



**Kazungu (Suing as a Legal Representative of the Estate of Adam Kazungu Nzamba-Deceased)
 & another v National Land Commission & 7 others; Masika & 5 others (Interested Parties)
 (Constitutional Petition E028 of 2022) [2023] KEELC 22531 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22531 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MALINDI
 CONSTITUTIONAL PETITION E028 OF 2022
 EK MAKORI, J
 DECEMBER 19, 2023**

BETWEEN

**SAID ADAM KAZUNGU (SUING AS A LEGAL REPRESENTATIVE OF THE
 ESTATE OF ADAM KAZUNGU NZAMBA-DECEASED) 1ST PETITIONER
 HAFSA MOHAMED 2ND PETITIONER**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
 CHIEF LAND REGISTRAR 2ND RESPONDENT
 KILIFI LAND REGISTRAR 3RD RESPONDENT
 MINISTRY OF LAND AND PHYSICAL PLANNING 4TH RESPONDENT
 ATTORNEY GENERAL 5TH RESPONDENT
 EGLE DORATO 6TH RESPONDENT
 ABDI ABDULAHI 7TH RESPONDENT
 AYOW BLESSINGS LTD 8TH RESPONDENT**

AND

**ALPHONSE NYUKURI MASIKA INTERESTED PARTY
 MOHAMED AMIN INTERESTED PARTY
 MOHAMED YUNIS INTERESTED PARTY
 ESTATE OF MOHAMED ISHAQ INTERESTED PARTY
 ROBERT KAINGU MAITHA INTERESTED PARTY
 KIBOKONI PROPERTIES LIMITED INTERESTED PARTY**



RULING

1. This is yet another of the Chembe/Kibabamshe convoluted lawsuit. As will be seen from the materials and submissions placed before me, the war on the ownership of Land parcel No. Chembe/Kibabamshe/404, started in earnest in February 2005 with over 9 lawsuits (sic) and still counting.
2. Due to the so many suits over the suit property, a Preliminary Objection has been raised by the 2nd to the 5th respondents and the 2nd, 3rd, and 4th interested parties, with the 1st and 6th, 7th, and 8th respondents supporting the same.
3. 2nd, 3rd, and 4th interested parties' Preliminary Objection is as follows:
 - i. The entire claims in the petition are res judicata having been previously filed in Court, adjudicated, and judgments and rulings delivered by courts of competent jurisdiction over ownership of the suit property being original Land Parcel No. Chembe/Kibabamshe/404 citing the following cases:
 - a. Malindi HCCC No.15 of 2005: Passaglia Giuseppe v Attorney General, Said Adam Kazungu, Hafsa Mohammed, Mohamed Amin, Mohamed Yunis, Estate of Mohamed Ishaq and Karisa Chengo. The suit was dismissed by Ouko J. (as he then was).
 - b. Malindi ELC Case No.53 of 2006 (OS): Robert Kaingu Maitha v Mohamed Amin, Mohamed Yunis, Estate of Mohamed Ishaq. The suit was determined on 18th December 2008.
 - c. Malindi HCCC No. 2 of 2007: Mohamed Amin, Mohamed Yunis, Estate of Mohamed Ishaq and Kibokoni Properties Ltd. v Passaglia Giuseppe, Giordano Allievi, Gabriella Toscano and Daniella Olmo D'Allessandro. The suit was consolidated with Malindi HCCC NO.9 OF 2012: after a full hearing on merits, judgment was delivered on 25th July 2014.
 - d. Malindi HCCC No.9 of 2012: Giordano Allievi and Gabriella Toscano v Kibokoni Properties Ltd consolidated with Malindi HCC. No.2 of 2007 and judgment delivered on 25th July 2014.
 - e. Malindi H.C. Misc. No.13 of 2009 (JR): Kibokoni Properties Ltd v Commissioner of Lands, Kilifi Land Registrar, and Said Adam Kazungu. The ruling was delivered on 15th June 2010 after a full hearing. The Petitioner herein was a party thereto.
 - f. Malindi CMCC No.459 of 2010: Kibokoni Properties Ltd v Said Adam Kazungu and Municipal Council of Malindi, judgment delivered on 16th April 2013.
 - g. Malindi ELC No.38 of 2012: Said Adam Kazungu v Kibokoni Properties Ltd. Dismissed with costs by a ruling dated 20th February 2015 and Orders given on 24th March 2016.
 - h. Kilifi SPMCC Misc. No.10 of 2020: Said Adam Kazungu v Kibokoni Properties Ltd and County Land Registrar Kilifi. Struck out with costs on 7th October 2020.



