



**Mwatsahu & 4 others (Mwadzaya Mwachanda Clan Welfare Registered Trustees) v County Government of Kilifi & 5 others (Petition 26 of 2016) [2022] KEELC 13424 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13424 (KLR)

**REPUBLIC OF KENYA**

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

**PETITION 26 OF 2016**

**MAO ODENY, J**

**OCTOBER 11, 2022**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 22, 40, 48, 63 OF THE CONSTITUTION**

**BETWEEN**

**RAMADHAN ALI MWATSAHU ..... 1<sup>ST</sup> PETITIONER**  
**MOHAMED MENZA YAMA ..... 2<sup>ND</sup> PETITIONER**  
**HAMISI HASSAN MWATSAHU ..... 3<sup>RD</sup> PETITIONER**  
**BURU MGANDI NYOTA ..... 4<sup>TH</sup> PETITIONER**  
**TAHIR MWATSAHU MWADZAYA ..... 5<sup>TH</sup> PETITIONER**  
**MWADZAYA MWACHANDA CLAN WELFARE REGISTERED TRUSTEES**

**AND**

**COUNTY GOVERNMENT OF KILIFI ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 3<sup>RD</sup> RESPONDENT**  
**MINISTRY OF TRANSPORT AND INFRASTRUCTURE ..... 4<sup>TH</sup> RESPONDENT**  
**MINISTRY OF DEFENCE ..... 5<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> respondent's preliminary objection dated June 15, 2022 on the following grounds; -



1. That this honourable court lacks the requisite jurisdiction to hear and determine the petitioners' petition for reasons that; -
    - a. The suit property herein substantially relates to the subject matter in Environment and Land Court Case No 243 of 2014 between Tsangwa Ngala Chome (suing as the administrator of the estate of the late Mumba Chome Ngala –deceased) V Town Council of Mariakani & Others which matter was already concluded and judgment prepared by Justice O Angote dated July 12, 2018 which was delivered by Justice Olola on the July 19, 2018.
    - b. That Justice Olola vide a ruling dated January 29, 2021 dismissed petition No 30 of 2019 (instituted by the petitioners herein over the same subject matter as in this petition) for want of jurisdiction by virtue of the judgement of Justice O Angote in Malindi ELC no 243 of 2014.
  2. That this honourable court lacks the jurisdiction to entertain this petition seeks to revise, amend, review and/or overturn a judgment delivered by a court with a co-ordinate jurisdiction.
  3. That the 1<sup>st</sup> respondent herein subsequently lodged an appeal against the judgment of justice O Angote in Malindi ELC No 243 of 2014 to the Court of Appeal being Civil Appeal No 126 of 2018 at Malindi between the County Government of Kilifi being the defunct Town Council of Mariakani v Tsangwa Ngala Chome which appeal is pending before the Court of Appeal.
  4. That the said appeal is now consolidated with Civil Appeal No 127 of 2018 between Oscar Mumo Nzanah V Tsangwa Ngala Chome & 6 others which matter is also actively pending before the Court of Appeal relating to the suit property herein.
  5. That the petition herein strictly offends the doctrine of judicial hierarchy and upsets the established judicial order as the Court of Appeal is yet to give its verdict in relation to the two appeals.
  6. That arising from the above, the petition herein is an utter abuse of the court and therefore incurably defective, bad in law and is incompetent and ought to be struck out with costs.
2. Counsel for the 1<sup>st</sup> respondent submitted on the grounds enumerated above and stated that the court lacks jurisdiction to hear and determine this petition as there is already a judgment on the same subject matter vide ELC No 243 of 2014 delivered on July 12, 2018 and two pending appeals in the Court of Appeal.
  3. Ms Mulongo urged the court to dismiss the petition with costs.
  4. Counsel for the 2<sup>nd</sup> to 6<sup>th</sup> respondents also submitted that they are in support of the preliminary objection and associated themselves with the submissions of Ms Mulongo counsel for the 1<sup>st</sup> respondent.

### **Petitioners' submissions**

5. Counsel for the petitioners opposed the preliminary objection and submitted that this is a constitutional petition where the petitioners are alleging infringement of rights. Counsel admitted that it is indeed true that the petitioners filed Petition No 30 of 2019 which was struck out on the grounds that this current Petition No 26 of 2016 was still pending hearing and determination.
6. Mr Ondabu further submitted that the petitioners herein were not parties to ELC No 243 of 2014 and that they are seeking compensation for being evicted from their land to pave way for the Mariakani Military Barracks but were never compensated.



7. It was counsel's submission that the striking out of Petition No 30 of 2019 gave way for the hearing of this petition and urged the court to dismiss the preliminary objection with costs.
8. In response to the preliminary objection, Mr Mugira for the 5<sup>th</sup> respondent submitted that the subject matter in dispute is Kilifi/Madzimbani/Mitangoni/B/1 as per the documents that were annexed to the petition which are similar to the maps in ELC 243 of 2014 and Petition No 30 of 2019.
9. Mr Mkala for the 3<sup>rd</sup> 4<sup>th</sup> and 6<sup>th</sup> respondent also supported the preliminary objection and stated that the suit land is the same with the one in ELC 243 of 2014 where a judgment was rendered hence the petition should be dismissed.

