



**County Government of Kilifi v Ricci; National Land Commission & 2 others (Interested Parties)
(Environment & Land Case 9 of 2019) [2022] KEELC 14699 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 9 OF 2019
EK MAKORI, J
NOVEMBER 9, 2022**

BETWEEN

COUNTY GOVERNMENT OF KILIFI PLAINTIFF

AND

DANIEL RICCI DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

CHIEF LAND REGISTRAR INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Application for disposal, dated the 25th of March 2022. The Plaintiff seeks under certificate of urgency a temporary injunction to restrain the Defendant from demolishing or interfering with the public use of the Fish Depot built on the 60-meter reserve land adjoining land known as Chembe/ Kibabamshe/427 situate in Kilifi. With costs.
2. A Preliminary Objection thereto dated the 4th of March 2022 was raised by the Defendant which seeks the entire matter and the pending application be struck out, with costs on grounds that this matter is *res judicata* as the issues raised herein were conclusively determined as between the parties in ELC Case No 178 of 2013 *Daniel Ricci v Land Registrar Kilifi & Another*.
3. The court directed the two motions to be heard simultaneously and the parties filed their respective submissions.
4. To proceed in an orderly manner I will propose to deal with the Preliminary Objection first because if it succeeds, it will have a bearing on the manner the entire matter will proceed. If it fails, then I will proceed to deal with the motion seeking a temporary injunction.



The Defendant's Preliminary Objection

5. Defendant contends that he sued Plaintiff herein and the 3rd Interested Party through ELC No 178 of 2013 – [Daniel Ricci v County Land Registrar Kilifi & The Hon Attorney General](#). Consequently, the matter was heard and judgment delivered in favour of the Defendant herein by Hon Justice Angote. The parties in that matter were fully represented by counsel and knew the outcome of that case. A decree was duly extracted by the Deputy Registrar of the High Court Malindi.
6. The existence of ELC No 178 of 2013 – [Daniel Ricci Vs County Land Registrar Kilifi & The Hon Attorney General](#) according to the Defendant is not disputed. It is admitted in the Plaintiff's application dated March 25, 2019, in paragraphs 6,10, and 11 of the supporting affidavit sworn by one Bibi Fondo.
7. Defendant has annexed two documents in support of his plea that this matter is res judicata. Annexure BN-4 is the Decree issued by the court showing that the Defendant herein was declared as the rightful owner of the matter property which was in controversy, in that case, the property was neither a fish pond nor Government Land, Gazette Notice that revoked the Defendant's title declared illegal, and the Defendant's title reinstated.
8. Annexure BN-5 is an application dated October 3, 2016, seeking to set aside the judgment of the court in the former matter in which the Plaintiff is named as the 3rd Defendant/Applicant, the Attorney General who was the Principal Legal Advisor of the Government, as well as the County Land Registrar, were parties to the matter.
9. The Defendant avers that the decision of the court was judgment *in rem*. It settled the question of ownership of the land and is a message to the whole world about who the property owner is.
10. Defendant contends that despite Plaintiff being aware of the position, Plaintiff still went ahead to file and institute matter vide Plaintiff filed on the March 27, 2019. Which is now the subject of the current Preliminary Objection.
11. The Defendant submits that the Preliminary Objection is hinged on Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and seeks the application and the entire matter be dismissed in limine for reasons that the matter is *res judicata*.
12. The Defendant has quoted the Court of Appeal case of [Kenya Commercial Bank Limited Vs Benjob Amalgamated Limited](#) [2017]eKLR which sets out the elements that constitute *res judicata* -the matter or issue was directly and substantially in issue in the former matter; that former matter was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former matter, and the court that formerly heard and determined the issue was competent to try the subsequent matter or the matter in which the issue is raised. Defendant concludes that ELC No 178 of 2013 – [Daniel Ricci v County Land Registrar Kilifi & The Hon Attorney General](#), dealt with similar issues raised herein and fully and finally determined the same.
13. On the issue of what constitutes judgment *in rem*, the Defendant has quoted the case of [Abukar G Mobammed v Independent Electoral and Boundaries Commission](#) [2017] eKLR - that the judgment affects the suit property and that it is directed to the whole world about the property in issue even though some parties could not have litigated over it. The Defendant further quotes the case of [Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Limited](#) [2008] eKLR, supporting the same assertions on what constitutes judgment in rem.



