



**Board of Management Kadzuhoni Primary School & another v Ahmed & 4 others  
(Environment & Land Petition 5 of 2020) [2022] KEELC 3715 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3715 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND PETITION 5 OF 2020**  
**JO OLOLA, J**  
**JULY 28, 2022**  
**N THE MATTER OF**  
**THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF**  
**ARTICLES 2(1), 10, 22, 23, 25, 28, 47(1), 48, 50 53, 159 OF**  
**THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF**  
**THREATENED INFRINGEMENT OR CONTRAVENTION OF**  
**ARTICLES 43(F), 53(1)(B) AND 53(2) OF**  
**THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF**  
**DECLARATION OF PUBLIC LAND UNDER ARTICLE 62(1)(B) OF**  
**THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF**  
**ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF**  
**THE CONSTITUTION OF KENYA**  
**AND**  
**MALINDI ELC PETITION NO 5 OF 2020 RULING PAGE 1 OF 18**  
**IN THE MATTER OF**



**INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF  
ARTICLES 259 AND 258 OF  
THE CONSTITUTION OF KENYA 2010  
AND  
IN THE MATTER OF  
THREATENED INFRINGEMENT OR CONTRAVENTION OF  
SECTION 7 OF THE CHILDREN'S ACT NO 8 OF 2001  
AND  
IN THE MATTER OF  
THREATENED INFRINGEMENT OR CONTRAVENTION OF  
SECTIONS 28, 30 AND 59(A) OF  
THE BASIC EDUCATION ACT NO 14 OF 2013**

**BETWEEN**

**BOARD OF MANAGEMENT KADZUHONI PRIMARY SCHOOL .... 1<sup>ST</sup>  
PETITIONER**

**THE COUNTY GOVERNMENT OF KILIFI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**AMIR MAREI AHMED ..... 1<sup>ST</sup> RESPONDENT**

**ANNE FUAD MBARAK WARSHOW ..... 2<sup>ND</sup> RESPONDENT**

**JAMILA SHARIFF HAMID ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR KILIFI COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. By their Petition dated July 22, 2020 the Board of Management Kadzuhoni Primary School (the 1<sup>st</sup> Petitioner) and the County Government of Kilifi (the 2<sup>nd</sup> Petitioner) pray for the following orders against the five (5) respondents.
  - (a) A declaration that the portion in occupation of Kadzuhoni Primary School measuring six (6) acres out of the parcel of land known and described as Plot LR 11883 situate in Mambrui measuring 339.0 acres and registered as CR No 13648 in Kilifi County is public land pursuant to the provisions of Article 62(1) (b) of the *Constitution*;
  - (b) A declaration that by virtue of the provisions of Article 62(1)(b) of the *Constitution* Kadzuhoni Primary School is legitimately in occupation of the



portion measuring six (6) acres out of the parcel of land known and described as Plot LR 11883 situate in Mambui measuring 339.0 acres and registered as CR No 13648 in Kilifi County;

- (c) A declaration that the guaranteed constitutional rights of the children of Kadzuhoni Primary School under Article 53 and the right to education under Article 43(f) of the Constitution have been infringed and/or contravened by the Respondents actions of forceful entry into the School and commencing eviction without due regard and subsequently demolishing a section of two (2) classroom walls;
  - (d) A declaration that the guaranteed Constitutional rights of the children of Kadzuhoni Primary School under Article 53 and the right to education under Article 43(f) of the Constitution are threatened by any possible and/or impending eviction of the portion in occupation of Kadzuhoni Primary School measuring six (6) acres out of the parcel of land known and described as Plot LR 11883 situate in Mambui measuring 339.0 acres and registered as CR No 13648 in Kilifi County;
  - (e) A declaration that the 2<sup>nd</sup> petitioner is tasked with safeguarding public land which shall vest in and be held by the County Government in trust for the people resident in the County and shall be administered on their behalf by the National Land Commission under provisions of Article 53(2) of the Constitution;
  - (f) An order for a permanent injunction restraining the respondent either by themselves or their agents, servants, employees or any other person acting for or claiming under them jointly or severally from any purported demolition and or forceful eviction by the respondents against Kadzuhoni Primary School;
  - (g) An order of mandamus directing the 4<sup>th</sup> respondent to enter the interest of the portion in occupation of Kadzuhoni Primary School measuring six (6) acres of the parcel of land known and described as Plot LR 11883 situate in Mambui measuring 339.0 acres and registered as CR No 13648 in Kilifi County;
  - (h) Any other or further orders, writs and directions this honourable court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms and the enforcement and defence of the Constitution pursuant to Article 23(3); and
  - (i) Costs of this petition be borne jointly by the respondents.
2. Filed contemporaneously with the Petition on the same July 22, 2020 was a notice of motion application dated the same day seeking orders of temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from any purported demolition and or forceful eviction against Kadzuhoni Primary School pending the hearing and determination of the application and the Petition. The petitioners also sought an order compelling the 2<sup>nd</sup> Petitioners' County Surveyor to visit the suit property and to ascertain the extent and use of the portion in occupation of the school and to file a detailed report thereon.
  3. That application was opposed by Amir Marei Ahmed Amne Fuad Mbarak Warshow and Jamila Shariff Hamid (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively). By their grounds of opposition dated October