- i. Malindi ELC Misc. No. E001 of 2021 (JR): Kibokoni Properties Ltd v SPM's Court, Kilifi, Said Adam Kazungu and Land Registrar, Kilifi. Struck out with costs on 24th September 2020.
 - j. National Land Commission – Public Hearings 2015/2016: Determination through Gazette Notice No.6862 dated 27th July 2017 at page 4316.
- ii. The petition constitutes another gross abuse of the Court process by the petitioner in the light of the nine (9) (sic), previous Court proceedings and determinations on the ownership of the suit property by Courts of competent jurisdiction and the National Land Commission after public hearings in which the petitioners participated and were represented by advocates.
 - iii. The petition should be struck out with costs being res judicata and constituting gross abuse of the Court process.
4. 2nd and 5th respondents raised the following Preliminary Objection:
- a. That this Court lacks the jurisdiction to hear and determine the petition herein.
 - b. That this suit is res judicata Malindi High Court Civil Case Number 53 of 2006 (OS), Malindi High Court Miscellaneous Civil Application Number 13 of 2009 (JR), and Malindi High Court Civil Case Number 38 of 2012.
5. The 6th respondent simultaneously filed an application dated 3rd My 2023 seeking:
- a. That the petition dated 25th November 2022 be filed by the petitioners be struck out on account of being res judicata and for being otherwise and abuse of the Court process.
 - b. That this Court be pleased to strike out the petition dated 25th November 2022 filed by the petitioners on account that the suit is time-barred as the alleged violations are over fifty (50) years since occurrence.
 - c. That the Court be pleased to bar the petitioners from instituting any further habitual suits in respect to the suit property.
5. The Court directed that the Preliminary Objections be canvassed by way of written submissions with the application by the 6th respondent fused with the Objections because the issues raised are similar.
6. The 2nd, 3rd, and 4th interested parties averred that the cause of action in this petition relates to the ownership of Original Land Parcel Title No. Chembe/Kibabamshe/404 which is situated in Watamu, Malindi within Kilifi County. The issue in this petition therefore is the ownership of the parcel of land and not a Constitutional issue.
7. The first suit about the ownership of the said land was filed in February 2005 in Malindi HCCC No. 15 OF 2005; Passaglia Giuseppe v Attorney General (Representing Commissioner of Land), Said Adam Kazungu, Hafsa Mohamed, Mohamed Amin, Mohamed Yunis, The Estate of Mohamed Ishaq & Karisa Chengo. The plaintiff claimed to have purchased the land following a search he conducted at the Lands Office Kilifi. The petitioners were the 2nd and 3rd defendants. The 2nd, 3rd & 4th interested parties were the 4th, 5th and 6th defendants therein. The Attorney General was the 1st defendant. By a ruling delivered by Ouko J. (As he then was) on 27th February 2006, the suit was struck out against the 4th, 5th, and 6th defendants. Subsequently, the plaintiff withdrew the rest of the suit through a Notice of Withdrawal dated 4th December 2008.



8. The second suit about the ownership of the suit property was filed in the year 2006 - Malindi HCCC No. 53 of 2006 (O.S) claiming adverse possession by one Robert Kaingu Maitha against the registered owners of the property; Mohamed Amin, Mohamed Yunis, and the Estate of Mohamed Ishaq. This Originating Summons was determined through a Consent Order dated 18th December 2008 and endorsed as the orders of the Court on 19th December 2008. Under the said Consent Order, the defendants - Mohamed Amin, Mohamed Yunis, and the Estate of Mohamed Ishaq, who are the 2nd, 3rd and 4th interested parties herein sold the suit property to the 6th interested party Kibokoni Properties Ltd.
9. Before the order was extracted and the transfer could be effected, the Court records were meddled with and the original scripts plucked out and a forged order extracted purporting to have been given by Omondi J. on 23rd February 2009 and extracted/issued on 24th September 2009 altering the Consent Judgment/Orders and purporting to consolidate the suit with the HCCC No. 15 of 2015 which had been partially struck out and subsequently withdrawn purporting to give the suit property to Said Adam Kazungu, 1st petitioner herein. This prompted the purchaser - Kibokoni Properties Ltd, who is the 6th Interested Party herein to file a Judicial Review Application in Malindi H.C. Misc. Appl. No. 13 of 2009 (JR) in which the 1st petitioner, Said Adam Kazungu was named as an interested party, and by a ruling delivered on 15th June 2010, the Court expunged the forged Court records/orders of 19th December 2008 and 24th September 2009 and ordered for the removal of the name of the 1st petitioner from the entry at Kilifi Land Register relating to the suit property.
10. Following the ruling and orders in Malindi -HCCC Misc. App. No. 13 of 2009 (JR) on 15th June 2010 and the Police (CID) Report dated 27th October 2009, the 2nd, 3rd & 4th interested parties surrendered the Original Title of the suit property dated 26th August 1997 together with the Limited Grant of Letters of Administration Ad Litem in respect of the 4th interested party and the suit property was transferred into the name of the 6th interested party on 7th September 2010.
11. The 1st petitioner was subsequently arrested and charged with four (4) counts of forgery in Malindi CM Cr. Case No. 301 of 2011 but eventually acquitted on 2nd July 2015, with the Criminal Court observing that the 1st petitioner was not the custodian of Court Files and Court Records and somebody else, an insider (sic), must have been the planner of the forgery and alteration of the Court proceedings who the Police did not charge.
12. The 1st petitioner after his acquittal in the Criminal Case filed an application dated 12th May 2016 in Malindi HCCC (ELC) No. 53 of 2006 (OS) seeking Orders to reinstate the forged orders dated 23rd September 2009 which had been expunged in the Judicial Review Application (Malindi HCCC Misc. App. No. 13 of 2009) and reinstate him as the registered owner of the suit property and the application dated 12th May 2016 was fully heard and dismissed by this Court - Olola J. on 31st January 2019 and the 1st petitioner was on 21st May 2019 Ordered to pay Costs of Kshs.450,000/= to the 6th interested party which he failed to pay and was committed to civil jail on 20th April 2020. The petitioner's advocates on record were the same advocates who made the application.
13. After the suit property was transferred from the 2nd, 3rd, and 4th interested parties' names to the 6th interested party's name - on 7th September 2010, the 6th interested party took occupation and erected a perimeter wall, the petitioner falsified a letter from the Municipal Council of Malindi and used hired goons to raid and demolish the perimeter wall of the suit property and the 6th interested party filed a suit against the 1st petitioner and the Municipal Council of Malindi in Malindi - CMCC No. 459 of 2010 (Kibokoni Properties Ltd v Said Adam Kazungu & Municipal Council of Malindi). It turned out that the letter from the Municipal Council of Malindi was false/forgery and after a full hearing,