Plaintiff's Case and Rejoinder

14. The Plaintiff states the National Land Commission, the 1st Interested Party in this case issued a finding through Gazette Notice No 6862 dated July 17, 2017, revoking title held by the Defendant and directing the 2nd Interested Party – The Chief Land Registrar to regularize the matter property as a fish landing site and hence public land.
15. The probe and findings of the 1st Interested Party were under Article 62(2) of the [Constitution of Kenya](#) and the matter property being public land, ought to enjoy the protection of the law.
16. On the Preliminary Objection raised by Defendant, Plaintiff states that the same does not meet the test laid in *Mukisa Biscuits Manufacturing Co Limited Vs West End Distributors Limited* [1969] EA 696 on page 700, which holds that a Preliminary Objection is primarily a point of law raised with the potential of disposing off a matter if argued successfully.
17. The Plaintiff similarly has hinged the Preliminary Objection on Section 7 of the [Civil Procedure Act](#) which provides the threshold for the rule of *res judicata* to be invoked. The plaintiff has also quoted the case of the [Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others](#) [2017] eKLR which also expounds on the principles applicable for *res judicata* to apply.
18. Plaintiff contends that the issues in the former matter were not the same as in this one, the parties were different, and Plaintiff was never a party in that matter even though it could have been a necessary party in the matter who ought to have been joined. The case of [CK Bett Traders Limited & 2 Others v Kennedy Mwangi & Anor](#) [2021] eKLR is quoted on how to differentiate when a former and a latter matter are similar. Plaintiff concludes that the issues raised in this matter and the parties in ELC No 178 of 2013 – [Daniel Ricci v County Land Registrar Kilifi & The Hon Attorney General](#) are incongruent with the current one.

Issues for Determination

19. The issues that are for determination in this application are whether the Preliminary Objection raised has achieved the threshold as laid in the case of *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* [1969] EA 696, and whether the current matter is *res judicata*.

Analysis and Determination

20. The *Mukisa Biscuits* Case has been applied with approval by our courts in so many other cases for instance in the case of [Gladys Pereruan v Betty Chepkorir](#) [2020] eKLR, Hon Justice Githinji, quoting several authorities held as follows: -

“The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v Safaricom Ltd & Anor* [2020] eKLR as follows:

“[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*. [1969] EA 696, where Law JA and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA:



“So far as I am aware, a Preliminary Objection consists of a pure 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 matter. Examples are an objection on 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 matter to refer the dispute to arbitration.”

Newbold, P:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

- [10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.
- (11) In the case cited by the 1st Respondent, David Nyekorach Matsanga & Another v Philip Waki & 3 Others [2017] eKLR, the three-judge bench of the High Court (Lenaola, J (as he then was), Odunga and Onguto, JJ) after considering various holdings of the Supreme Court of Kenya on the question of Preliminary Objection held as follows:

“We quickly turn to the question of whether we have before us a Preliminary Objection proper. Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“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 matter”

The preliminary objection if allowed may dispose off the entire matter without allowing parties to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.

The court is guided by Order 2 rule15 of the Civil Procedure Rules on when a matter can be struck out as provided below:



- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:
- a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous, or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) it is otherwise an abuse of the process of the court, and may order the matter to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

21. Going by the authorities I have quoted, the Defendant has raised the issue of *res judicata*, if at the end of the day it is argued and found that this matter is similar to a former one that has already been heard substantially and fully and finally determined by a competent court, on the same issues, which will tend to dispose off the current one, then the Preliminary Objection is relevant and falls within the cornerstone and, in my view meets the threshold of the *Mukisa Biscuits* Case.
22. From the Plaintiff this matter seeks prayers as follows: -
- a) A declaration that the matter property known as Kilifi/Chembe/ Kibabamshe/427 situated in Kilifi County is public land vested in the Plaintiff to hold it in trust of the constituents of Kilifi County; and
 - b) The 1.3 hectares of a marine reserve on which the Fishing Depot is situated is public land and should be cut off from the matter property.
 - c) A permanent Injunction to issue restraining the Defendant either by himself, his agents, servants, or any person under his authority or instructions from demolishing or in any way interfering with public use, access, and occupation of the Fish Depot built on the 60-meter reserve land adjoining land known as Kilifi/Chembe/ Kibabamshe/427.
 - d) An order directed to the 2nd Interested party to register the Plaintiff as the owner of the entire land known as Kilifi/Chembe/ Kibabamshe/427, holding it in trust of the residents of the County of Kilifi and in the alternative, register the Plaintiff as the owner of the land known as Chembe /Kibabamshe/427 measuring 1.3 hectares and forming part of the marine reserve and to hold it in trust of the residents of the Kilifi County.
 - e) An order that the Defendant bears the costs of these proceedings.
 - f) Such other reliefs as the court deems fit.
23. The suit property is said to have been allotted to the Plaintiff according to Part 2 of the 4th Schedule of the [Constitution](#), the Transitional Authority issued Legal Notice No 149 of 2013 transferring the fish landing station and function of fisheries including demarcation and fencing of fish landing stations to the Plaintiff. After taking over, the Plaintiff built a modern fishing depot at a cost of Kshs 9 million on a 60-meter reserve as per Regulation 110 of the Survey Regulations.



