



**Nason & 26 others v County Government of Mombasa (Environment & Land
Case 63 of 2020) [2023] KEELC 19126 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 63 OF 2020**

NA MATHEKA, J

JULY 27, 2023

BETWEEN

HARUN NTORURU NASON 1ST PLAINTIFF
ROSE MASITSA INDECHE 2ND PLAINTIFF
JACKSON MAINA 3RD PLAINTIFF
DAN NGURE 4TH PLAINTIFF
PETER NJENGA 5TH PLAINTIFF
LAWRENCE NGINGA MARANGA 6TH PLAINTIFF
SAMUEL CHEGE & 20 OTHERS 7TH PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

JUDGMENT

1. The case is that the Plaintiffs are organised as a group of traders of about 30 people known as Kongowea Wholesale Market Stall Owners. The Plaintiffs are the tenants of the Defendant and are currently paying monthly ground rent determined by the Defendant in accordance with space occupied by each of them. They are in possession of the suit properties either by themselves or through their tenants. The properties subject to these proceedings are privately owned permanent structures situate on the right hand side of the motor vehicle entrance of the market on one side and on the north eastern gate of the Kongowea public market on the second side. The Plaintiffs' complaint is that the Defendant's employees and/or servants have threatened to without a lawful reason violate the rights of the Plaintiff as guaranteed under Article, 40 (a) and (b) of *the Constitution* by arbitrary attempting to take over possession.



2. The said action runs contrary to the provision of Article 47 of *the Constitution* that guarantees an administrative decision that is fair, lawful, and reasonable. The said threats also run contrary to the consent orders issued by the Court Order on September 29, 1999 in HCC Judicial Review Application Misc Civil Cause No71 of 1998 *Lawrence N Maranga & 12 Others v The Attorney General and Municipal Council of Mombasa*, in which the predecessor of the Defendant, former Municipal Council agreed in court that the Plaintiffs members who had prior to the institution of the proceedings herein commenced construction of their business structures/buildings at the said Kongowea market be allowed to complete the same on the basis of as is where is. That those members of the Plaintiff who have not yet commenced construction of their proposed structures/buildings should only do so upon approval of building plans by the 2nd Defendant. That the Plaintiffs to pay the requisite or applicable ground rent to the 2nd Defendant. That payment of such ground rent to become effective on the January 1, 2000. That a lease/tenancy be provided for. That the Plaintiffs and the 2nd Defendant to agree Tenancy and which Lease/Tenancy should be duly executed on or before the January 1, 2000. That in the event of the 2nd Defendant being desirous of repossessing any portion of the whole of its land and upon which the Plaintiffs have erected their structures/building the 2nd Defendant should/is to fully compensate the Plaintiffs or any one of them, as the case may be, for the costs of the same.
3. That the Plaintiffs will suffer irreparable damage unless the criminal invasion of applicant's private property by the Respondents is restrained by permanent injunction because the Respondent which is a public body managed by the local politicians will, complete the invasion, and politicise the invasion, thereby converting a purely criminal issue of criminal trespass into a political matter. That to allocate the land to unsuspecting members of the public makes it very difficult if not impossible to enforce a decree of Permanent injunction, vacant possession or warrants of eviction due to the multiplicity of third parties who will claim to be bonafide purchasers for value without notice. Accordingly, the final orders of the court will be rendered nugatory even if the case results in the favour of the Applicant. Reasons whereof the Plaintiffs pray that judgment be entered for the Plaintiff against the Defendant for,
 - a. A declaration that the Defendant's actions of evicting the Plaintiffs from the suit properties demolishing, evicting or otherwise interfering with the Plaintiffs structures and quiet possession of the all the suit properties being the privately owned permanent structures situate on the right hand side of the motor vehicle entrance of the Kongowea Public market on one side and on the north eastern gate of the market on the second side is illegal.
 - b. A declaration that the Defendants actions of evicting the Plaintiffs from the suit properties, demolishing, or otherwise interfering with the Plaintiffs' structures without giving a lawful notice and compensating the Plaintiffs in accordance with the consent agreement entered in HCC Judicial Review Application Misc Civil Cause No 71 of 1998 *Lawrence N Maranga & 12 Others v The Attorney General and Municipal Council of Mombasa* is unlawful.
 - c. A permanent injunction restraining the Defendant from evicting the Plaintiffs from the suit properties, demolishing, or otherwise interfering with the Plaintiffs structures all the suit properties being the privately owned permanent structures situate on the right hand side of the motor vehicle entrance of the Kongowea Public market on one side and on the north eastern gate of the market on the second side without giving a lawful notice and fully compensating the Plaintiffs the value of the structures at the prevailing market value.
 - d. Costs.



4. The Defendants DW1 and DW2 gave evidence that they spoke to the traders to remove their stalls as they needed to open up the road and they refused to do so. DW1 had meetings with their leaders for four months and explained the need to create an access road. This was done and there is now a cabro road there.
5. This court has considered the evidence and the submissions therein. The Plaintiffs seek a declaration that the Defendants actions of evicting the Plaintiffs from the suit properties, demolishing, or otherwise interfering with the Plaintiffs' structures without giving a lawful notice and compensating the Plaintiffs in accordance with the consent agreement entered in HCC Judicial Review Application Misc Civil Cause No71 of 1998 *Lawrence N Maranga & 12 Others v The Attorney General and Municipal Council of Mombasa* is unlawful.
6. Section 7 of the [Civil Procedure Act](#) on *res judicata*, reads as follows:

“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.”

7. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
8. *Res judicata* is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, *res judicata* will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), (2017) eKLR, that;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, here would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”



9. Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR pronounced itself as follows;

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

10. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (supra), the Supreme Court while considering the said provision 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.”

11. In HCC Judicial Review Application Misc Civil Cause No71 of 1998 *Lawrence N Maranga & 12 Others v The Attorney General and Municipal Council of Mombasa* the parties and the subject matter is the same as in the instant suit. The Plaintiffs submitted that the Defendant’s actions run contrary to the consent orders issued by the Court Order on September 29, 1999 in HCC Judicial Review Application Misc Civil Cause No71 of 1998 *Lawrence N Maranga & 12 Others v The Attorney General and Municipal Council of Mombasa*, in which the predecessor of the Defendant, former Municipal Council agreed in court;

- a. That the Plaintiffs members who had prior to the institution of the proceedings herein commenced construction of their business structures/buildings at the said Kongowea market be allowed to complete the same on the basis of as is where is.
- b. That those members of the Plaintiff who have not yet commenced construction of their proposed structures/buildings should only do so upon approval of building plans by the 2nd Defendant.
- c. That the Plaintiffs to pay the requisite or applicable ground rent to the 2nd Defendant.
- d. That payment of such ground rent to become effective on the January 1, 2000.
- e. That a lease/tenancy be provided for.



- f. That the Plaintiffs and the 2nd Defendant to agree Tenancy and which Lease/Tenancy should be duly executed on or before the January 1, 2000.
 - g. That in the event of the 2nd Defendant being desirous of repossessing any portion of the whole of its land and upon which the Plaintiffs have erected their structures/building the 2nd Defendant should/is to fully compensate the Plaintiffs or any one of them, as the case may be, for the costs of the same.
12. From the foregoing I find that the matter is the same and involves the same parties and meets the bar of res judicata. Having found so there would be no need to go into the issue of evidence. If the Defendant has breached the terms of the consent then the remedies are to be pursued in the same case. I therefore strike out this suit for being res judicata with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH JULY 2023.

N.A. MATHEKA

JUDGE

