



**Mbitha & 72 others v Haji (Sued in his capacity as the trustee and legal representative of the estate of Hassan Bin Haji-deceased) & 6 others (Environment & Land Case 3 of 2021) [2022] KEELC 15396 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15396 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND CASE 3 OF 2021**  
**MAO ODENY, J**  
**DECEMBER 20, 2022**  
**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF**  
**KENYA**  
**IN THE MATTER OF PLOT NUMBERS 268, 269, 276, 299 AND 300 ALL**  
**SECTION III/MAINLAND NORTH SITUATE IN KILIFI COUNTY**

**BETWEEN**

**KAHINDI MWAMBIRE MBITHA & 72 OTHERS ..... APPLICANT**

**AND**

**OMAR HASSAN HAJI (SUED IN HIS CAPACITY AS THE TRUSTEE AND LEGAL REPRESENTATIVE OF THE ESTATE OF HASSAN BIN HAJI-DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN ABDALLA HASSAN (SUED IN HIS CAPACITY AS THE TRUSTEE AND LEGAL REPRESENTATIVE OF THE ESTATE OF HASSAN BIN HAJI-DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER IN CHARGE KIJIPWA POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**KILIFI COUNTY POLICE COMMANDER ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE POLICE ..... 5<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR MOMBASA ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**



## RULING

1. This ruling is in respect of a Notice of Motion dated 26<sup>th</sup> February 2021 by the applicants seeking for the following orders:
  - a. Spent
  - b. Pending inter partes hearing and determination of this application, the Honourable Court be pleased to stay execution of its Judgment delivered on 22<sup>nd</sup> January 2021 in ELC No. 23 of 2017 (Omar Haji & Another vs Safari Kazungu and 49 others) the decree thereof and all other consequential orders thereto.
  - c. Pending inter partes hearing and determination of the Originating Summons filed herewith, the Honourable Court be pleased to stay execution of its Judgment delivered on 22<sup>nd</sup> January 2021 in ELC No. 23 of 2017 (Omar Haji & Another vs Safari Kazungu and 49 others) the decree thereof and all other consequential orders thereto.
  - d. Pending inter partes hearing and determination of this Application, the Honourable Court be pleased to issue a temporary injunction restraining the respondents whether by themselves or servants from evicting or in any way interfering with the applicants' peaceful use, occupation, and enjoyment of plot Nos, 268, 269, 276, 299, and 300 all in Section III Mainland North.
  - e. Pending inter partes hearing and determination of this Originating Summons the Honourable Court be pleased to issue a temporary injunction restraining the respondents whether by themselves or servants from evicting or in any way interfering with the applicants' peaceful use, occupation, and enjoyment of plot Nos, 268, 269, 276, 299, and 300 all in Section III Mainland North.
  - f. The Officer Commanding Station (OCS) Kijipwa to ensure tranquility in execution of these court orders.
  - g. Costs of this application be provided for.
2. The Applicants relied on the grounds on the face of the application together with the supporting affidavit of Anthony Kitsao Kahindi who deponed that they have been in occupation of the suit land ranging between 30 to 60 years without interruption hence are claiming adverse possession to the land.
3. It was the Applicants' case that they filed this suit upon learning of a judgment delivered in ELC No. 23 of 2017 Omar Hassan Haji & another v Safari Kazungu & 49 others which ordered for their eviction from the suit land.
4. The 1<sup>st</sup> Respondent opposed the application vide a Replying Affidavit dated 16<sup>th</sup> March 2021 where he deponed that the application was bad in law and incompetent for being res judicata ELC No. 23 of 2017 Omar Hassan Haji & another v Safari Kazungu & 49 others; that the supporting affidavit was defective; and that the title documents relied upon by the Applicants do not relate to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also deponed that the suit properties were initially owned by Hassan Bin Haji-deceased, who allowed the defendants in the former suit to cultivate seasonal crops., that the defendants in turn invited the Applicants.
5. The respondent further stated that the Applicants were all along aware of the pendency of the former suit since they participated through the defendants in that suit.



6. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

### **Applicants' Submissions**

7. Counsel submitted that the application is unopposed hence should be allowed as prayed and relied on the principles for grant of injunctions as per the case of *Giella v Cassman Brown* [1973] EA 358 and stated that the Applicants have established a *prima facie* case with a probability of success as they have been in occupation of the suit properties for a period of more than 60 years and that they risk being evicted.
8. Counsel further relied on the case of *Nguruman Limited v Jan Bonde Nielson & 2 others* [2014] eKLR and submitted the applicants will suffer irreparable injury as if they are evicted, they will be unable to pursue their rights to the suit land.
9. It was counsel's submission that the applicants stand to suffer the greatest harm and relied on the case of *JM Gichanga v Co-operative Bank of Kenya Limited* [2005] eKLR and urged the court to allow the application as prayed.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

