



Goodison Nine Limited v Athman & 4 others; Athman & 3 others (Plaintiffs to the Counterclaim); Goodison Nine Limited & 5 others (Defendant to the Counterclaim) (Environment & Land Case 20 of 2024) [2025] KEELC 322 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 20 OF 2024
FM NJOROGE, J
FEBRUARY 4, 2025**

BETWEEN

GOODISON NINE LIMITED PLAINTIFF

AND

AMINA ATHMAN 1ST DEFENDANT

ABDULMAJID MAHMOUD 2ND DEFENDANT

MOHAMED AHMED 3RD DEFENDANT

THE LAND REGISTRAR, LAMU 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

AND

AMINA ATHMAN PLAINTIFF TO THE COUNTERCLAIM

ABDULMAJID MAHMOUD PLAINTIFF TO THE COUNTERCLAIM

MOHAMED AHMED PLAINTIFF TO THE COUNTERCLAIM

ANDREW MWANGI KIMANI PLAINTIFF TO THE COUNTERCLAIM

AND

GOODISON NINE LIMITED DEFENDANT TO THE COUNTERCLAIM

ABDULLAHI FARA HAJI DEFENDANT TO THE COUNTERCLAIM

HASHIM GOT SAT DEFENDANT TO THE COUNTERCLAIM

TOM M. NYANGAU DEFENDANT TO THE COUNTERCLAIM

THE LAND REGISTRAR, LAMU DEFENDANT TO THE COUNTERCLAIM

THE HON. ATTORNEY GENERAL . DEFENDANT TO THE COUNTERCLAIM



RULING

1. In an application dated 30/4/2024, the applicant Abdullahi Fara haji, who is the 2nd defendant in the counterclaim sought the following orders: -
 - a. That the counterclaim be struck out for being res judicata the judgments and decisions made in Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others; CA No 128 Of 2018 Swaleh Mohamed Waziri & 3 Others V Houd Mahmoud Athman & Another and Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General & 7 Others.
 - b. That the counterclaim be struck out for being an abuse of the process of court;
 - c. That the statement of defence dated 25th March 2024 by the 4th and 5th defendants be struck out for violating the doctrine of judicial estoppel;
 - d. That the costs of this application and the counterclaim be awarded to the 2nd defendant in the counterclaim.
2. The application is supported by the affidavit of Abdulahi Fara Haji which reiterates the matters in the application. The deponent states that the substantive issues raised in the counterclaim have been determined by a court of competent jurisdiction in Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others which was upheld by the Court of Appeal. That further the plaintiffs in the counterclaim filed a cross petition in Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General & 7 Others seeking the same reliefs which was dismissed by the court. The deponent has attached to his petition a copy of the cross petition and the judgment as Exh 2 and exhibit 3 respectively. Further the deponent avers that the counterclaimants have violated the doctrine of judicial estoppel since they argued in the petition that their title had been cancelled and sought an order to reinstate it which the court declined, while in this case they have turned around and claimed that they have good title.
3. He states that the 4th and 5th defendants' defence should similarly be struck out for violating that doctrine of estoppel.
4. Those first prayer is reiterated in grounds no 1 and 2 of the the notice of preliminary objection dated 5/4/2024.

The Response.

5. The 1st 2nd and 3rd defendants in the main suit and who are the 1st -3rd plaintiffs in the counterclaim filed a replying affidavit sworn on their behalf by one Ali Haidar Ali, a son to Amina, who holds a power of attorney from her. That affidavit is also sworn on behalf of the 4th plaintiff in the counterclaim. He depones that the petition concerned land known as Lamu/Manda Island/ 259, and the court in its judgment stated that it could not find for either party either in the petition or cross-petition; that the decision of the court also stated that the cross petitioners were not involved in either Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others or CA No 128 Of 2018 Swaleh Mohamed Waziri & 3 Others V Houd Mahmoud Athman & Another and that they can revisit that petition and show that the decree should not apply to them as they were never heard; that the court in the petition therefore went to great lengths in order not to trigger off the doctrine of res judicata; that the 2nd defendant has failed to sign the supporting affidavit and it vitiates the present application



which should thus be struck out; that the contents of the present Lamu Land Registrar shed light on relevant matters in contrast to the evidence of the previous Land Registrar in the petition and that it provides clarity to the matters in the present suit.

Submissions

6. The 2nd defendant in the counterclaim and the plaintiffs in the counterclaim filed submissions on the motion and the Preliminary objection. I have considered those submissions during the preparation of this ruling.