24. ELC No 178 of 2013 – *Daniel Ricci Vs County Land Registrar Kilifi & The Hon Attorney General*, declared the Defendant herein as the rightful owner of the matter property. The Plaintiff was never joined as a necessary party.
25. The National Land Commission - 1st Interested Party did a probe after complaints from the Government and Public on ownership of the matter property and found that rights in the property ought to inhere in the Plaintiff. The findings are as can be found in Gazette Notice No 6862, dated July 17, 2017 revoking the Defendant's title hence this matter.
26. The former suit aforesaid was heard before Hon Justice Angote - ELC No 178 of 2013 – *Daniel Ricci Vs County Land Registrar Kilifi & The Hon Attorney General*. It is reported as Daniel Ricci v County Land Registrar Kilifi & another [2016] eKLR. In that case, the Plaintiff sought the following reliefs: -

“The Plaintiff has sued the Defendants vide a Plaint dated October 9, 2013 seeking the following orders: -

- a) A declaration that the Plaintiff is the genuine and rightful owner of all that parcel of land known as Chembe/kibabamshe/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.
- b) A declaration that the Plaintiff's parcel of land known as Chembe/kibabamshe/427 is not a fish landing site hence Government land.
- c) A declaration that the revocation of the Plaintiff's Title Deed vide Gazette Notice No 15444 of December 9, 2011 by the 1st Defendant is illegal and unconstitutional.
- d) An order revoking the said Gazette Notice No 15444 of December 9, 2011.
- e) An order directing the 1st Defendant to reinstate the Plaintiff's Title Deed and make proper entries in the Register reinstating the Plaintiff's Title Deed and ownership of Chembe/kibabamshe/427.
- f) An order of compensation of damages suffered by the Plaintiff for loss of use of the land from the time of the Gazettement up to the date of determination of this matter at the rate of 310,800 Euros per month or Kshs 35,742,000/- per month.
- g) Special damages of Kshs 15,000,000/- being money paid to the Architecture for designing the Villas plan
- h) In the alternative the Plaintiff prays for the compulsory acquisition of the land and payment of compensation by the Government of the Republic of Kenya at the current market rate together with all expenses incurred by the Plaintiff since the issuance of the Title Deed until termination of the matter.
- i) Special damages of a sum of Kshs 10,000,000/- being money expended in resettling squatters.
- j) Cost of the matter.
- k) Interest thereon accordingly.
- l) Any other or further relief that the Court shall deem fit and just to grant.”



27. The Judge narrowed the issues for determination as follows: -

“The only issue for determination in this matter is whether the Plaintiff is the rightful owner of a parcel of land known as Chembe/Kibabamshe/427 (the matter property) and if so, whether the Plaintiff is entitled to special damages as pleaded in his Plaintiff.”

28. After hearing the parties, on merit the Judge proceeded to make the following orders: -

“For those reasons, I allow the Plaintiff’s Plaintiff dated October 9, 2013 in the following terms.

- (a) A declaration be and is hereby issued that the Plaintiff is the genuine and rightful owner of all that parcel of land known as Chembe/kibabamshe/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.
- (b) A declaration be and is hereby issued that the Plaintiff’s parcel of land known as Chembe/ Kibabamshe/427 is neither a fish landing site nor Government land.
- (c) A declaration be and is hereby issued that the revocation of the Plaintiff’s Title Deed vide Gazette Notice No 15444 of December 9, 2011 by the 1st Defendant is illegal and unconstitutional.
- (d) An order be and is hereby issued revoking the said Gazette Notice No 15444 of December 9, 2011.
- (e) An order be and is hereby issued directing the 1st Defendant to reinstate the Plaintiff’s Title Deed and make proper entries in the Register reinstating the Plaintiff’s Title
- (f) The Defendants to pay the costs of the matter.”

