



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mambrui Sea Denus Limited & 2 others v Yeri & 12 others (Petition  
16 of 2020) [2023] KEELC 18843 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18843 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**PETITION 16 OF 2020**

**MAO ODENY, J**

**JULY 17, 2023**

**IN THE MATTER OF: ARTICLES 10, 21, 22, 23, 35, 62 AND 67 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDR  
ARTICLES 40, 47, 60, 64, 65, 73 AND 232 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 165 (4) OF THE CONSTITUTION OF KENYA  
2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND  
PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT NO.  
19 OF 2011, SECTION 13**

**AND**

**IN THE MATTER OF: THE LAND ACT, SECTION 4, 7, 150, PART VIII;  
LAND REGISTRATION ACT SECTIONS 24, 25, 26, 30,  
34, 35, 36, 37, 40, 101**



**BETWEEN**

**MAMBRUI SEA DENUS LIMITED ..... 1<sup>ST</sup> APPLICANT**  
**ALESSANDRO TRENTA VIZI ..... 2<sup>ND</sup> APPLICANT**  
**ACRE ONE LIMITED ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JOSEPH KASENA YERI & 12 OTHERS ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 23<sup>rd</sup> August 2021, by the Applicant seeking the following orders;
  - a. This matter be certified by this Honourable Court as raising substantial questions of law under article 165 clause 3 (b) and (c) of the Constitution of Kenya, 2010.
  - b. Pending the hearing and final determination of this suit, this Honourable Court be pleased to constitute a bench of an uneven number of judges, being not less than three, assigned by the Chief Justice.
  - c. Those costs of this suit be in cause.

**Petitioners' Case**

2. The application is supported by the affidavit of Alessandro Trentavizi dated 23<sup>rd</sup> August 2021 which gave a background to the case as follows;
  1. That the Petitioners brought this action in their own behalf and in the public interest.
  2. That the 1<sup>st</sup> Petitioner was the proprietor of portions of land known as Portions No 658 to 707(Original No 652/2-51) situated North of Mabruui Town having acquired it from the original owner vide a transfer registered in the land office as CR No 24478/2.
  3. That sometime in the year 1999, the 1<sup>st</sup> Petitioner became aware of an erroneous survey that had been undertaken by the 8<sup>th</sup> and 9<sup>th</sup> Respondents resulting in the encroachment by the said survey on private lands.
  4. That further to the above and following administrative intervention it was discovered that some 600 portions of land had been illegally surveyed and titles issued. The titles were therefore recalled and the 8<sup>th</sup> to 10<sup>th</sup> Respondents were required to cancel the survey and the subsequent titles to the portions of land overlapping with other private lands.
  5. That further to the above on 30/09/2004 the 1<sup>st</sup> Petitioner commenced proceedings in the High Court of Kenya at Malindi being HCC No 38/2004 ALFRED KAHINDI YERI (the 2<sup>nd</sup> Respondent herein) and 5 others seeking orders of vacant possession of the areas occupied by them in portions No 658 to 707 (Original No 652/2-520).
  6. That further to the above and while lamenting confusion and inaction in the part of 10<sup>th</sup> Respondent to correct the anomaly by cancelling the survey and subsequent registration, the



trial judge gave judgment to the Plaintiff ordering vacant possession of the suit premises. The Respondents were duly evicted and the 1<sup>st</sup> Respondent fenced the entire portion of land.