judgment was entered on 16th April 2013 in favour of the 6th interested party against the 1st petitioner for a sum of Kshs.347,500/= in Special Damages and costs of Kshs.194,600/= and a permanent injunction restraining the 1st petitioner from trespassing or causing any damage in the suit property and a decree was Issued on 19th April 2017 and the 1st petitioner was unable to settle the decretal sum and upon execution, he was arrested and committed to civil jail in execution. The petitioner once again applied before the Chief Magistrate Court - Oseko (CM) and a ruling was delivered on 11th April 2018 allowing the 1st petitioner to liquidate the decretal sum in monthly installments of Kshs.30,000/= which he again defaulted and filed an appeal to the High Court in Malindi HCCA. No. 24 of 2018 which was also dismissed by Nyakundi J. on 18th December 2020.

14. During the same period, the 1st petitioner filed another suit in Malindi ELC No. 38 of 2012; Said Adam Kazungu v Kibokoni Properties Ltd claiming ownership of the suit property. The suit was stayed pending the hearing of the two other suits that had already been filed in respect of the same property. HCCC No. 2 of 2007 and HCCC No. 9 of 2012 involving the 2nd, 3rd, and 4th interested parties who were the original owners of the suit property and the 6th interested party who had purchased the property and acquired title in 2010 and three (3) Italians who had constructed villas on the suit property.
15. The two Cases - Malindi HCCC No. 2 of 2007 and HCCC No. 9 of 2012 were consolidated and fully heard on the merits by Meoli J. and a judgment was delivered on 25th July 2014 where the Court held that the 4th plaintiff who is the 6th interested party, is the lawful registered owner of the suit property and ordered the 1st defendant (Passaglia Giuseppe) to make restitution to the 2nd and 3rd defendants (Giordano Allievi and Gabriella Toscano, a couple who had built a villa on the suit property and the 4th defendant Daniella Olmo D'Allesandro who had also built a villa on the suit property upon valuation of the villas and payment within 45 days before they could yield vacant possession of the Villas in the suit property to the 4th Plaintiff (Kibokoni Properties Ltd) and each party was ordered to bear their costs in both suits. There was no appeal to the said judgment.
16. After delivery of the Judgment, the 6th interested party who had filed an application dated 4th December 2012 against the 1st petitioner in Malindi-ELC No. 38 Of 2012 which had been stayed pending the hearing and determination of HCCC No. 2 OF 2007 and HCCC 9 of 2012 fixed the said application dated 4th December 2012 for hearing before Angote J. who after hearing both parties delivered a ruling on 20th February 2015 ordering the plaintiff therein (Said Adam Kazungu who is the 1st petitioner) to deposit Kshs.800,000/= as security for costs for the defendant (Kibokoni Properties Ltd) who is the 6th Interested Party herein failing which the suit would stand dismissed with costs and not to file any other suit unless he provided security for costs. He failed to comply with the ruling and orders of the Court and on 24th March 2015 the Court dismissed the suit with costs to the defendant (6th Interested Party) and the costs, which were taxed on 20th February 2017 to the tune of Kshs.537,815/= and a Certificate of Taxation issued on 22nd February 2017 and on 13th March 2019 a NTSC fixed for hearing on 22nd May 2019 when the plaintiff/judgment debtor (1st petitioner) was committed to civil jail and served for two weeks before being released.
17. In the middle of all these Court proceedings, the 1st petitioner filed a complaint with the National Land Commission (1st respondent) herein for determination of the question of Ownership of Titles (Grants and Disposition) of Public Land which was duly Gazetted through Public Advertisements on the Standard Newspaper on Tuesday 1st September 2015 at Page 23 and the Daily Nation Newspaper on Wednesday 2nd September 2015 at Page 45 for hearing on 16th September 2015 and the 6th interested party filed its Memorandum of Appearance on 2nd September 2015 and attended the hearing on 16th



