



**Kalu & 151 others v Kenya Petroleum Refineries (Land Case  
E017 of 2025) [2025] KEELC 1224 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1224 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE E017 OF 2025  
SM KIBUNJA, J  
MARCH 12, 2025**

**BETWEEN**

**ARNOLD KAZUNGU KALU & 151 OTHERS & 151 OTHERS & 151  
OTHERS ..... PLAINTIFF**

**AND**

**KENYA PETROLEUM REFINERIES ..... DEFENDANT**

**RULING**

1. The plaintiffs moved the court through the notice of motion under certificate of urgency dated the 14<sup>th</sup> February 2025, seeking for the following orders:
  - a. “Spent.
  - b. Spent.
  - c. The honourable court be pleased to issue a temporary injunction barring the defendant, whether by itself, its servants, agents, proxies, assignees, transferees or directors from carrying out any demolitions, evictions, placing marks or in any other way interfering with the plaintiffs’ houses erected on parcel plot No. MN/V1/255/1 Mazunguka Community within Port Reitz ward, Changamwe Sub-County, in Mombasa County, pending the full hearing of this suit.
  - d. Costs of this application be provided for.”

The application is premised on the nineteen (19) grounds on its face marked (a) to (s), and supported by the affidavit of Arnold Kazungu Kalu, the 1<sup>st</sup> plaintiff, sworn on the 14<sup>th</sup> February 2025, in which he inter alia deposed that the defendant had issued them with verbal eviction notices, had their houses marked with red X, and may be demolished at any time; that they have lived on the suit property for all their lives openly and without interruption; the defendant has not informed them of any arrangements



to relocate or compensate them; that evicting them and demolishing their houses will contravene their right to property under Article 40 of the Constitution, and the injunction sought should be granted.

2. The application is opposed by the defendant through the four grounds of opposition dated the 21<sup>st</sup> February 2024 and the undated replying affidavit of Kadzo Kalama, head legal department, inter alia deposing that the application is misplaced and res judicata; that the suit property is part of series of properties owned by the defendant making up the KPRL Common User Petroleum Infrastructure Corridor; that the issue of ownership and occupation of the suit property was subject matter of HCCC No. 544 of 2000- Hassan Ngao & 53 Others v Kenya Petroleum Refineries Limited, where judgement was delivered on 12<sup>th</sup> March 2013, holding that the defendant were the rightful owners of the suit property, and the plaintiffs had not satisfied the court of their adverse claim; the suit property was also subject matter in ELCC Petition No. 250 of 2015- John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Limited & 3 Others, which the court found was res judicata and dismissed it; that the plaintiff appealed the decision in Civil Appeal No. 70 of 2016-John Omolo Oracha & 3 Others v Kenya Refineries Limited & 3 Others, in which the Court of Appeal agreed with the trial court that the issue of ownership and occupation of the suit property had been conclusively decided by courts, and dismissed the appeal; that the defendant had graciously given the plaintiffs seven years to find alternative places and relocate, but did not do so leaving the defendant with no option but to mark their structures for demolition; that the defendant has several petroleum infrastructures on the land, and the continued occupation of the suit property by the plaintiffs puts them, general public and the infrastructures thereon at great risk. The defendant filed a further replying affidavit sworn by the same deponent on the 24<sup>th</sup> February 2025, reiterating the earlier depositions.
3. The defendant also filed the notice of motion dated 21<sup>st</sup> February 2025 seeking for:
  - a. “Spent.
  - b. Spent.
  - c. That this court be pleased to strike out the plaintiffs’ application dated 14<sup>th</sup> February 2025 for being an abuse of the court process.
  - d. That the court be pleased to strike out the entire suit for being res judicata.
  - e. That the costs of this application be provided for.”

The application is based on the twelve (12) grounds on its face marked (a) to (l), and supported by the affidavit of Kadzo Kalama, head of legal services, sworn on 21<sup>st</sup> February 2025, in which he more or less reiterated the depositions in their replying affidavit set out above, and further deposed inter alia that the plaintiffs obtained the injunction order with unclean and tainted hands, against the principles for grant of equitable relief; that the exparte injunction order should therefore be discharged.