7. That further to the above, the 1<sup>st</sup> Petitioner sold the portions of land known as portions number 667 (Original No 652/11), 668 (Original No 652/12), 669 (Original No 652/12), 679 (Original No 652/23), 680 (Original No 652/24), 681 (Original No 652/25), 692 (Original No 652/36), 693 (Original No 652/37), 703 (Original No 652/47), 704 (Original No 652/48), 705 (Original No 652/49), 706 (Original No 652/50), 707 (Original No 652/51), to me and I installed a chain link fence. ..As earlier alluded to, I subsequently sold portions No 703 (Original No 652/47) and 705 (Original No 652/49) to the 4<sup>th</sup> Petitioner who also fenced her plots.
8. That further to the above, unbeknown to us, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents and like situated persons, never surrendered their respective titles that had been created over the petitioners' private lands and like situated persons' lands though they remained out of sight from the lands as the Petitioners remained in possession.
9. That further to the above, unbeknown to the petitioners, the 1<sup>st</sup> Respondent with the help of officers of the 8<sup>th</sup> to 11<sup>th</sup> Respondents corruptly, fraudulently, unlawfully and without any color of right and in total disregard of official communication in their custody and the judgments of the honourable court in Malindi HCC No 38/2004 against the 2<sup>nd</sup> Respondent herein and 5 others, Malindi ELC Petition 2/2010 *Zinj Ltd v The Commissioner of Lands and 3 others*, and the Court of Appeal holding in *Zinj LTD v Attorney General and 3 others* [2019] eKLR, *Chrispus Chengo Masha and 7 others v Daniel Ricci* [2017] eKLR, permitted the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to not only effect subdivisions of defunct titles to parcels No Ngomeni Squatter Settlement Scheme/1400 into 2 portions being Malindi/Ngomeni/2239 and 2230 respectively, they also permitted the 2<sup>nd</sup> Respondent to transfer what was now referred to as Malindi/Ngomeni/2239 to the 2<sup>nd</sup> Respondent and also cleared and effected a purported transfer from the 4<sup>th</sup> Respondent to the 5<sup>th</sup> Respondent of what is known as Ngomeni Squatter Settlement Scheme/1401.
10. That further to the above, the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents are now holders of titles that were issued as part of the same unlawful scheme resulting in what is known as Ngomeni Squatter Settlement Scheme/1399, Ngomeni Squatter Settlement Scheme/1398 and Malindi/Ngomeni Settlement Scheme/1403.
3. The application is opposed by the 3<sup>rd</sup> Respondent who filed grounds of opposition dated 17<sup>th</sup> June 2022 stating that the petition does not raise any substantial question of law necessitating certification of the matter under the threshold set in article 165 (4) of the *Constitution*. That such empanelment will only serve to imperil the prudent and efficient use of judicial resources.
4. Similarly, the 4<sup>th</sup> and 5<sup>th</sup> Respondents filed grounds of opposition dated 24<sup>th</sup> October 2022 stating that the application was *res judicata* another application filed on 16<sup>th</sup> December 2020 which was dismissed on 28<sup>th</sup> April 2022.

### **Petitioners' submissions**

5. Counsel for the petitioners submitted that for a matter to be certified as raising substantial questions of law as envisaged under article 165 (4), the court has to look at two instances; whether a right or fundamental freedom has been denied, violated, infringed or threatened; or that it involves a question respecting the interpretation of the *constitution*.



6. Counsel relied on the principles enunciated by the Supreme Court of India in the case of *Chunilal V. Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 13142 and the case of *Wydliffe Ambetsa Oparanya and 2 others v DPP* [2016] eKLR to buttress the point the Petition raises substantial questions of law.
7. It was counsel's submission that the issues herein have been litigated for quite a long period since the year 2004 noting the fact that various cases have been filed and the outcomes have been in favour of the Applicants herein.
8. On the issue of the Petition raising substantial questions of law, counsel submitted that complex nature of the petition requires additional Judges, that there are several parties involved, and finally that the suit properties have a long history and it is in the interest of justice that a 3 judge bench hears and determines this matter to offload the backlog
9. Mr. Ole Kina finally submitted that the Respondents would not suffer any prejudice if the application is allowed as the Petition raises matters of great public concerns and violation of rights and fundamental freedoms.

### 3<sup>rd</sup> Respondent's Submissions

10. Counsel submitted that the test under article 165 (4) requires that two questions be answered; first whether the Petition raises a substantial question (s) of law; and whether the Applicant has persuaded the court on the balance between substantial question and the delay that will be occasioned by the scarcity of judicial resources.
11. Regarding the first question, counsel relied on the guidelines highlighted in the cases of *Christopher Mutinda Mutua and another v Alfred Nganga Mutua and 11 others* [2019] eKLR; *Spence Sankale Olochike v Maasai Mara University; Transparency International Kenya and 22 others* [2021] eKLR; and *Wydliffe Oparanya and 2 others v DPP and another* [2016] eKLR.
12. Counsel therefore submitted that the Petition does not qualify to warrant certification for empaneling a bench as it does not raise any substantial questions of law, action of settled principles under the *Fair Administrative Action Act*, the law on adjudication and compensation where private land is acquired by the state. That the issues are clear and not novel or complex as to raise substantial questions of law.
13. On the second question, counsel argued that the petition was in respect of ownership of land and empaneling a bench will only make the trial process unnecessarily lengthy and untenable.