- September 2015 and A further Public hearing on 14th January 2016 which proceeded at the Kilifi County Government Hall and both parties attended the hearing with their advocates.
18. After conducting all the hearings which took over Nine (9) Months, the National Land Commission Gazetted its determinations in the Kenya Gazette; Vol CXIX-No. 97 dated 17th July 2017 in Gazette Notice No. 6863 at Page 4316 where a determination was made that the ownership of Plot 404 Chembe/Kibabamshe was confirmed and regularized to Kibokoni Properties Ltd and the ownership issue settled.
 19. On 15th June 2020, the 1st petitioner once again filed a Miscellaneous Application dated 13th June 2020 at the Senior Principal Magistrates Court at Kilifi in SPMC. Misc. Appl. No. 10 of 2020: Said Adam Kazungu v Kibokoni Properties Ltd and County Land Registrar Kilifi. The suit was heard ex-parte without service on account of a falsified Affidavit of Service and final ruling and Orders delivered on 27th July 2020 ordering the Land Registrar to cancel and revoke the Title of the suit property registered in the name of Kibokoni Properties Ltd (6th interested party) and issue a fresh Title in the name of Said Adam Kazungu (1st petitioner).
 20. The 6th interested party (Kibokoni Properties Ltd) upon being notified of the order filed a complaint with the National Land Commission, the Chief Justice, and JSC, against the Magistrate's Court, the LSK against the advocates on record (Miller George & Gekonde advocates) and simultaneously filed a Judicial Review Application dated 21st September 2020 in Malindi ELC (JR) No. E001 of 2020 and a Preliminary Objection dated 22nd September 2020 in Kilifi - SPMC Misc. App. No. 10 of 2020 and the ELC Court in Malindi – Olola J. granted orders of leave and stay in J.R. No. E001/2020 on 24th September 2020. The SPM-Kilifi Court immediately fixed the Preliminary Objection dated 22nd September 2020 for hearing and before the 21 days for filing the Notice of Motion in the Malindi ELC JR. No. E001/2020 had matured, the SPM's Court in Kilifi delivered a ruling in SPMC No. 10/20 on 7th October 2020 upholding the Preliminary Objection and striking out the entire proceedings together with the orders given on 27th July 2020 and condemning the applicant (1st petitioner) to pay punitive costs assessed at Kshs.100,000/= to the 1st respondent, Kibokoni Properties Ltd who is the 6th Interested Party herein.
 21. The 2nd, 3rd, and 4th interested parties contended that petitioners have now filed the present petition despite all the Court determinations highlighted above in respect of the same issue which is the ownership of the suit property. That issue has been determined by competent Courts in all the suits highlighted above and the decisions were supplied to this Court.
 22. It is further stated that the petition is in violation of statutory provisions of Section 7 of the [Civil Procedure Act](#) on the doctrine of “res judicata” and this Court is statutorily barred from hearing, trying, or entertaining the petition where the issue has been directly and substantially heard and determined by Courts of competent jurisdiction in the former suits. The only option left for the Court is to strike out the petition as the respondents and interested parties move to enforce previous orders given by this Court and other Courts including recovery of costs and enforcement of the orders of Angote J. given on 20th February 2015 in ELC No. 38 of 2012 and bar the petitioners from filing any fresh suit about the suit property and declaring the petitioners a vexatious litigants.
 23. The 2nd, 3rd, and 4th interested parties relied on the previous decisions of the Courts herein and the several authorities to be alluded to below in support of the Preliminary Objection.
 24. The 2nd and 5th respondents represented by the Honourable the Attorney General adopted the stance taken by the 2nd 3rd and 4th interested parties and urged the Court to strike out the current petition.



25. The 6th respondent while filing a motion to have the petition struck out based on the doctrine of res judicata added that the petition had been brought 50 years after the alleged violation was committed. The 6th respondent argued that this is a stale demand which ought to be struck out.
26. The 6th respondent further stated that due to the so many cases brought by the petitioners, this Court should declare the petitioners particularly the 1st petitioner a vexatious litigant and place a total bar on him not to originate any other suit on the suit property.
27. The 7th, 8th respondents and the 6th interested party also support the Preliminary Objections raised herein adding that they are innocent purchasers of the suit property having done due diligence before doing so and that the Constitutional Petition herein does not meet the threshold on Constitutional Petitions as held in the *Anarita Karimi Njeru v the Republic* [1979] eKLR. They also averred that this is not a Succession Court to distribute the estate of the deceased herein.
28. The petitioners stated that the petition dated 25th November 2022 invokes the jurisdiction under Article 165 (3) (b) of *the Constitution* to determine alleged violations under Chapter 6 and Article 47 (1) of *the Constitution*. If determined in the affirmative, petitioners pray for orders of compensation for the value of the subject land or in the alternative restitution of the subject property unto the petitioners.
29. The principal parties cited in the petition are the 1st to 5th respondents while the other parties stand as interested parties.
30. The several suits that have gone by have never hitherto addressed the issue raised in the petition or the issues have never been heard on the merits hence the doctrine of res judicata cannot come into play.
31. The petitioners averred that res judicata is premised on two concepts, a bar to the prior judgment which exists when between the first case where judgment was rendered and the second case that sought to be barred, there is identity of parties. Subject matter and causes of action, and conclusiveness of judgment which finds application when a fact or question has been squarely put in issue, judicially passed upon, adjudicated in a former suit by a Court of competent jurisdiction.
32. The petitioners further proceeded that in determining a claim based on the doctrine of res judicata, the test as laid in the *Maina Kiai & Others v IEBC and Others* has to be achieved.
33. The petitioners are of the view that the Objectors have not demonstrated every element (the four elements) of Section 7 of the *Civil Procedure Act*, as held in *Uhuru Highway Developers Ltd v Central Bank of Kenya Ltd* [1999] eKLR, to preclude the petitioners from propagating the issues they have raised in this petition.
34. The petitioners stated that the issues raised in this petition are novel, and cannot be said to be the same as the ones raised at any time in the past as posited in the Preliminary Objections, the issues raised in this suit are miles apart from the matters already litigated in the past.
35. The issues that fall for the determination of this Court is whether the Preliminary Objections raised herein stand germane and ought to be sustained based on the doctrine of res judicata. Whether the petition herein meets the threshold in the *Anarita Karimi Njeru Case*(supra) on the test of mounting Constitutional Petitions. Whether the petition is a stale demand brought 50 years after the acts complained of. Whether the petitioners should be declared vexatious litigants. Whether the petition herein is an abuse of the Court process given the so many cases decided concerning the suit property. Who should bear the costs?



