



**Said & another v Nderitu; County Government of Kilifi &
3 others (Interested Parties) (Environment and Land Appeal
18 of 2023) [2025] KEELC 3042 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 18 OF 2023
FM NJOROGE, J
APRIL 2, 2025**

BETWEEN

OMAR ALI SAID 1ST APPELLANT

ABDUL RATIF 2ND APPELLANT

AND

DOUGLAS IKUA NDERITU RESPONDENT

AND

COUNTY GOVERNMENT OF KILIFI INTERESTED PARTY

SEIF MOHAMED SAID INTERESTED PARTY

HILAL MOHAMED SAID INTERESTED PARTY

**KHALIFA MOHAMED SAID (AS ADMINISTRATORS OF THE ESTATE OF
ZAYAN BINTI AZAN - DECEASED) INTERESTED PARTY**

JUDGMENT

1. This is an appeal that arises from the decision of the Hon Resident Magistrate’s Court in Malindi delivered in a ruling dated 27/10/2023. In that ruling the trial court considered a Preliminary Objection dated 24th July 2023 wherein it was stated inter alia that the suit is res judicata the Case No ELC 200 of 2015- Malindi.
2. It appears that the opposition to that preliminary objection was by way of a filed replied affidavit dated 9th August 2022 filed by the plaintiff. In the ruling the learned trial Magistrate found that the preliminary objection had no merit and dismissed it with no orders as to costs.



3. The Memorandum of Appeal in this case is based on only one ground: that the learned trial Magistrate made an error in law and in fact in failing to find that the suit is *res judicata* Case No ELC 200 of 2015- Malindi.
4. Did the learned trial Magistrate make such an error in law and in fact? That is the issue for determination herein.
5. It is evident that the issue of *res judicata* was brought to the attention of court in the learned trial Magistrate's court below by where of preliminary objection dated 24th July 2023. The trial court in its ruling correctly pointed out that a preliminary objection comprises of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued may dispose of the suit; that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the court discretion. The learned trial Magistrate's also observed that a suit being *res judicata* is a pure point of law, but added that suing the wrong party may be made the subject of amendment of pleadings.
6. After analyzing the pleadings, the learned trial magistrate properly noted in her ruling that the plaintiff states that he is the owner of a house standing partly on plot number 4323 and partly on plot number 4343 yet he was served by the first and second defendants with an eviction notice in respect of plot number 4322 which he avers in his plaint that he does not occupy. The learned trial Magistrate also noted that a verification report done shows that the plaintiff's house has not encroached into plot number 4322 in any way. She concluded by holding that there are facts in issue that need to be ascertained and dismissed the preliminary objection.
7. The holding of the court in the renowned case of *Mukisa Biscuit Manufacturers Ltd versus West End Distributors Ltd* (1969) EA 696 is that a preliminary objection cannot be raised if certain facts have to be ascertained. In the present case it is not agreed in the pleadings as to which plot the plaintiff's house is located on. If the decision in Malindi ELC Case No 200 of 2015 referred to eviction from plot number 4322 and the plaintiff denies being thereon, there is a live issue for trial.
8. In litigation a preliminary objection should be able to stand on its own without any evidence being brought or adduced both for or against it.
9. To determine whether the suit was *res judicata* Case Number 200 of 2015 – Malindi, the trial court would have needed to go out of its way and examine the pleadings filed in that other case and the proceedings. Those pleadings and proceedings not being part of the case before her court, what the learned trial Magistrate would have been doing would have amounted to seeking of evidence in support of the defendants' preliminary objection. That the court had to examine a verification report filed before it, which showed that the plaintiff's house has not encroached into plot number 4322 in any way, was in itself a contravention of the rule as to determination of matters on the basis of a preliminary objection. That amounted to seeking of evidence in support of the objection. This court is of the view that the objection was thus removed from the realm of a preliminary objection since it required evidence or scrutiny of other documents to support it. I therefore find that though the trial Magistrate erred in relying on the verification report, she did not err in dismissing the preliminary objection.
10. Consequently, the present appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 2ND DAY OF APRIL 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