Analysis And Determination

7. The main issue for determination in both the application and the preliminary objection is whether the counterclaim in present suit is res judicata Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others or CA No 128 Of 2018 Swaleh Mohamed Waziri & 3 Others V Houd Mahmoud Athman & Another as well as Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General & 7 Others.
8. The doctrine of res judicata is embodied in Section 7 of the [Civil Procedure Act](#) which states 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.
9. In the case of Independent Electoral and Boundaries Commission and 5 others [2017] eKLR it was held that the doctrine of res judicata was meant to bring finality to litigation and afford parties closure and respite from the spectre of being vexed by issues and suits that have already been determined by a competent court. In the case of North West Water Ltd V Binnie & Partners [1990] 3 ALL E.R.547 the court explained the doctrine of res judicata as follows:

“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”
10. As is apparent from the provisions of Section 7 set out herein above the doctrine has several factors that govern it as follows:
 - a. the issues must be identical in both suits;
 - b. that the parties in both suits must be the same;
 - c. that court that determined the former matter must have been possessed of competent jurisdiction; and
 - d. there is a conclusive determination as far as the previous decision is concerned.
11. To establish if the counterclaim is res judicata one has to consider the pleadings and judgment in Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others as well as in Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General & 7 Others.



12. To begin with and in order to save considerable judicial time, I must state that I have read the judgment of the court in Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General; The Land Registrar Lamu, Amina Athman, Abdulmajid Mahmoud, Mohamed Ahmed (Respondents) & Houd Mahmoud Athman and Goodison Fifty-Three Limited. In that petition the orders sought by the petitioner were as follows:
- a. A declaration that the certificates of lease held by the 3rd to 5th respondents are simply pieces of paper and cannot confer any interest in land.
 - b. A permanent injunction restraining the respondents from trespassing, intimidating, harassing, and in any other way from further interfering with parcel No Lamu/Manda Island/259.
 - c. A permanent injunction restraining the respondents from interfering with the land's registration record of the suit property.
13. In that petition also the 3rd to 5th respondents lodged a cross-petition challenging the title held by the 2nd interested party and sought the following orders:
- a. A declaration stating that the Title held by; (1) Amina Athman, (2) Abdulmajid Mahmoud, (3) Mohamed Kassim Ahmed and (4) Andrew Mwangi Kimani, is legal and valid in law.
 - b. A declaration that the Title and Certificate of Lease obtained by Abdulahi Fara Haji was fraudulently obtained and as such void in law.
 - c. A declaration that the transfer of Land Title No Lamu/Manda Island/ 259 from Abdulahi Fara Haji to Goodison Fifty-Three Limited was based on fraud and illegalities and as such is void.
 - d. An order directing the Land Registrar Lamu to rectify the Land Title No Lamu/Manda Island/259 by cancelling the Title held by the 5th Respondent.
 - e. Aggravated damages for fraud.
 - f. Costs.
14. That petition had Lamu Manda Island/259 as the subject matter. That is the same subject matter of the present suit. On a preliminary note the plaintiff in the present suit has pleaded at paragraph 34 of the plaint that there has never been any determination regarding that land parcel in the earlier litigation in Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others or in Malindi ELC Petition No 29 Of 2022 Abdullahi Fara Haji V The Attorney General.
15. Where a suit has not been heard and determined on the merits res judicata does not apply. In Ng'ati Farmers Co-operative Society v Attorney General & 7 others; Wachira & 126 others (Interested Party) [2022] KEELC 4776 (KLR) the court stated as follows:
- “ 15. I have examined the order issued on October 28, 2020 ELC case no 76 of 2016 -Ngati Farmers Co-operatives Society & Another vs Kenya Electricity Transmission Company Limited & 9 others. The most critical part thereof states as follows:
 - “2. That the plaintiff/respondent suit herein be dismissed for want of prosecution.”