36. Once a preliminary Objection is raised, it has to be dealt with at the earliest as it has the potential of disposing of the entire suit as held by Law JA. in the leading decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] thus:
- “...so far as I’m aware, a preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
37. The thrust of the Preliminary Objections herein rests directly on the jurisdiction of this court, as held by Nyarangi JA. in the *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.”
38. The petitioners filed this claim stating that in the 1950s, the petitioners settled upon, tilled, and developed a portion of Government land measuring 4.4 hectares – which portion was later to be known as Chembe/Kibabamshe/404. In 1970 the government gazetted the creation of the Chembe/Kibabamshe Settlement Scheme. Over a decade or so, adjudication was done and the petitioners expected to be adjudicated as the rightful occupiers, possessors, and owners of the suit property. It would later transpire that one of the adjudication officers conducting the adjudication allotted the suit property to himself. That officer the 1st interested party was an employee of the Land and Adjudication Department Kilifi. He worked as such for decades. The officer quickly transferred the land to the 2nd, 3rd, and 4th interested parties hence conferring a benefit unto himself at the expense of the petitioners who remained on the ground.
39. The 1st respondent investigated the historical injustices around the Chembe/Kibabamshe Settlement Scheme. The irregularity was brought to the attention of the 1st respondent who ignored the plea by the petitioners. This resulted in the legitimization of the said historical injustice and the illegal transfer of the suit property to the current title holders.
40. The petitioners were later in the year 2005 evicted from the suit property. In the years and decades to follow, the petitioners attempted to remedy the same by petitioning several Government agencies responsible for the administration of land in this Country to no avail.
41. The petitioners concluded that the titles held by the interested parties stem from irregular disposition/ allocation made to the 1st interested party and blatant forgeries products of the 5th interested party, which forgeries precipitated the 6th interested party holding title to the subject property by way of purported transfer.
42. The petitioners now seek that this Court finds that the allocation of the suit property to the 1st interested party amounted to an illegal conferment of a benefit and any subsequent transfer of the suit property stands null and void. A declaration that the suit property was meant for squatters and the involvement of the 1st interested party was illegal and therefore the subsequent transfers of the suit property null and void. That the 1st respondent’s move to legitimize the acquisition of the suit property



by the 1st interested party violated the petitioner's rights under Article 47(1) of [the Constitution](#) on Fair Administrative Action. A prohibition to be directed against the 2nd and 3rd respondents from implementing recommendations as contained in Kenya Gazette No. 6862 contained in Vol. CXIX-No. 97 dated 17th July 2017 or in any way regularizing the title deed held by the 6th interested party. That an order of mandamus to issue directed to the 1st respondent to reinvestigate the historical injustices relating to the suit property. Or in the alternative the Court to regularize the same in favour of the petitioners. Or further in the alternative, the petitioners be compensated the full value of the land in question at a rate of Kshs. 10,000,000/= per acre plus 25% interest at commercial rates upon the award made under clause 38 of the petition from the date of filing suit. The issues raised herein stand a foul the doctrine of res judicata. The so many suits heard and determined crystalized and settled the issue of ownership of the suit property.

43. Several authorities were cited by the Objectors on what constitutes res judicata - William Koross (Legal Personal Representative of Elijah C.A. Koross) – v Hezekiah Kiptoon Komen & 4 Others [2015] eKLR, Maithene Malindi Enterprises Ltd v Kaniki Karisa Kaniki & 2 Others [2018] eKLR and Kennedy Mokuia Ongiri v John Nyasende Mosoima & Florence Nyamoita Nyasende [2022] eKLR,
44. On the preliminaries, from the materials placed before me land parcel Chembe/Kibabamshe/404, was a product of adjudication. The adjudication process is usually governed by the [Land Adjudication Act](#) Cap. 284 Laws of Kenya. In the case of Kanyarkwat Group Ranch & 4 Others v Meringiro Lodakir Joseph & 3 Others [2021] eKLR, Odeny J. highlighted the simple steps to be followed under the Act before a title is issued under the [Land Registration Act](#) (read in this case the repealed Registered [Land Act](#) Cap. 300 Laws of Kenya) as follows:

“Under the [Land Adjudication Act](#), the process of ascertainment and recording of rights and interests in Trust Land follows a few simple steps. I summarize them here below.

