



Mwaro v District Land Surveyor – Kilifi & 5 others (5th & 6th Respondents sued in their capacity as the officials of one Faith Pentcostal Church aka Pentecostal Church of Africa) (Petition 17 of 2021) [2022] KEELC 14416 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14416 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 17 OF 2021
MAO ODENY, J
OCTOBER 21, 2022
IN THE MATTER OF:ARTICLES 22(1) & 23(1) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF:INFRINGEMENT OF FUNDAMENTAL RIGHTS
& FREEDOMS UNDER ARTICLE 27, 40 & 47
OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JUMWA KATANA MWARO PETITIONER

AND

DISTRICT LAND SURVEYOR – KILIFI 1ST RESPONDENT

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER
KILIFI 2ND RESPONDENT**

LAND REGISTRAR- KILIFI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

SIMON KARISA 5TH RESPONDENT

JOHN KOMBE 6TH RESPONDENT

**5TH & 6TH RESPONDENTS SUED IN THEIR CAPACITY AS THE OFFICIALS
OF ONE FAITH PENTCOSTAL CHURCH AKA PENTECOSTAL CHURCH OF
AFRICA**



RULING

1. This ruling is in respect of a Notice of Motion dated February 17, 2022 by the 5th and 6th Respondents seeking the following orders: -
 - a. That the petition filed in Court on August 20, 2021 be struck out for being res judicata.
 - b. That costs of this Application be provided for.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

5TH AND 6TH RESPONDENTS' SUBMISSIONS

3. The Applicant relied on grounds on the face of the application and his annexed affidavit sworn on February 17, 2021 where he deponed that the court has no jurisdiction to hear the Petition as it is res Judicata in light of several suits between the Petitioner herein and the Respondents in Kilifi SRMCC No 656 of 2010- Jumwa Katana Mwaro v Simon Karisa & Another and Malindi ELC Land Case No 92 OF 2017- Jumwa Katana Mwaro & 2 Others v Simon Karisa & 3 Others where the issue of ownership of the suit property was determined.
4. Counsel submitted that the Petition filed in Court on August 20, 2021 should be struck out with costs for being res judicata and cited Section 7 of the *Civil Procedure Act* which provides that: -

“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 substantially raised or has been heard and finally decided by such Court.”
5. It was counsel’s submission that the Petition herein raises issues regarding the legality of the adjudication process which allegedly lead to the amendment of the map sheet for Plot No 31, Kibarani, the suit property herein which issues have been subject of proceedings in Kilifi SRMCC No 656 of 2010 between the Plaintiff and the 5th and 6th Respondents herein.
6. Counsel submitted that they have annexed the judgment in the Kilifi case which was conclusive and no appeal was preferred against it hence this court has no jurisdiction to hear and determine the issues raised in the Petition which were conclusively heard and determined.
7. Counsel further submitted that the petition has been brought to the wrong forum as it challenges the decision of the Adjudication process as the *Land Adjudication Act* provides for the procedure to be followed by any person aggrieved by the decision of the Land Adjudication Officer by making a complaint before the committee for redress.
8. It was counsel’s submission that in a ruling delivered on May 25, 2018 in Malindi ELC Case No 92 of 2017, *Jumwa Katana Mwaro & Others v Simon Karisa & Others*, the Court stated at paragraph 15 as follows: -

15. “It is evident to me that other than adding here two sons as Co-Plaintiffs and enjoining the Kilifi District Registrar and Surveyor herein, the issue in in dispute is the same one that was directly and substantially in dispute between the parties in the subordinate Court. That suit was substantially between the Plaintiffs on one hand and the First and Second



Defendant's on the other litigating under the same title. The said dispute was fully and finally determined by the Resident Magistrate's Court and it would appear to me that no appeal was preferred therefrom."

9. Counsel cited the cases of *Kenya Commercial Ltd v Benjob Amalgamated Ltd (2017) eKLR* and *Independent and Electoral Boundaries Commission v Maina Kiai & others (2017) eKLR* and urged the court to strike out the petition with costs to the Respondents as it is res judicata.

PETITIONER'S SUBMISSIONS

10. In response to the application the Petitioner filed a Replying Affidavit sworn on March 15, 2022 and deponed that in Kilifi SRMCC No 656 of 2010 she was seeking for a permanent injunction to restrain the Defendants from trespassing or encroaching onto Plot No 31 Kibarani Settlement Scheme and that in Malindi ELC No 92 of 2017, she was seeking a permanent injunction against the 1st Defendant and an order directed to the Land Registrar Kilifi to issue her with a title deed for Plot No 31 and that the issues of law and fact were substantially the same as those in Kilifi SRMCC No 656 of 2017.
11. It was the petitioner's case that in the current petition, the issue for determination is whether or not there was an amendment to the Map sheet for Kibarani Settlement Scheme relating to Plot No 31 resulting to alteration of its boundaries and a reduction of the acreage of the suit property without her involvement thereby infringing upon her constitutional rights.
12. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

13. This is an application seeking to strike out this petition as being res judicata. The doctrine of res judicata is anchored under Section 7 of the *Civil Procedure Act* which states: -

"No court shall try any suit 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 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."

14. In the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR*, the Court of Appeal held that: -

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
- b) The 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."



15. The Petitioner has admitted that the issues were similar save for the fact that in this current petition she is seeking the determination of the issue whether or not there was an amendment to the Map Sheet for Kibarani Settlement Scheme relating to Plot No 31 Kibarani Settlement Scheme resulting to alteration of its boundaries and a reduction of the acreage of the suit.
16. It is on record that the Petitioner and the Respondent have had several suits being Kilifi SRMCC No 656 of 2010 – *Jumwa Katana Mwaro v Simon Karisa & Another* and Malindi ELC Case No 92 of 2017- *Jumwa Katana Mwaro & 2 Others v Simon Karisa & 3 Others*.
17. Further in Kilifi Misc Application No 1 of 2019 *Simon Karisa & 2 Others v Jumwa Katana Mwaro & 2 Others* where the court ordered the Kilifi District Surveyor to undertake a survey and subsequently, a survey Report prepared to that effect.
18. This Petition raises issues regarding to the legality of the adjudication process which eventually led to the amendment of the map Sheet for Plot No 31 which issue as rightly pointed out by the Respondents was already dealt with in Kilifi SRMCC 656 of 2010 between the same parties.
19. There has to finality in litigation and parties should bring their claims to court wholly not litigate by instalments. In the case of *James Wigram v C in Henderson v Henderson 1843 3 Hare 100 – 114 – 115* where the court stated as follows: -

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

I have considered the application, the cases attached, the submissions by counsel, the relevant judicial authority and find that the application has merit and therefore the Petition is struck out with costs to the 5th and 6th Respondents

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF OCTOBER, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 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.