4. The plaintiffs opposed the defendant’s application through the replying affidavit of Arnold Kazungu Kalu, sworn on the 26<sup>th</sup> February 2025, and filed on 1<sup>st</sup> March 2024, inter alia deposing that the structures marked for demolition have never been subject of litigation as claimed under HCCC No. 544 of 2000; that the suit should be allowed to go to full trial, as the defendant has been using HCCC No. 544 of 2000 to deny the residents of the entire Port Reitz ward their right to fair hearing; that the plaintiffs’ structures are not near the defendant’s wayleave, but there are private developers who recently came and elected their structures on the wayleave and they have not been marked for demolition; that their suit cannot be said to be res judicata as HCCC No. 544 of 2000 was filed in a court without jurisdiction and the issues in the two suits were different; that if the interim orders



are discharged, the defendant will move in haste and demolish their structures denying them an opportunity to be heard.

5. The learned counsel for the parties appeared before the court on the 24<sup>th</sup> February 2025 when directions on canvassing the two applications together, filing and exchanging of submissions were given.
6. The learned counsel for the defendant filed their submissions dated 26<sup>th</sup> February 2025. The learned counsel for the plaintiffs filed two sets of submissions, the first is dated 26<sup>th</sup> February 2025, and was filed on 27<sup>th</sup> February 2025, and the second one is dated 27<sup>th</sup> February 2025, and filed on 1<sup>st</sup> March 2025.
7. The issues in both applications for determinations are as follows:
  - a. Whether this suit and application commenced through the plaint and amended notice of motion dated 14<sup>th</sup> February 2025, are res judicata, and if so, what orders to issue.
  - b. Whether the plaintiffs have met the threshold for injunction order to issue at this stage.
  - c. Who pays the costs in each of the two applications?
8. The court has carefully considered the grounds on the two applications, grounds of opposition, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited therein, the pleadings and come to the following determinations:
  - a. That the plaintiffs have at paragraph 3 of the Amended Plaint dated 17<sup>th</sup> February 2025 averred that they are the beneficial and or lawful owners Parcel Plot No. MN/V1/255/1, which they have described as the suit property. At paragraph 22 of the said plaint, they averred that they will suffer irreparable loss and damage if the defendant is not permanently restrained from continuing with the planned demolitions and evictions of the plaintiffs from the said land. At prayers (i) & (iii), the plaintiffs seek for declaration orders in respect of Parcel Plot No. MN/V1/3957, while at prayer (v) which is an alternative to prayer (iv) for compensation, they seek for defendant to give them vacant possession of Parcel Plot No. MN/V1/255/1 and in prayer (ix) they seek for permanent injunction in respect of Parcel Plot No. MN/V1.255/1. Prayers (2) & (3) on the Amended Notice of Motion dated the 1<sup>4th</sup> February 2025 are for temporary injunction orders in respect of Parcel Plot No. MN/V1/255/1. Though parcel MN/V1/3957 has been mentioned in prayer (i) and (iii) of the plaint, it is clearly not subject matter of the plaintiffs' application subject matter of this ruling.
  - b. The defendant has through its notice of motion dated the 21<sup>st</sup> February 2025, indicated that it is the owner of MN/V1/255/1. It further stated and deposed that their ownership of the said land has been litigated and confirmed through HCCC No. 544 of 2000- Kenya Petroleum Refineries v Hassan Ngao & 53 Others, ELC Pet. No. 250 of 2015 - John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Limited & 3 Others, and Civil Appeal No. 70 of 2016 - John Omolo Oracha & 3 Others v Kenya Refineries Limited & 3 Others. The plaintiffs have at paragraphs 3 & 15 of their replying affidavit sworn on 26<sup>th</sup> February 2025 deposed inter alia that the defendant has marked for demolitions structures erected on parcels of land that has never been subject of litigation as claimed in HCCC No. 544 of 2000, including Plot Nos. MN/V1/3957, MN/V1/3794 and MN/V1/4182, and as such it is necessary for the court to visit the locus to ascertain which parcels were under litigation and which were not.
  - c. I have perused the copy of the judgement in HCCC No. 544 of 2000- Kenya Petroleum Refineries v Hassan Ngao & 53 Others attached to the affidavit and it is apparent the subject matter was MN/6/255/1, which I take to be the same parcel described herein as MN/



V1/255/1. The defendants in that suit had claimed to be in adverse possession of the said parcel in their defence. In the judgement delivered on 12<sup>th</sup> March 2013, the court inter alia found that the plaintiff's title is not disputed and ordered as follows:

- i. "An injunction do issue and hereby issue to restrain the defendants from remaining on or continuing in occupation of the suit premises.
- ii. Vacant possession of the suit premises to be granted to the plaintiff."