12. First, the Government, through the relevant Ministry by a County Council to or itself identifies an area of Trust Land whose ownership rights should be ascertained and recorded and makes an order to that effect. That is done pursuant to the provisions of Section 3 of the Act. Second, the Ministry declares that areas as an Adjudication Area. Third, the Ministry appoints by Gazette Notice an Officer to be in charge of the adjudication area. Fourth, the Adjudication Officer appoints survey, demarcation, and recording officers to be in charge of the adjudication area but under him.
13. Fifth, the Adjudication Officer establishes adjudication sections within the area or proceeds with the process as one block of adjudication. In case the officer proceeds with the former, a separate notice must be issued for each adjudication section. Sixth, there is the establishment of Adjudication Committees and Provincial Arbitration Boards which shall record and make decisions about the ascertainment of the interests, and arbitrate on matters arising from the Committees respectively. Seventh, anyone claiming an interest in the land shall make such claims to the Recording Officer in accordance with Section 19 as read with Section 5(2) of the Act. Eighth, objections to claims are made, recorded, and handled as in civil proceedings except where the decisions are made thereon but if the Recording Officer is unable to determine them, he shall refer them to the Committee which if unable to resolve shall refer them to the Board.



14. Ninth, once decisions are made in accordance with Sections 20, 21, and 22 of the Act, an Adjudication Register will be made in accordance with Section 23. Tenth, upon completion of the Register, it is published in terms of Section 25 and any objections made. Eleventh, if none is made or if made and resolved the Register is finalized under Section 27 only subject to appeals to the Minister as provided under Section 29. Twelfth, upon determination of the Appeals in accordance with the law, the Minister shall send the same to the Director of Land Adjudication and the Chief Land Registrar. Thirteenth, the Director of Adjudication alters the Register in line with the determinations of the appeals and certify on the duplicate that is final.
15. Fourteenth, he will send it to the Chief Land Registrar who makes final alterations. Fifteenth, titles are issued thereafter. At this point, the land ceases to be under the *Land Adjudication Act*. Once that happens, the Land Adjudication Officer ceases to have anything to do with the land.”
45. From the affidavit in support of the petition, the 1st petitioner admitted from paragraphs 13 to 16 that he was accorded neither a letter of offer nor a title deed in respect to the suit property in his words:
- “ 1st petitioner being in active occupation of the said parcel of land, and having had rights adjudicated in his favour, legitimately expected to receive a letter of offer and title deed to it..... neither the letter of offer nor title deed was issued to the 1st petitioner..... true to the fact, the subject property title deed was issued to the 1st interested party Alphonse Masika Nyukuri.”
46. What followed thereafter was that the said Alphonse Masika Nyukuri (1st respondent), having been adjudicated as the rightful owner of the suit property sold the land in 1978 to the 2nd, 3rd, and 4th interested parties who later secured a lease on it.
47. In 1986 the Commissioner of Lands through Gazette Notice No. 2505 of 30th of May 1986 directed the cancellation of all titles already issued in the Chembe/ Kibabamshe Settlement Scheme. In 1997, after the 1st petitioner complained to several offices was issued with a letter of offer and certificate of outright purchase and lease against which he allegedly paid. In 2000 a ground report dated 8th February 2000 by the Land Adjudication and Settlement Officer indicated he was on the ground. This persisted by 2003.
48. The situation turned against him in 2005 when one Passaglia Giuseppe with the support of police forcibly evicted him from the suit property. He was later to complain to the National Land Commission in 2017 and the Commission found against him.
49. Back to the many suits filed in this matter. I have placed the chronology of how both the Civil and Criminal Cases were heard and determined. They have a common strand – the ownership of Land parcel No. Chembe/Kibabamshe/404. It is a litany of cases spanning over decades and still counting. If this land were to be a human being, I would describe the plethora of cases filed herein by the combatants as fighting for the spirit the soul, and the body of this gem. It has been quite vicious. So many Judges and Magistrates have handled cases either criminal or civil touching on this suit property. It is located on the seafront facing the Indian Ocean. Quite attractive if placed on sale and strategic for building tourist hotels and villas.
50. Did the proliferated cases resolve the issue of ownership? Can the doctrine of res judicata apply here? Several authorities were quoted on what the Court needed to reckon before invoking the principle of res judicata. On the issue of res judicata, it has been submitted by the Objectors that for the said



doctrine to attach, as held in *William Koross (Legal Personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoon Komen & 4 Others* [2015] eKLR, where the Court of Appeal held as follows:

“The Philosophy behind the principle of “res judicata” is that there has to be finality; Litigation must come to an end. It is a rule to Counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

51. The Court of Appeal went further to state in the same decision as follows:

“res judicata constitutes a mandatory bar that injuncts and precludes any fresh trial or reconsideration of a concluded issue”

The Court went further to state:

“That the 1st Respondent and his alleged Co-Defendants were allowed to engage the Plaintiff and the Appellant in endless rounds of litigation for decades after the issue had been determined by Scriven J is not particularly Complimentary to our Courts and Clearly amounted to a Vexatious abuse of Court process. The Learned Judge (and his Colleagues before him) ought to have put a stop to the rigmarole at the earliest opportunity that presented itself. In failing to do so he erred and in entertaining the Counterclaim and rendering a Second Judgment while well aware of the existence of Scriven J’s Judgment of 2nd April 1980, he acted on wrong legal principles thus inviting our interference”.