10. Counsel raised the issue of *res judicata* and cited the provisions of section 7 of the *Civil Procedure Act*, and submitted that the matter in ELC No 23 of 2017 is directly and substantially in issue in the Originating Summons as the Applicants seek to be declared proprietors of Plot Nos. 268, 269, 299 & 300 all of Section 111 Mainland North through adverse possession.
11. It was counsel's submission that in both suits the matter directly and substantially in issue is the ownership of the Plot Numbers 268, 269, 276, 299 and 300, further that in the former suit the Defendant/Respondents herein were Plaintiffs while the Plaintiffs in the present suit litigated under the Defendants in the former suit.
12. Counsel submitted that the matter was heard and determined whereby the court declared the Defendants herein as the legal owners of the said properties and no appeal has been preferred against the said judgment.
13. Counsel relied on the doctrine of estoppel under Section 44 of the *Evidence Act*. Section 44 of the *Evidence Act* and stated that a final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.
14. Counsel further submitted that the application is barred by estoppel by virtue of the Judgment delivered on 22<sup>nd</sup> January 2021 in ELC No 23 of 2017 and relied on the cases of Civil Appeal No. 43 of 2018 *Accredo A.G & 3 others v Steffano Uccelli & another; John Florence Maritime Service Limited & another v CS Transport and Infrastructure & 3 others* [2015] eKLR and submitted that the court observed that it matters not that the dispute is stated differently as long as the primary relief is the same over the same subject matter.
15. Ms Bujra submitted that that the doctrine of *res judicata* also applies to issues that ought to have been raised and canvassed in a former suit and relied on the case of *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR Counsel further stated that if the Applicants are squatters on



the suit properties, then they ought to have sought to be joined in the previous suit and raise the issue of adverse possession.

16. Counsel took issue with the defects in the supporting affidavit whereby it is indicated that the deponent is Anthony Kitsao Kahindi yet it is signed by Kahindi Mwambire Mbitha and there is no evidence that it is one and the same person. Counsel therefore stated that the affidavit was incapable of being admitted rendering the evidential basis unavailable and relied on the provisions of Order 19 rule 4 and Order 51 rule 4 of the Civil Procedure Rules, 2010.
17. Counsel therefore urged the court to dismiss the application with costs.

### **Analysis and Determination**

18. The issues for determination are whether the applicants have met the threshold for grant of injunction, stay of execution and whether this suit is *res judicata*.
19. I will not belabor much on the issue as to whether the applicant has met the threshold for grant of injunction or stay of execution. This is a matter that directly and substantially touches on ELC 23 of 2017 which matter was heard and determined. The applicants admit that they have filed this case due to a decree emanating from the said case which ordered their eviction from the suit.
20. The doctrine of *res judicata* is set out in 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 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 subsequently raised, and has been heard and finally decided by such court.
21. In the cases of Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR, the Court explained:

- “ 44. A close reading of Section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
  - i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.
  - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”



In the case of *Karia & Another vs Attorney General* 2005 1 E.A 83, and it was also held in *Henderson vs Henderson* (1843) 67 E.R 313 that:

“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 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 point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.

22. If it is true that the applicants were not parties to the suit, then they were at liberty either to be joined in the suit ELC No 23 of 2017 as parties to defend their rights and not file an Originating Summons to seek for orders of adverse possession which the court has heard and determined.

23. I notice that the Learned Judge in the Judgment in ELC No 23 of 2017 expressly stated at paragraph 40:

“While the nature of the defence adverted to in their pleadings put so much reliance on long possession and occupation, they neither filed a claim for adverse possession nor a counterclaim herein. I am unfortunately for them, unprepared to accept the submission that a group of people can just move into a piece of land registered in the name of another person and by virtue of that entry and building of unauthorized structures claim the land to be their own.”

24. The above paragraph in the judgment in my view is the one that has emboldened the applicants to try another bite of the cherry by filing a claim of adverse possession which the court stated that they never filed a counter claim. They should have filed an appeal and not another suit.

25. The doctrine of res judicata is a public policy doctrine, which requires an end to litigation to protect the interest of all parties from repetitive litigation without end. Parties should not be allowed to reinvent and recreate themselves to beat the doctrine of res judicata, appearing as new parties with the same subject matter. The two cases are in respect of the same subject matter, the same suit of land, same parties who are seeking the same reliefs for ownership of the suit land.

26. In the case of *Omondi v National Bank of Kenya Limited & others* (2001) E.A 177 the court held that:

“Parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit”.

27. The applicants filed a further supplementary affidavit in response to the issue of the suit being *res judicata* and submitted that the applicants were not parties to the previous suit and that the issue of adverse possession was never in issue. Further that the respondents submitted that the titles that the applicants are occupying belongs to other 3<sup>rd</sup> parties which shifts the evidentiary burden upon the respondents.

28. This case meets the ingredients of *res judicata* and the only reason why the court would spare it from being struck out is the fact that the respondents have mixed themselves by stating that the suit parcels occupied by the applicants belong to third parties.



29. This is a convoluted case of which the court has given its views on what should have happened in the previous file and not this one. I therefore find no merit in the application and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**M.A. ODENY**

**JUDGE**