16. The suit ELC Case no 76 of 2016 - Ngati Farmers Co-operatives Society & Another vs Kenya Electricity Transmission Company Limited & 9 others was therefore not heard on its merits. In the circumstances of this case, the 2nd respondent's preliminary objection dated March 4, 2022 therefore lacks merit and it is hereby dismissed with costs.
16. I find that though the land in the counterclaim herein was the subject of Malindi Petition 29 Of 2022, the court therein did not conclusively determine the rights of the parties. I state that because the court in that petition stated as follows:
- “On the other hand, the 3rd to 5th respondents/cross petitioners given the findings in petition No Malindi Environment and Land Court Case No 62 of 2012 and lack of all necessary entries and the holistic history of Title No Lamu/Manda Island/259, the fraud assigned to the 2nd interested party cannot stand. And therefore, I could not find for any of the petitioners either in the main petition or the cross-petition. Perhaps a rematch between the 3rd to the 5th respondents/cross petitioners and the 2nd interested party/ 5th respondent may be necessary to trace the root of the title. I could not succeed here... In a nutshell, both the petition and the cross-petition are denied, and each party will be responsible for paying its own costs. The explanation for this is that none of the parties provided the real evidence that was required to help this Court make a comprehensive and conclusive judgment on the Constitutional issues posed.”
17. In the case of Tee Gee Electrics and Plastics Company Ltd vs Kenya Industrial Estates Limited [2005] KLR 97 it was held as follows:
- “Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
18. Whatever property was involved, it is quite evident from its judgment that the court in Malindi Petition No 29 Of 2022 can not be said to have heard and determined the dispute on its merits, and, in dismissing the petition and cross-petition with the above language intended that the parties should seek to have the matter properly ventilated later on. On the basis of that holding of the court per se, I therefore find that in Malindi Petition No 29 Of 2022, there was no conclusive determination of the matters dispute regarding the said land especially as between the counterclaimants herein and the 2nd defendant to the counterclaim herein and the counterclaim is therefore not res judicata that suit.
19. As to whether the present counterclaim is res judicata Malindi ELC Case No 62 Of 2012 Houd Mahmoud Athman V Attorney General & Others and the appeal resulting therefrom, this court is inclined to first examine the joinder of parties. In Malindi ELC Case No 62 Of 2012, the



parties were Houd Mahmoud Athman V Attorney General, The Commissioner Of Lands, Rishad Hamid Ahmed, Abdulbasit Swaleh Mohdin, Swaleh Mohaed Waziri, Nasra Hassan Mohamed, Ahmed Abdulhasim Kassim, Matano Ahmed, Ndovu Masaud Mohamed, and Jamila Yusuf Mahamed.

20. That suit was commenced by way of petition. Houd Mahmoud Athman claimed that by a letter of allotment dated 20th August, 1997, he was allocated unsurveyed agricultural plot number (c) at Manda Island which was later on surveyed and renamed as parcel number 93; that he later on learnt that land known as Manda Island/58 had overlapped on Manda Island/93 and that the offending title was subsequently cancelled; that thereafter, he learnt that a parcel of land known as Manda Island/88 had been carved out of the suit land; that the title document for plot number 88 was forged; that even after protesting, the said title was issued to the 3rd and 4th Respondents, Rishad Hamid Ahmed and Abdulbasit Swaleh Mohdin, who sub-divided it into parcel numbers 176 to 185; that a declaration should issue that he is the legal and beneficial owner of land known as Lamu/Manda Island/93 and the title in respect of parcel numbers Lamu/Manda Island/88 and 176-185 should be cancelled. It appears that the petition never sought to have the title for plot no Lamu/Manda Island/259 cancelled.
21. In their Affidavit in reply, the 3rd-10th Respondents (Rishad Hamid Ahmed, Abdulbasit Swaleh Mohdin, Swaleh Mohamed Waziri, Nasra Hassan Mohamed, Ahmed Abdulhasim Kassim, Matano Ahmed, Ndovu Masaud Mohamed, and Jamila Yusuf Mahamed) deponed that they are the registered proprietors of parcels of land known as Lamu/Manda Island/176, 177, 183, 184, 185 and 259; that the issuance of the Title Deeds for the said parcels of land was procedural and that Parcel Number 93 was not in existence in the year 2007. The Respondents finally deponed that the court did not have jurisdiction to entertain the Petition because: the Petitioner has admitted that he did not have rights over the suit premises; the Petition was an attempt to enforce a non-existent right, and that the issues raised in the Petition fell within the mandate of an ordinary civil court.
22. It is the respondents in that petition, rather than the petitioner, who therefore brought up the issue of Lamu/Manda Island/259. From what was said in that petition and the Court of Appeal decision, it appears that the issuance and validity of title to that plot number was not dealt with on the merits.
23. The Petition Malindi ELC Case No 62 Of 2012 proceeded by way of viva voce evidence. The court held as follows:

“The titles that were issued to the 3rd-10th Respondents have no basis at all. In the absence of evidence to show the process that was followed before the titles were issued to the 3rd-10th Respondents, I find that the same were not obtained lawfully. Considering that the Petitioner produced in evidence a letter of allotment together with an approved Part Development Plan, it is the Petitioner who is entitled to land known as Lamu/Manda Island/93. The purported titles that the 3rd-10th Respondents obtained for parcels of land known as Lamu/Manda Island/88 and Lamu/Manda Island/176 to 185 were fraudulently acquired and cannot be protected by *the Constitution*. For those reasons, I allow the Amended Petition dated 6th February, 2013 as prayed.”
24. In the appeal against the decision of the ELC in that petition, MSA CA No 128 Of 2018 the parties were as follows: Swaleh Mohamed Waziri, Nasra Hassan Mohamed, Ahmed Abdulhasim Kasim, Jamila Yusuf Mohamed Versus Houd Mohmoud Athman and Attorney General. The appellate court noted that gist of the appellants’ argument is that they acquired valid titles since the survey plan to which their plots related was different from that of the subject land; that they had attached copies of certificates of lease, receipts showing payment for the lease certificates, attestation charges, inter alia to the 1st



appellant replying affidavit. However, the Court of Appeal, declining the respondent's plea and upholding the ELC decision, held that:

“The respondents' who did not appear in court or testify had annexed copies of their title documents to the replying affidavit of the 1st appellant. Distinctly missing from their documents were letters of allotment, and receipts evidencing payments of stand premium charges and related fees. It is clear that, instead of title to the subject land being issued to the 1st respondent, who had paid the required sums, and was therefore the bona fide allottee, titles were issued to the titleholders, who had neither been allocated the subject land by the Commissioner of Lands, and nor had they paid any stand premiums in respect of the subject land.

Essentially, a crucial step in the land allotment process was omitted in the titleholders' case leading to the conclusion that the titles they acquired were not legally established, while the 1st respondent who, by virtue of his having paid the stand premiums and survey fees and subsequently acquired rights to own the land, was deprived of ownership the subject land, which was a violation of his rights.”

25. What the plaintiffs in the counterclaim in the present suit state in their response to the striking out motion is that they and the 2nd defendant to the counterclaim were not parties to Malindi Petition no 62 of 2013 and its appeal, and neither was the suit land herein among the plots whose titles were to be cancelled. This court agrees with the plaintiffs in the counterclaim that they were not parties to Malindi Petition No 62 of 2013 and the appeal that arose therefrom.

26. Admittedly therefore, Plot No Lamu/Manda Island/259, the suit land herein, was mentioned in the judgment in Malindi Petition No 62 of 2013 only once at paragraph 9 as follows:

“9. In their Affidavit in reply, the 3rd-10th Respondents deponed that they are the registered proprietors of parcels of land known as Lamu/Manda Island/176, 177, 183,184,185 and 259; that the issuance of the Title Deeds for the said parcels of land was procedural and that parcel of land number 93 was not in existence in the year 2007.”

27. It appears from the judgment that though that parcel was mentioned only in passing in the judgment. In the response to the petition, the respondents never identified the actual person who claimed interest therein; therefore, the real subject matter of the suit and the judgment in Malindi ELC Case No 62 Of 2012 were the parcels of land known as Lamu/Manda Island/88 and Lamu/Manda Island/176 to 185, and it is clear that only their titles were nullified in the judgment.

28. I must now address the issue of judicial estoppel. This doctrine is raised for the ostensible reason that the plaintiffs in the counterclaim now claim in the present suit to have valid title while they had already challenged the cancellation of their title in the previous Petition No 29 of 2022. However, this issue may be addressed in a very simple manner: the reason why the plaintiffs were challenging the cancellation is because they believed the title was valid and the cancellation was illegal. The court not having determined in that petition as to whether the cancellation was illegal or not, then their belief that their title is still valid still holds, hence their counterclaim in this case. In effect what they are still urging here is the same thing that they were urging in Petition No 29 Of 2022: that their title is valid and the cancellation is illegal. It can not be for them to validate or invalidate their title before the court does so; their duty is to present their case in court and await its decision; that is why they were and are before court. The alternative would be to remain silent and let the purported cancellation be deemed to have been valid, in which case the 2nd defendant to the counterclaim would have a field day, a walk-over,



so to speak. I think taking the path of argument regarding estoppel that the objector has taken is not proper as it may automatically prejudice and bar parties from pursuit of their rights by deeming their claims to be an expression that they have forfeited their property even when they were trying to protect it. Claiming that the purported cancellation was illegal is not the same as admitting that it was legal, but in fact the opposite. The objection does not meet the threshold of estoppel and it must be dismissed.

29. Lastly, I find that the affidavit presented as supporting the application has not been signed at all. This should have been the first issue to be addressed but as this court was intent on not utilizing much time on technicalities that may drag the proceedings further, it dealt with the substantive issues first. It is clear that even if the affidavit had been executed the application would still have failed on substantive grounds.
30. Consequently, I find that the preliminary objection dated 5/4/2024 and the notice of motion dated 30/4/2024 lack merit and both are hereby dismissed with costs to all the other parties in the case.
31. Since much time has now elapsed without a determination on the plaintiff's application dated 15/2/2024, this court hereby orders that all parties shall ensure that their submissions and replies in relation thereto are uploaded on the CTS portal and served and affidavits of service are also uploaded on the CTS portal and the matter shall be given a last mention before ruling on 13/2/2025 for issuance of a ruling date.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 4TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