52. In *Maithene Malindi Enterprises Ltd v Kaniki Karisa Kaniki & 2 Others* [2018] eKLR, the Court of Appeal in Mombasa citing the earlier authority of - *William Koross v Hezekiah Kiptoon Komen* (Supra) added as follows:

“The practical effect of the res judicata doctrine is that it is a complete estoppel against any Suit that runs afoul of it, and there is no way of going around it, not even by Consent of Parties, because it is the Court itself that is debarred by a Jurisdictional Injunction from entertaining such Suit”.

52. The Court proceeded to analyze the elements to be satisfied before the principle and doctrine of res judicata to attach and found that it has to be applied in terms as set out in Section 7 of the [Civil Procedure Act](#) and concluded that:

“The Plea of res judicata applies.....not only to points upon which the Court was actually required by the parties to form an opinion and pronounce 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 that time”.

52. In the Case *Kennedy Mokuia Ongiri v John Nyasende Mosoima & Florence Nyamoita Nyasende* [2022] eKLR, Mugo J. while following the decisions of the Court of Appeal on the principle of res judicata held that by virtue of Section 7 of the [Civil Procedure Act](#), a Court lacks jurisdiction to deal with a matter which had already been decided by another Court of competent jurisdiction.

53. Here over nine cases have been quoted either criminal or civil to have addressed the issue of ownership. The most significant to me in all the decisions on the issue of ownership are the two Cases - *Malindi HCCC No. 2 of 2007* and *HCCC No. 9 of 2012*, which were consolidated and fully heard on the



merits by Meoli J. and judgment delivered on 25th July 2014 where the Court held that the 4th plaintiff who is the 6th interested party, is the lawful registered owner of the suit property and ordered the 1st defendant (Passaglia Giuseppe) to make restitution to the 2nd and 3rd defendants (Giordano Allievi and Gabriella Toscano, a couple who had built a villa on the suit property and the 4th defendant Daniella Olmo D'Allesandro who had also built a villa on the suit property upon valuation of the villas and payment within 45 days before they could yield vacant possession of the villas in the suit property to the 4th Plaintiff (Kibokoni Properties Ltd) and each party was ordered to bear their costs in both suits. There was no appeal to the said judgment. This is what the judge said on ownership upon her admission that the issue raised in the two suits were convoluted and stated as follows:

“The controversy surrounding the ownership of this land parcel is aptly captured in the plaint filed by the 1st defendant in HCCC 15/05. At least three titles – to Karisa Chengo (1994), Maitha (1993), the Mohammeds (1997), and letters of allotment to Adam Kazungu Nzamba and Hafsa Mohammed (1997) were issued for the same property. The latter 3 dealings were confirmed by witnesses in this case. It appears that after numerous tussles the 1st – 3rd plaintiffs were issued with a lease in 1997. It is difficult in light of the contention and without a benefit of all relevant material, to state conclusively that the said persons were always the lawful owners of the suit property, rather that they were issued with a lease in 1997.

This however did not end the bitter fight. Mainly because Maitha persisted in his claim while Said Adam Kazungu the son of Adam Kazungu Nzamba (who died in 1998) joined the fray. In a real sense, the present litigation is between Kibokoni who claimed title derived from the 1st to 3rd plaintiffs, and Maitha and those whose alleged interests are derived from the interest which can be traced back to Adam Kazungu Nzamba and the 1st defendant. Hence it is a continuation of the old war as who is the true owner of the suit property. Sadly, the Land Registrar (DW5) in his evidence seemed to have scanty details of this history and also failed to tender before this Court the full record of transactions touching on the suit property.

I am prepared to hold, in light of the established history and the fact that 1st to 3rd plaintiffs ceded their title to the earliest alleged title holder Maitha, that Maitha thus became the lawful owner of the suit property. The Court therefore recognizes Maitha as the lawful owner of the suit property from the year 2009.

52. Significant to this case the Court further held as follows on the possible interest of Adam Kazungu Nzamba the father of the 1st petitioner herein(deceased) and the 1st petitioner himself as follows:

“It is true that the two agreements with SICA Ltd did not involve the 1st defendant and that they were not completed. But they were also agreements based on rotten roots in the sense that SICA Ltd, in which Ghidoni and his wife were allegedly directors, themselves claimed to derive title from one Adam Kazungu Nzamba (deceased by the time of the agreement with SICA Ltd made before Lucy Muli advocate, apparently purported to transact in the name of his deceased father, whose title for all intent and purposes was under dispute in 1997, as he held only a letter of allotment with Hafsa Mohammed.”

