



County Government of Kilifi v Mwenga & 3 others (Environment & Land Case E071 of 2024) [2025] KEELC 414 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E071 OF 2024
EK MAKORI, J
FEBRUARY 5, 2025**

BETWEEN

COUNTY GOVERNMENT OF KILIFI PLAINTIFF

AND

JACINTA KEKU MWENGA 1ST DEFENDANT

PIUS MUTUA MWENGA 2ND DEFENDANT

MIRIAM MWENI MWENGA 3RD DEFENDANT

REGISTRAR OF TITLES, KILIFI 4TH DEFENDANT

RULING

1. The plaintiff filed this suit with a Notice of Motion dated 8th July 2024 seeking injunctive orders against the defendants, by themselves, their agents, employees, and or any other person from dealing with Plot No. CR. No. 71879, LR. No. 5054/2529 Kilifi Township (the Suit Property). The application is supported by Samuel Menza Mkutano's affidavit and the attached annexures.
2. The 1st, 2nd, and 3rd defendants filed a Notice of Preliminary Objection and a replying affidavit dated 6th August 2024 and 15th August 2024, respectively.
3. The court directed the Preliminary Objection and the Notice of Motion to be canvassed via written submissions.
4. From the materials presented, I frame the issues for this court's decision: whether the current suit is res judicata, whether the plaintiff has demonstrated enough grounds to be granted the orders sought, and who should bear the costs.
5. The applicant and interested parties oppose the Preliminary Objection but support the application for an injunction, while the 1st to 3rd respondents support the Preliminary objection and oppose the



application. The warring sides have provided the rationale for their respective cases, citing various judicial authorities; I will revert to the same where relevant.

6. Regarding res judicata, I can see the ruling attached dated 29th February 2020 and the orders extracted dated 5th November 1999 (Khaminwa J. as she then was (RIP)). 1st - 3rd The respondents contend that the 1st defendant in this matter is the daughter of Anthony Mwenga Mavua (Deceased) and sister to the 2nd and 3rd defendants; they are the administrators of the deceased's estate. The suit property herein CR NO. 71879 LR NO. 5054/1529 Kilifi Township is the property of the estate of the late Anthony Mwenga Mavua, who is the registered owner. The deceased applied for the property allocation correctly and paid all the requisite charges until he was issued the Title Deed. Before the allocation, the deceased ran the King'enda Bar and Restaurant business. In 1999, the then County Council of Kilifi and Town Council of Kilifi purported to grant one Gurudev Singh a license/lease to construct a structure trespassing on the deceased's property.
7. The deceased filed a suit, HCCC No. 303 of 1999 - Mombasa; Anthony Mwenga Mavua v County Council of Kilifi, Gurudev Singh, and Town Council of Kilifi. The County Council of Kilifi was represented by Mr. K. Lughanje & Company Advocates.
8. The 1st—3rd respondents aver that, in their defence, in the said suit, the County Council of Kilifi admitted having allocated the suit land to the deceased in 1979 and that if the commissioner of lands offered another plot, he would be moved there. It is against these issues that the 1st - 3rd defendants submit that this matter is res judicata. The only avenue available to the plaintiff concerning the suit property is the post-judgment procedures.
9. Citing several judicial authorities, the 1st – 3rd respondents believe the doctrine of res judicata should apply in this matter, and therefore the entire suit should be struck out.
10. The applicant and the interested party state that in Mombasa High Court Civil Case No. 303 of 1999, the issues for determination were based on trespass on the suit property, and the court declared that no developments and structures were to be put up on the suit property. The orders issued by Khaminwa J. are as follows:
 - i. That an injunction be and is hereby issued to restrain the defendants by themselves or through their agents or servants, employees or workers or otherwise howsoever from erecting or continuing to erect any wall or structure howsoever within the area where the Plaintiff's bar, restaurant and lodging is erected within Kilifi Township and in contravention of the Local Government (Adoptive by-laws) (Building) Order 1968.
 - ii. That a mandatory injunction be and is hereby issued against the defendants, compelling them to pull down and remove so much of their said structures as are erected beyond the plaintiff's outer (perimeter) wall and to remove all building materials and waste blocking the access to the plaintiff's business premises known as King'enda Bar, Restaurant and Lodging, within Kilifi Township.
 - iii. That the defendants shall bear the costs of this application.
11. The applicant and the interested party are of the view that the instant suit raises issues of ownership and legality of the respondents' title, the alienation and subsequent conversion of the suit property from public to private land was illegally and unlawfully done, and that the respondents cannot enjoy constitutional protection as the suit property was unlawfully acquired and believe that these are very distinct issues thus, the respondents cannot claim that any court in the Republic of Kenya has previously determined the same issues.



12. Further, the parties in both suits are different; besides that, the pleadings and said order, prominently featured in this suit, are not before the court. It would have been prudent for the respondents to avail of the same before the court since they rely on the same documents to prove that the issues raised herein had previously been heard and determined.
13. Applicants assert that whereas the two suits concern the suit property, the main issue for determination in Mombasa High Court Civil Case 303 of 1999 was trespass. On the other hand, the main issue in this suit is the legality of title, that the suit property is a public utility, and it is challenging how the suit property was alienated and subsequently allocated to the first registered owner. To this end, the court is urged to find that this suit is not res judicata as the elements to make such a finding have not been met. The applicant is equally entitled to the protection of its rights to equal protection under Article 27(1) and the right to a fair hearing under Article 50(1) of *the Constitution*.
14. It is thus submitted that the Preliminary Objection In the circumstances, be dismissed and the application for injunction be allowed.
15. The court concurs with the parties on the elements that constitute res judicata as stipulated in Section 7 of the *Civil Procedure Act*, emphasizing the need for finality in the resolution of litigation:

“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.”
16. As held by the Apex Court of Kenya in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2021] eKLR while deliberating on the issue of res judicata:

“Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”
17. The judge dealt with an application in the decision supplied by the applicant—Mombasa High Court Civil Case 303 of 1999. I have not been informed whether the matter was tried on its merits, whether judgment was rendered, or whether a decree was issued – the court’s verdict was not supplied for this court to consider. Besides, prima facie, based on the ruling supplied touching on the former suit and the plea in the current suit, the issues raised here touch on ownership and the legality of the respondents’ title, the alienation, and the subsequent conversion of the suit property from Public to Private land. The same is alleged to have been illegally done, and the respondents cannot be accorded the protection enshrined in Article 40 of *the Constitution*. Res judicata will not apply.
18. Consequently, the Preliminary Objection will be declined.
19. In the spirit of Active Case Management, based on the materials I have, I reckon the notice of eviction has long lapsed; to expedite the matter further and dispose of the pending application for an injunction, this court will order the status quo as it obtains on the ground to persist pending the hearing and determination of the current suit.
20. Costs in the cause



DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 5TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Mwangi for, the Plaintiff

Ms. Umara for the 1st – 3rd Respondents

Happy: Court Assistant