27, 2020 but filed herein on November 5, 2020, the said respondents are opposed to the application on the grounds listed as follows:

1. That the application and the petition are null and void as the Petition as filed fundamentally offends the provisions of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and section 6 of the [Civil Procedure Act](#) Cap 21, the Applicants therefore have no case to warrant the injunction, in fact by agreement between parties in ELC Case No 66 of 2015, there is an order of *status quo* as regards the School, the subject matter is pending before court in Malindi ELC 66 of 2015 (Consolidated with Malindi ELC No 36 of 2015) which situation violates the application totally;
  2. That the 2<sup>nd</sup> applicant herein lacks locus standi as the County Government has no footing in litigating matters on behalf of the National Government. The Applicants are already represented by the Honourable Attorney General in the aforementioned matter in the Environment and Land Court, they have an active application for review, stay of Judgment and proceedings.
  3. That the application herein is res judicata based on the facts that:
    - (i) The matter directly and substantially in issue herein has been directly and substantially in issue in Malindi ELC 66 of 2015 (consolidated with Malindi ELC No 36 of 2015);
    - (ii) In the two suits i.e. Petition herein and the Malindi ELC 66 of 2015 (consolidated with Malindi ELC No 36 of 2015) involves the same parties;
    - (iii) The case in Malindi ELC 66 of 2015 (is before a court of competent jurisdiction; and
    - (iv) The matter in ELC court was heard and determined vide a Judgment of court delivered on April 9, 2020. However, the 1<sup>st</sup> applicant herein, represented by the Honourable Attorney General re-activated it vide an application to court and the same is ongoing.
  4. That the application is a duplication of the matter already filed and pending in the ELC court. This is therefore an abuse of the court process.
  5. That the application should be struck out and or dismissed with costs. The prayers sought are not available to the applicant;
  6. That in the circumstances of this case for the interest of justice, fairness and equity to be met, we pray that that application dated July 27, 2020 and the petition be dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
4. Filed together with a grounds of opposition and dated the same October 27, 2020 was a notice of preliminary objection wherein the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent literally reproduced their grounds of opposition as listed herein above.
  5. Following directions taken herein, it was agreed by the parties that the said preliminary objection would be disposed of by way of written submissions.
  6. As it turned out, I was unable to find any submissions filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. I have nevertheless carefully considered the pleadings filed herein as well as the submissions filed by the petitioners as well as those in support of the Petition filed by the honourable the Attorney General who entered appearance for the Land Registrar, Mombasa County (the 4<sup>th</sup> respondent).



7. The main basis for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' preliminary objection is the contention that the Petition is *res judicata* as the subject matter herein was directly and substantially in issue in Malindi ELC 66 of 2015 as consolidated with Malindi ELC No 36 of 2015.
8. The doctrine of *res judicata* is provided for under Section 7 of the *Civil Procedure Act* 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 the 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.”
9. Accordingly for a plea of *res judicata* to be upheld, there must be:
  - (i) A previous suit in which the matter was in issue;
  - (ii) The parties must have been the same or litigating under the same title;
  - (iii) A competent court that heard the matter in issue; and
  - (iv) The issue has been raised in a fresh suit.
10. The existence of both Malindi ELC Case No 36 of 2015 and No 66 of 2015 is not denied by the Petitioners. On the contrary, the Petitioners have made extensive references to those cases at Paragraphs 41 to 48 of the Petition wherein they assert as follows:
  41. The School went about its learning process and day to day operations as per normal until the First Petitioner would later come to learn that some 197 Applicants being members of the Community residing on other portions of the suit property filed a suit on the March 10, 2015 at Malindi in the Environment and Land Court being Malindi ELC No 36 of 2015 seeking (the) court's determination on acquisition of the suit property by reasons of adverse possession against the First and Second Respondents on the grounds that since the year 1960, the 197 Applicants have been openly and peacefully enjoying occupation of the suit property for over twelve (12) years.
  42. In the meantime, the first and second respondents herein filed a Plaint dated March 3, 2015 on the April 29, 2015 at Malindi in the Environment and land Court being Malindi ELC No 66 of 2015 seeking Judgment to be entered against Defendants who comprised a portion of the 197 Applicants in Environment and Land Court being Malindi ELC No 36 of 2015.
  43. The two aforesaid suits were later consolidated and on April 9, 2019, the Learned Judge of the Environment and Land Court issued Judgment in Malindi ELC No 66 of 2015 consolidated with ELC No 36 of 2015 OS granting vacant possession to the Plaintiffs therein namely Amir Marei Ahmed, Amne Fuad Mbarak Warshow and Jamila Shariff Hamid, the First, Second and Third respondents herein respectively;
  44. Although the Board of Management was not a Party to either of the two aforesaid suits, the Learned Judge of the Environment and Land Court clearly recognised the presence of the School among other social amenities namely churches, mosques and water points on the suit property, the aforesaid Judgment delivered on the April 9, 2019, had the effect of demolition of the School as the said Plaintiffs therein were accordingly granted vacant possession of the suit property notwithstanding.