### **Analysis and determination**

10. The issue for determination is whether the preliminary objection raised by the 1<sup>st</sup> respondent and supported by the 2<sup>nd</sup> to 6<sup>th</sup> respondents on the ground that the suit property herein substantially relates to the subject matter in Environment and Land Court Case No 243 of 2014 between Tsangwa Ngala Chome (Suing as the administrator of the estate of the late Mumba Chome Ngala –deceased) V Town Council of Mariakani & Others which matter was concluded vide a judgment dated July 12, 2018.
11. The Supreme Court in the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others [2015] eKLR* held as follow ;-
  1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.
  2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. In the instant case the prayer for consideration of extension of time to file a notice of appeal out of time tied with a claim that the issue had been overtaken by events was a factual issue, to be established by evidence from both parties. Therefore, the court was unable to dispose of the question, without first evaluating evidence from the parties. It raised no pure point of law on its own.
12. The petitioners filed this petition on December 6, 2016 seeking the following reliefs: -
  - a. The respondents jointly and severally be ordered to compensate the petitioners promptly and fairly of their land taken up for public purposes at the current market valuation by an independent valuer.
  - b. An order of mandamus do issue to the chairman National Land Commission to survey and value the land as per his decree issued on the public hearing held on November 17, 2015 in response to the petition filed by the petitioners to the National Land Commission which he has not put to action to date.
  - c. An order of mandamus do issue to the Cabinet Secretary Ministry of Lands and Physical Planning to be compelled to issue title documents to the petitioners to secure their proprietary interests in the remaining land of the petitioners' land



- d. Costs and interest of this suit.
  - e. Or such other orders as this honourable court shall deem just.
12. The petitioners while this case was still pending filed another Petition No 30 of 2019 dated October 31, 2019 seeking the following reliefs: -
1. A declaration that the 1<sup>st</sup> respondent's clan land boundary does not extend into Kenya Defence Forces (KDF) Mariakani Barracks and is marked by parallel line 46°; 44° along the road passing through the Mariakani Barracks and further that the petitioner's land is the one occupied by the KDF Mariakani Barracks;
  2. An order of certiorari do issue removing into Court the certificate of title re-issued on September 17, 2018 in the name of Tsangwa Ngala Chome being LR No Madzimbani/Mitangoni/B/1 measuring approximately 2780 Ha and do revoke/cancel/ and/or otherwise nullify the same for the Kilifi Land Registrar to rectify his records accordingly in compliance with the Community Land Act, 2016 and the Constitution of Kenya, 2010;
  3. An order of injunction be given restraining the 1<sup>st</sup> respondent, his servants, agents, proxies and/or otherwise all persons from encroaching, trespassing, laying claim into the land occupied by the Kenya Defence Forces(KDF) in any manner solely with the purpose of claiming compensation and to observe the boundary marked by the parallel line 46°, 44° along the road into the Mariakani Army Barracks;
  4. An order be made for compensation to the petitioners for land compulsorily acquired for the construction of public facilities such as schools, churches, roads, power transmission lines, Mariakani Weighing Bridge and KDF Mariakani Barracks; and
  5. The costs of the petition be paid by the 1<sup>st</sup> respondent.
13. Petition No 30 of 2019 was struck out as it was in respect of the same subject matter as the current petition. Counsel also submitted that Petition No 30 of 2019 was struck out to give way for the hearing of this petition. From the prayers in the petition it is clear that the subject matter is Kilifi/Madzimbani/Mitangoni/B/1.
14. Counsel further submitted that the petitioners were not parties to ELC No 243 of 2014 which purportedly determined the issue and that what the petitioners are claiming is compensation.
15. It is also on record that there are two appeals pending in the Court of Appeal in respect of the same subject matter being Appeal no 126 and 127 of 2019 of counsel for the petitioners confirmed that he acts for the objectors in the said appeals.
16. The proceedings, Judgment and decree in Malindi ELC No 243 of 2014 were availed to court which upon perusal, the record from the judgment shows that the subject matter which is Kilifi/Madzimbani/Mitangoni/B/1 was declared to belong to the clan of Mumba Chome Ngala, represented by Tsangwa Ngala Chome who had been sued together with the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 6<sup>th</sup> respondents in Petition No 30 of 2019.
17. The 1<sup>st</sup> respondent's contention that this matter has already been determined by a competent court of the same jurisdiction vide Malindi ELC No 243 of 2014 is sound as the subject matter and parties in the current suit are directly and substantially in issue in ELC Petition No 26 of 2016 which was determined by a competent court.



18. The petitioners are trying to avoid the operation of the doctrine of res judicata by adding and subtracting parties to make it seem as a new suit. The petitioner specifically mentioned the subject matter of the suit as Kilifi/Madzimbani/Mitangoni/B/1 in Petition No 30 of 2019 which is similar to this suit but avoided mentioning the suit parcel by name opting to describe it but the maps relied on betrayed them.
19. In the case of *Henderson vs Henderson (1843) 67 ER 313* res-judicata was described as follows; -
- ' where a given matter becomes the subject of litigation in, and 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 litigations in respect of a 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 pleas 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 point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time'.
20. In the case of *Mohamed Anwar Abdirahman Haji Abbas v Mangale Dzombo Ngoka & 3 others [2022] eKLR* this court held that:-
- ' litigation must come to an end at some point and parties must not be allowed to file fresh suits on matters that have been litigated and determined by a competent court. When a judgment is rendered and a party is aggrieved, such a party has the right to appeal and not file a fresh suit.'
21. It is further on record that there are pending appeals in respect of the same parcel of land which is admitted by all counsel. This court cannot sit on its own judgment unless it is a review. The parties took the right step to file appeals therefore the filing of this suit is an abuse of court process hence is dismissed with costs to the respondents. The preliminary objection has merit and is upheld.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF OCTOBER, 2022.**

**MA 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.