There is nothing to suggest that any appeal or review application was ever filed against that judgement. I have also perused the copy of the judgement delivered by the Court of Appeal on 31<sup>st</sup> March 2017 in Civil Appeal No. 70 of 2016 - John Omolo Oracha & 3 Others v Kenya Refineries Limited & 3 Others, over the decision of this court in ELCC No. 250 of 2016, where the court considered inter alia HCCC No. 544 of 2000 as a judgement in rem and dismissed the appeal.

- d. That contrary to the plaintiffs' submissions that the defendant is riding on the judgement in Mombasa HCCC No. 544 of 2000 in order to effect evictions from all the parcels of land in the neighbourhood, including residents on Plot MN/V1/3957, MN/V1/4182 and MN/V1/3974, the two applications subject matter of this ruling have not sought for any orders in respect of any other parcel of land except MN/V1/255/1, which is the subject matter in this suit. This finding is based on the fact that though parcel MN/V1/3957 is mentioned in prayers (i) & (iii) of the plaint, there are no averments about it in the body of the plaint, unlike MN/V1/255/1.
- e. I have considered the superior courts decisions cited by counsel on what constitutes a suit being res judicata and court functus officio, and without reproducing them in this ruling, one fact presented by the defendant remains unchallenged, and that is, the Court of Appeal in Civil Appeal No. 70 of 2016 - John Omolo Oracha & 3 Others v Kenya Refineries Limited & 3 Others, that was over the decision of this court in ELCC No. 250 of 2016, considered inter alia HCCC No. 544 of 2000 as a judgement in rem, over ownership of MN/V1/255/1 in favour of the respondent, who is now the defendant herein, and dismissed the appeal. The decision by the Court of Appeal is binding to this court and so long as it remains undisturbed, the plaintiffs' application to restrain the defendant from exercising its rights as proprietor of the suit property is a non-starter. The plaintiffs' amended notice of motion dated 14<sup>th</sup> February 2025 is therefore without merit. It follows therefore that the defendant's notice of motion dated 21<sup>st</sup> February 2025 in respect of discharging or setting aside the injunction order issued, and striking out the plaintiffs' application is resolved by declining the plaintiffs' amended notice of motion.
- f. On the defendant's prayer (4) for striking out the suit for being res judicata, the court is of the view that an order directing the striking out of all averments and prayers touching on ownership and possession of land parcel MN/V1/255/1 from the Amended plaint would suffice. That will leave the plaintiffs with the option of pursuing appropriate amendments to enable the remainder of their claim move to prosecution. The defendant will also be at liberty to move the court as appropriate should the plaintiffs fail to act.
- g. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the events, unless where ordered otherwise for good cause. In this case I find no reasons to deviate from that edict. The defendant will have costs in both applications.



9. Flowing from the foregoing determinations on the two applications, the court finds and orders as follows:
- a. The plaintiffs' amended notice of motion dated the 14<sup>th</sup> February 2025, is without merit and is dismissed.
  - b. The defendant's notice of motion dated 21<sup>st</sup> February 2025, to discharge and or set aside the ex parte injunction order has merit, and the status quo order issued on 17<sup>th</sup> February 2025, and extended on 24<sup>th</sup> February 2025, is hereby vacated.
  - c. That prayer (4) of the defendant's notice of motion dated 21<sup>st</sup> February 2025 is partially granted through an order directing the striking out of all averments and prayers touching on the ownership and possession of land parcel MN/V1/255/1 from the plaintiffs' amended plaint, in view of the Court of Appeal decision in Civil Appeal No. 70 of 2016 - John Omolo Oracha & 3 Others v Kenya Refineries Limited & 3 Others.
  - d. The defendant is awarded costs in both applications.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12<sup>TH</sup> DAY OF MARCH 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiffs : Mr Edwin Yose

Defendant : Mr Lumatete And Walumbugo

Shitemi- Court Assistant.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