### 4<sup>th</sup> And 5<sup>th</sup> Respondent's Submission

14. Counsel gave a brief background to the petition and an application dated 16<sup>th</sup> December 2020, an application for conservatory orders which was dismissed hence counsel argued that the current application was *res judicata*.
15. Counsel relied on the cases of *Chunilal v Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 (*supra*) and *Lambert Lwanga Ochochi & 6 others v Ponangipali Venkata Ramana Rao & 8 others* [2022] eKLR and submitted on the issue whether the petition raises substantial questions of law to warrant the empanelment of a bench.
16. Mr. Kibunja also submitted that the novelty or complexity of the issues raised in the petition is alone not sufficient reason for certifying the matter for empanelment of a bench and relied on the case of *J. Harrison Kinyanjui v Attorney General & another* [2012] eKLR



17. Counsel therefore urged the court to dismiss the application because it is *res judicata* and that it has not met the threshold for certification for empanelment.

### Analysis And Determination

18. This is an application for certification for empanelment of a bench under article 165(4) of the [Constitution](#) and the issue for determination is whether the Petitioner/Applicant has met the threshold for such certification.
19. Before I go into the merits of the application, counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondents raised an issue of *res judicata* where he argued that the that the present application was *res judicata* the application dated 16<sup>th</sup> December 2020.
20. The doctrine of *res judicata* is set out in section 7 of the [Civil Procedure Act](#) The doctrine 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.
21. I have perused the application dated 16<sup>th</sup> December 2020, the issues therein were substantially related to issuance of conservatory orders and injunction, which is not the case in the present application. In the circumstances, the objection on *res judicata* fails.
22. The issue of substantial questions of law to enable certification of empanelment was explained in Supreme Court of India in the case of *Chunilal V. Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 1314, *supra*) as follows:
- “a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”
23. Further in the case of [Okoya Omtatab Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others](#) [2017] eKLR the court expressed itself as follows: -
- “In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under article 163(4) (b) some of which are relevant in the context of certification under article 165(4). Drawing therefrom, we adopt, with modification, the following principles:
- i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
  - ii. The applicant must show that there is a state of uncertainty in the law;
  - iii. The matter to be certified must fall within the terms of article 165 (3)(b) or (d) of the [Constitution](#);



- iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law, which he or she attributes to the matter for which the certification is sought.

It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of article 165(4) of the *Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”

23. The Petitioner admitted that there are many cases, which have been filed in respect of the same parcels, and the orders have been given in their favor. These orders were issued by the same courts involving one Judge Bench.
24. The reason I listed the grounds the Petitioner is relying on to canvass this application was to show the nature of the grievance in the Petition. In summary, they are issues involving ownership, portions of land illegally surveyed and titles wrongfully issued, disrespect of court order and effecting subdivisions, whether the government unlawfully deprived the Petitioners of the said land.
25. There are already in place well established principles to determine such issues. It matters not the number of parcels of land involved. The Petition neither discloses any novel issue that needs divergent views nor does it raise any issue on interpretation of the *Constitution*. These are not issues that raise public concern as such they are individual issues that concern the parties.
26. Counsel for the Petitioner had also submitted that the suit parcels have a long history and that it would be in the interest of justice that a three-judge bench hears and determines this case. This is not a reason to seek for certification for empanelment of a bench.
27. The issues raised in my view do not raise any substantial questions of law that cannot be handled by one Judge. In the case of *Vadag Establishment v YA Shretta & Another* Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011 where this Court held that:
- “It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”
28. I have considered the application, the submissions by counsel and judicial authorities and find that the application lacks merit and is therefore dismissed with costs in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF JULY 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 Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