52. After delivery of the judgment, the 6th interested party who had filed an application dated 4th December 2012 against the 1st petitioner in Malindi-ELC No. 38 of 2012 which had been stayed pending the hearing and determination of HCCC No. 2 of 2007 and HCCC 9 of 2012 fixed the said application dated 4th December 2012 for hearing before Angote J. who after hearing both parties delivered a ruling



on 20th February 2015 ordering the plaintiff therein (Said Adam Kazungu who is the 1st petitioner) to deposit Kshs.800,000/= as security for costs for the defendant (Kibokoni Properties Ltd) who is the 6th interested party herein failing which the suit would stand dismissed with costs and not to file any other suit unless he provided security for costs. He failed to comply with the ruling and orders of the Court and on 24th March 2015 the Court dismissed the suit with costs to the defendant (6th interested party) and the costs, were taxed on 20th February 2017 to the tune of Kshs.537,815/= and a Certificate of Taxation issued on 22nd February 2017 and on 13th March 2019 an NTSC fixed for hearing on 22nd May 2019 when the plaintiff/judgment debtor (1st petitioner) was committed to civil jail and served for two weeks before being released.

53. Effectively and for all purposes and intent the issue of ownership of the suit property was determined by Meoli J. and cemented by Angote J, the latter having given a lifeline and a chance to the petitioners to be re-heard on the issue of ownership – but failed to utilize it by depositing security for costs. From the two decisions alluded to above, the petitioners cannot be heard to say there are new and Constitutional issues to be covered. The adjudication process ended three decades ago. There has been too much litigation around the issue of ownership of the suit property. The initial title has long mutated. Several subdivisions have been done. The interests of the petitioners who were aware of the suits have been compromised since it will appear the 1st petitioner’s father had already sold his interest over that land using an allotment letter which Meoli J. ruled was based on a ‘rotten title.’ Meaning the father of the 1st petitioner had no good title to pass What followed was a proliferation of lawsuits orchestrated by the 1st petitioner using fraud in which he has been punished and already he is reeling under a deluge of costs. Too late to reverse the pendulum in this matter on the issue of ownership. Even if this suit is fashioned in an aura of Constitutional violations, it will not count! Reopening this matter will mean reversing all the renditions and judgments already pronounced by Courts of competent jurisdiction. What is pending is execution arising from the several suits already determined. This petition in my mind, albeit citing an alleged violation of Constitutional rights, is a normal Civil suit camouflaged as a Constitutional Petition. The issues raised revolve around ownership of the suit property which has already been settled.
54. It leads to my findings further that the Anarita Karimi Njeru test has not been achieved:
- “... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also *Meme v Republic & another* [2004] 1 KLR 637)
52. Other than raising the issue under the *Fair Administrative Action Act* that NLC did not give the petitioners a fair hearing and that the 1st respondent was a Public Officer and should not have benefitted from the allocation, there is nothing novel to be raised in this petition. it’s a replica of the past. Finally, if the issues raised here are new what is it that the petitioners have been doing in our Court corridors for over 2 decades? They had the chance for example to dispute how Adjudication was done and if any one of the steps had been overlooked, seek for immediate remedy under the available channels for redress. The window closed. Constitutional Petition has no such panacea.
53. Other than the Court proceedings and lawsuits, the NLC after conducting hearings that took over Nine (9) Months, Gazetted its determinations in the Kenya Gazette; Vol CXIX-No. 97 dated 17th July 2017 in Gazette Notice No. 6863 at Page 4316 where a determination was made that the ownership of Plot 404 Chembe/Kibabamshe was confirmed and regularized to Kibokoni Properties Ltd – 6th



Respondents herein and the ownership issue settled. A Constitutional Petition Cannot be the vehicle to check the legality and regularity of those proceedings. Perhaps Judicial Review could have been the remedy. In any event, I already ruled that the issues raised herein stand a foul the doctrine of res judicata.

52. Whether to declare the 1st petitioner a vexatious litigant. The provisions to do so are provided under Section 2 of the [Vexatious Proceedings Act](#):

“Power to make orders

- (1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant.
- (2) If the person against whom an order is sought under this section is unable on account of poverty to retain an advocate, the High Court shall assign an advocate to him in respect of such application.
- (3) A copy of any order made under this section shall be published in the Gazette.”

52. From the above provisions, I do not think in my view it is an exploration I need to undertake here. It will require a separate suit where the petitioner herein will have to be heard and a decision rendered in accordance with the rules of natural justice, that is hear the other side - audi alteram partem.
53. On whether the claim herein stands stale and brought after 50 years after the event, I will find that due to the many ongoing cases, blurred the vision on when to start reckoning time for purposes of the Statute of Limitation of Actions.
54. Ultimately, the litany of cases filed here and in other Courts and forums spanning over 2 decades and the adjudication process undertaken before then not only amount to an abuse of the Court process but contrary to the Oxygen (O2) principles and active case management strategies as posited in Section 1A and 1B of the [Civil Procedure Act](#) on expeditious, proportionate and affordable dispute resolution. I will think in my view litigation must come to an end.
55. The preliminary Objections raised herein succeed to the extent of striking out the entire petition dated 25th November 2022 with costs to the respondents and the interested parties. Since much has been said on the objections raised, the application dated 3rd May 2023 need not be addressed, in one way or another the issues raised have been tackled under the banner of the Objections which the 6th respondent supported.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mwadilo for the Petitioners

Mr. Ongocho Holding Brief for Ko'pere for the 2nd, 3rd, and 4th Interested Parties.



Mr. Kimani Holding Brief for Ingutya for the 7th, 8th Respondents, and 6th Interested Parties.

Court Clerk: Happy