45. On the July 14, 2019 the respondents forcefully entered the suit property and proceeded to evict communities and families residing on the portions of the suit property and further, partly demolished a section of two (2) classroom walls of the School pursuant to realising the Judgment and subsequent orders issued in Malindi ELC 66 of 2015 consolidated with ELC No 36 of 2015 OS thereby interfering with the learning environment and day to day operation of the School.
  46. Further the learning environment and day to day operation of the School was initially greatly affected by the eviction and settlement of displaced communities and families have sought refuse on the schools ground a trend which has a potential of recurring if the respondents proceed with the planned demolition and eviction as earlier;
  47. Whereas the Judgment and subsequent orders issued in Malindi ELC No 66 of 2015 consolidated with ELC No 36 of 2015 OS is subject to an application for review and orders of stay of execution, the School continues to face uncertainty owing to the lingering question of possible demolition and eviction since the orders for stay of execution were issued albeit temporarily pending the ruling of the honourable court in the application for review. The application for review is scheduled for hearing on the December 10, 2019; and
  48. The aforesaid application for review and orders for stay came up for ruling on the May 6, 2020 and the same was dismissed in favour of the first and second respondent herein.
11. In their submissions before the court, the petitioners assert that both the petitioners herein were not parties to the consolidated suits and that the subject matter in the said suits was the proprietorship of the parcel of land described as Plot LR 11883 situate in Mambrui measuring 339.0 acres and registered as CR No 13648 whilst the crux of the Petition herein is essentially protection against infringement and/or contravention and enforcement of the guaranteed Constitutional rights of the children learning in the concerned school under Article 53 and the right to education under Article 43(f) of the *Constitution of Kenya 2010*.
  12. While none of the parties supplied to the court the pleadings and or the decision in the consolidated suits this court has had occasion to peruse the record and it was clear that the subject matter of the former suit was the very same parcel of land from which Petitioners by this Petition claim a portion measuring 6 acres to be declared to belong to the 1<sup>st</sup> Petitioner.
  13. From the material placed before me, I was unable to see much difference between the petitioners herein and the defendants in the consolidated suits. At Paragraph 6 of the petition on the legal foundation of the Petition, the Petitioners assert that:
    - “6. The Petition is presented by the Petitioners on their behalf and on behalf of parents and students of Kadzuhoni Primary School (hereinafter referred to as “The School”) seeking protection against infringement and or contravention and enforcement of the guaranteed constitutional rights of the children under Article 53 and rights of education under Article 43(f).”
  14. It was clear to me that the parents on whose behalf the Petition is said to have been brought are the same ones referred to at paragraph 46 of the petition cited hereinabove and who are said to have been evicted pursuant to the judgement issued in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the consolidated suits.
  15. That was indeed the position taken by the defendants in the former (consolidated) suits. In their pleadings therein the 197 defendants had asserted that in the year 2001 when their community wanted



to construct what came to be known as Kadzuhoni Primary School, the 3<sup>rd</sup> respondent herein had resurfaced after a long absence and identified herself as the owner of the suit property. It was their case that the 3<sup>rd</sup> respondent thereafter disappeared again shortly after giving consent for the construction of the Primary School.

16. It was also clear from a perusal of the record that the Petition and the application before me were brought in abuse of the court process. That much is clear because after the impugned judgment, the 1<sup>st</sup> Petitioner herein filed a notice of motion application dated January 23, 2020 in the former (consolidated) suit seeking to be enjoined therein as a defendant and to be granted orders of stay of eviction from the suit premises.
17. In the said application, the 1<sup>st</sup> Petitioners main grouse was that they had been on the suit land since 1993 and that they had been condemned unheard. The said application was supported by an affidavit sworn by the Head Teacher of the said Kadzuhoni Primary School. At Paragraphs 8 and 9 of the supporting affidavit, the 1<sup>st</sup> Petitioner clearly acknowledged that the land on which the School was built belonged to the respondents herein and that it was them who gave consent for the school to be constructed thereon.
18. The 1<sup>st</sup> petitioners' said application was dismissed on July 30, 2021 after it became apparent that the 1<sup>st</sup> Petitioner had been aware of the existence of the suit from as early as the year 2014 but had not taken any steps to be enjoined therein.
19. Arising from the foregoing it was clear to me that this Petition was filed to serve other ulterior purposes. The principle of *res judicata* is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.
20. As Majanja J stated in *ETV 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. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action that which has been resolved by a court of competent jurisdiction.”
21. In the circumstances herein, it was clear to me that the Petitioners herein are trying to re-open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action disguised as constitutional infringements in subsequent suits.
22. In the result I find and hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents preliminary objection has merit and I allow the same. Accordingly both the petition and the motion dated July 22, 2020 are hereby struck out with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> JULY, 2022.**

In the presence of:

No appearance for the Applicants

No appearance for the Respondents

Court assistant - Kendi

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**J. O. OLOLA**  
**JUDGE**

