v Attorney General & Another [2012] eKLR: -

> "The Courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in a form of a new cause of action which had been resolved by a Court of competent jurisdiction."

24. Indeed, in Gurbacham v Yowani Ekori [1958] EA 450, 458, the Court of Appeal for Eastern Africa while considering the doctrine of res judicata cited with approval a passage of the Judgment from the old English Case of Henderson v Hernderson (1) 67 ER. 313, wherein the Lord Vice Chancellor stated as follows: -

> "In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time."

21. Parties have had a chance to ventilate all issues they had concerning what has been raised here. Enough judicial time has been accorded to them. Litigation must come to an end.

22. The upshot is that the Preliminary Objection dated 19th September 2024 is hereby upheld; I need not consider the pending application. Therefore, the pending application and the entire suit are hereby struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Katama, for the Plaintiffs

Happy: Court Assistant

In the absence of:

Mr. Kiponda, for the Defendants