29. Having established what, we have in this matter and the previous one, I now consider whether the doctrine of res judicata should apply. Parties have cited provisions of the law as well as several authorities on what principles must be considered before a court decides that res judicata should be invoked. Section 7 of the [Civil Procedure Act](#) states that: -

“No court shall try any matter or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former matter 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 matter or the matter in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation — (1) The expression “former matter” means a matter which has been decided before the matter in question whether or not it was instituted before it.

Explanation — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to the right of appeal from the decision of that court.

Explanation — (3) The matter above referred to must in the former matter have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation — (4) Any matter which might and ought to have been made ground of defence or attack



in the such former matter shall be deemed to have been a matter directly and substantially in issue in such matter.

Explanation — (5) Any relief claimed in a matter, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

30. In the case of *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal - Makhandia, Ouko, Kiage, M’noti & Murgor, JJ A held as follows: -

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of matters. That much is clear from Section 7 of the Civil Procedure Act, 2010;

“No Court shall try any matter or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former matter between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent matter or the matter in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former matter, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The matter or issue was directly and substantially in issue in the former matter.
- (b) That former matter 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 matter.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent matter or the matter in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when applying this Court’s decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR they rendered the elements as;

- (a) the former judgment or order must be final;
- (b) the judgment or order must be on merits;
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted, and hounded by issues and matters that have already been determined by a competent court.



It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of matters and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure, and certain justice.

There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, it was stated;

“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.

Speaking for the bench on the principles that underlie res judicata, YV Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice, and a good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving the determination of the same issue.”

The practical effect of the res judicata doctrine is that it is a complete estoppel against any matter that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such matter. That much was stated by this Court in *Ngugi v Kinyanjui & 3 Others* [1989] KLR 146 when it held (at p147) that;

“3 Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue.”

31. After being guided by the law and the authorities cited, I now consider whether the current matter stands in the way of the res judicata rule.
32. The subject matter in the former matter was land parcel No Chembe/kibabamshe/427, where the following orders were sought: -
 - a. A declaration that the Plaintiff is the genuine and rightful owner of all that parcel of land known as Chembe/kibabamshe/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.
 - b. A declaration that the Plaintiff's parcel of land known as Chembe/kibabamshe/427 is not a fish landing site hence Government land.
 - c. A declaration that the revocation of the Plaintiff's Title Deed vide Gazette Notice No 15444 of December 9, 2011 by the 1st Defendant is illegal and unconstitutional.



- d. An order revoking the said Gazette Notice No 15444 of December 9, 2011.
- e. An order directing the 1st Defendant to reinstate the Plaintiff's Title Deed and make proper entries in the Register reinstating the Plaintiff's Title Deed and ownership of Chembe/kibabamshe/427.
- f. An order of compensation of damages suffered by the Plaintiff for loss of use of the land from the time of the Gazettement up to the date of determination of this matter at the rate of 310,800 Euros per month or Kshs 35,742,000/- per month.
- g. Special damages of Kshs 15,000,000/- being money paid to the Architecture for designing the Villas plan
- h. In the alternative the Plaintiff prays for the compulsory acquisition of the land and payment of compensation by the Government of the Republic of Kenya at the current market rate together with all expenses incurred by the Plaintiff since the issuance of the Title Deed until termination of the matter.
- i. Special damages of a sum of Kshs 10,000,000/- being money expended in resettling squatters.
- j. Cost of the matter.
- k. Interest thereon accordingly.
- l. Any other or further relief that the Court shall deem fit and just to grant.”

The current matter seeks prayers as follows: -

- a. A declaration that the matter property known as Kilifi/Chembe/ Kibabamshe/427 situated in Kilifi County is public land vested in the Plaintiff to hold it in trust of the constituents of Kilifi County; and
- b. The 1.3 hectares of a marine reserve on which the Fishing Depot is situated is public land and should be cut off from the matter property.
- c. A permanent Injunction to issue restraining the Defendant either by himself, his agents, servants, or any person under his authority or instructions from demolishing or in any way interfering with public use, access, and occupation of the Fish Depot built on the 60-meter reserve land adjoining land known as Kilifi/Chembe/ Kibabamshe/427.
- d. An order directed to the 2nd Interested party to register the Plaintiff as the owner of the entire land known as Kilifi/Chembe/ Kibabamshe/427, holding it in trust of the residents of the County of Kilifi and in the alternative, register the Plaintiff as the owner of the land known as Chembe /Kibabamshe/427 measuring 1.3 hectares and forming part of the marine reserve and to hold it in trust of the residents of the Kilifi County.
- e. An order that the Defendant bears the costs of these proceedings.
- f. Such other reliefs as the court deem fit.

From the prayers in the former suit and this one, the cause of action and issues seem to me to resonate around the same subject matter and the same cause of action – acquisition and



the ownership of land parcel No Chembe/kibabamshe/427. The only marked difference is the parties in the former and this matter will be discussed below in this ruling.

33. The former suit was between the 1st Defendant who was the Plaintiff and the 2nd and 3rd Interested Parties. The Plaintiff and the 1st Interest Party were not parties to the proceeding in the former suit – it is the Attorney General as a Government Legal Advisor, who was present. I can see from the record in the former suit that the Plaintiff attempted to be joined in the matter vide application dated October 3, 2016. It will seem the parties abandoned it and commenced negotiations as of October 2, 2017, parties had not agreed on a settlement. The matter was stood over generally and remains so to date. The record in the former suit also shows there was an intended appeal to the Court of Appeal, whose outcome I cannot speculate.
34. Whereas the Plaintiff in this suit was not a party and claims that it was a very necessary party – which I agree – the Attorney General and the Land Register Kilifi, in my view were, capable to take care of the interests of the current Plaintiff in the former suit. They litigated on its behalf. The former being the Government Legal Advisor and the latter the custodian of the land titles and deeds documents.
35. The former matter was heard on merit and all the necessary parties testified, were cross-examined and relevant documents produced. The court rendered its decision on the issues in controversy placed before it and then fully and finally settled on the issues at hand by declaring the following: -

“For those reasons, I allow the Plaintiff’s Plaint dated October 9, 2013 in the following terms:

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- (a) A declaration be and is hereby issued that the Plaintiff is the genuine and rightful owner of all that parcel of land known as Chembe/kibabamshe/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.
 - (b) A declaration be and is hereby issued that the Plaintiff’s parcel of land known as Chembe/ Kibabamshe/427 is neither a fish landing site nor Government land.
 - (c) A declaration be and is hereby issued that the revocation of the Plaintiff’s Title Deed vide Gazette Notice No 15444 of December 9, 2011 by the 1st Defendant is illegal and unconstitutional.
 - (d) An order be and is hereby issued revoking the said Gazette Notice No 15444 of 9th December 2011.
 - (e) An order be and is hereby issued directing the 1st Defendant to reinstate the Plaintiff’s Title Deed and make proper entries in the Register reinstating the Plaintiff’s Title Deed and ownership of Chembe/kibabamshe/427.
 - (f) The Defendants to pay the costs of the matter.”
36. The only difference in this suit as stated elsewhere in this ruling is the coming in of the Plaintiff and joinder of the National Land Commission as 1st Interested Party. There was another Gazette Notice which revoked yet again the Defendant’s title as had been done in the former suit. The findings contained in Gazette No 6862 dated July 17, 2017, directed the Land Registrar to do the following: -

“Regularize as public land for fishing landing site”

The findings by the first Interested Party seem to reckon that the Defendant acquired the land in question from one Omar Khamis who had also acquired it from one Mathenge



Wachira the initial allottee after adjudication. The history of the land and how the Defendant acquired it is discussed extensively in the former suit.

37. Having concluded that this suit is similar in all aspects to the former one that is - ELC No 178 of 2013 – *Daniel Ricci v County Land Registrar Kilifi & The Hon Attorney General*, reported as Daniel Ricci v County Land Registrar Kilifi & another [2016] eKLR, it remains to consider whether the failure to join the Plaintiff in the former suit and the fresh Gazette Notice makes the current suit and cause of action different from the former one.
38. The judgment in the former suit was a judgment in rem. As correctly stated by the Defendant quoting the case of *Abukar G Mohammed v Independent Electoral and Boundaries Commission* [2017] eKLR, Justice Odunga held as follows: -

“Concerning a decision in rem it was held in *Kamunyu And Others v Attorney General & Others* [2007] 1 EA 116:

“In a matter seeking judgment in rem, that is a judgment applicable to the whole world, an individual does not sue on behalf of the whole world but sues for judgment which is effective against the whole world. In other words, in the present case, the appellants when successful in the matter obtain a judgment, which is effective against the whole world but does not confer benefits upon the whole world.”

8. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision in rem. I further associate myself with the decision in *George William Kateregga vs Commissioner for Land Registration & Others* Kampala High Court Misc Appl No 347 of 2013 in which the Court while citing the South African case of *Nicholas Francois Martemns & Others vs South African National Parks*, Case No 0117, expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgment over the matter land which was sanctioned by the court, it necessarily became a judgment of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or matter; which renders the judgment, in that case, a judgment in rem. A judgment in rem invariably denotes the status or condition of the property and operates directly on the property itself. It is a judgment that affects not only the thing but all persons interested in the thing; as opposed to judgment in personam which only imposes personal liability on the defendant.”

9. Similarly in *Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Ltd* [2008] eKLR it was held:

“It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgment in personam. A judgment may also be conclusive not only against the parties to it but also against the world. This is known as a judgment in rem. This is a judgment which declares, defines or otherwise determines the status of a person or a thing ie, the jural relation of the person or thing to the world generally.”



10. I am also alive to the decision in *Pattni vs Ali & Anor* (Isle of Mann (Staff of Government Division) [2006] UKPC 51 in which reliance was sought from Jowitt’s Dictionary of English Law (2nd Edn) p 1025-6 to the effect that:

“A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgment in rem.”

39. Although the Plaintiff was never a party in the former suit, it revolved around the ownership of land parcel Chembe/Kibabamshe/427. The court after complete adjudication, resolved its ownership fully and finally in favour of the Defendant herein, who was the Plaintiff in the former suit. Hon Justice Angote issued various declaratory orders in the manner I have set hereabove in this ruling. The judgment is still in place – it has not been set aside, varied by a Superior Court or this Court, or compromised in any other manner. It binds the whole world including the Plaintiff since it is a judgment in rem. The Gazette Notice No 6862 dated July 17, 2017, by the 1st Interested Party which relied on the earlier Gazette Notice No 15444 of December 9, 2011, revoking the Defendant’s title, ran afoul, or was oblivious of the orders issued by the Judge revoking the earlier Gazette Notice No 15444 of December 9, 2011. That Gazette Notice cannot be said to have occasioned a new cause of action since it placed reliance on an already revoked one aforesaid by the Judge in the former suit. It was a subject of discussion and determination in the former matter. The 1st Interested Party cannot be said to have sat as an Appellate Court to quash the orders of Hon Justice Angote. in ELC No 178 of 2013 – *Daniel Ricci Vs County Land Registrar Kilifi & The Hon Attorney General*. I can see from the parent file in the former suit, that it is at the execution stage with parties attempting negotiations as one way of settling. In my view, the proper approach that the Plaintiff ought to have taken is to move the court to be joined in the former suit and have the judgment varied, reviewed, or set aside, if there are new grounds to do so, or pursue an appeal than originate a separate and parallel cause of action involving the same subject matter and parties or parties litigating under them. There is a pending application, in the former suit dated October 3, 2016, which sought to ventilate the issues raised here. It is part of the annexures in support of an injunction in this file. There are no reasons given why it has never been pursued in the former suit. I can see the next application I am to deal with simultaneously with the current Preliminary Objection, is to injunct the Defendant from the use of the same property when he already has a decree he is executing in the former suit. If I were to issue injunctive orders here, the same will run parallel to the decree in place which is due for execution. It will lead to mayhem and proliferation of suits and conflicting orders flying all over on the same issues leading to what the Court of Appeal has described in the *Maina Kiai* Case (*supra*) as: -

“.....the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny.”

40. The upshot and my holding are that the Preliminary Objection dated March 4, 2022 is meritorious and is hereby upheld the current matter is hereby struck out in its entirety, with costs to the Defendant in any event.
41. Having found so, it follows that the application dated March 25, 2022 is rendered stillbirth. I will not consider it. It collapses in limine since the entire suit has been struck out.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
9TH DAY OF NOVEMBER 2022.**

E. K. MAKORI

Judge

In the Presence of: -

Mr. Momanyi for the Defendant

Mr. Ojwang for 2*nd and 3rd Interested Parties

Mr. Muliro for the Plaintiff

In the Presence of: -

1st Interested party

