



Mohamed & another v Masha & 2 others (Environment & Land Case E012 of 2024) [2024] KEELC 5270 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E012 OF 2024**

**EK MAKORI, J
JULY 11, 2024**

BETWEEN

ARAB FARAH MOHAMED 1ST PLAINTIFF

**KARISA CHARO KARISA (SUING AS A PERSONAL REPRESENTATIVE
OF THE ESTATE OF CHARO KARISA MWERI AND DIANA KARISA
MWERI) 2ND PLAINTIFF**

AND

RACHEL DAMA KADENGE MASHA 1ST DEFENDANT

DISTRICT LAND REGISTRAR, KILIFI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Application dated January 30, 2024 seeks significantly:
 - a. Temporary injunction directed at the respondent's alienation sale of land Parcel Kilifi/Mtondia/709.
 - b. A Temporary stay of decree and orders issued by Odeny J (Dr). ELC No. 10 of 2017. In Karisa Charo Karisa v Anas Hassan Musa & 3 Others.
 - c. OCS Kilifi will enforce the orders.
 - d. Costs be provided.
2. The application is premised on the affidavit of the applicants, Arab Farah Mohammed and Karisa Charo Karisa, deposed on 30 January 2024. The first applicant avers that he purchased 0.15 hectares from the second applicant on 1 October 2022. He built a perimeter fence and has enjoyed quiet possession of the suit property.



3. On 5 October 2023, a decree was served on him emanating from the judgment of this Court (Odeny J. Dr.) in Malindi ELC 10 of 2017 – *Karisa Charo v Anas Hassan Musa & 3 others*.
4. The applicant aver that the first respondent purchased the land fraudulently and, therefore, seeks to stay the judgment and decree emanating from this Court in Malindi ELC 10 of 2017—*Karisa Charo v Anas Hassan Musa & 3 others*.
5. The first respondent, Rachel Dama Kadenge Masha, in a replying affidavit sworn on 27 February 2024, opposes the application, contending that she was registered as the owner of Title No. Kilifi/Mtondia/709 on 9 July 2002. That is when the cause of action first accrued, and the twelve-year limitation period lapsed in 2014. The suit is accordingly time-barred, and the issue of a prima facie case can, therefore, not arise. In her replying affidavit, she exhibited a copy of the title deed for the suit land in her name. Given that the suit land was registered in the name of the 1st respondent on 9 July 2002, the 2nd applicant had no saleable interest in the suit land capable of being passed to the 1st applicant.
6. The Court directed parties to file written submissions. When writing this ruling, I only saw the submissions by Mr. Shujaa, learned counsel for the 1st respondent.
7. From the materials placed before me, the issues I frame for this Court's decision are whether this Court can grant an interlocutory injunction pending the hearing and determination of this suit and who should bear the costs of the application.
8. Mr. Shujaa has raised the issue that the application and the entire suit runs afoul of the doctrine of res judicata, given the disclosure that there is already a decree emanating from the judgment of this Court (Odeny J. Dr.) in Malindi ELC 10 of 2017—*Karisa Charo v Anas Hassan Musa & 3 others*. He has extensively highlighted the similarity of this matter with the former one, significantly stating that the former suit dealt with the same subject matter now under discussion in the current one, which is Title No. Kilifi/Mtondia/709. The land ownership issue was dealt with thoroughly, and finally, in the former suit, it cannot be revisited here. He has cited the decision in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport & Infrastructure & 3 others*, Supreme Court of Kenya Petition No.17 of 2015[2019] eKLR, which discussed extensively on conditions precedent before the doctrine of *res judicata* can be invoked:
 - a. The issues raised in the present suit were directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties as in the present suit or between parties under whom they claim.
 - c. The parties litigated under the same title, subject matter, and cause of action.
 - d. The issues raised in the present suit were heard and finally determined on merit in the former suit.
 - e. The Court that heard and determined the issues in the former suit was competent to try the issues raised in the present suit.
9. The threshold to achieve before the grant of an injunction is as held in the *Giella v Cassman Brown & Company Limited* [1973] E.A. 360:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of



convenience.” (This is the standard that the applicant must meet to justify the grant of an injunction; in this case, emphasis is supplied).

10. A prima facie case with the probability of success was held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125, to mean:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

11. As far as this application is concerned, it has been brought to the notice of this Court that in Malindi ELC 10 of 2017—*Karisa Charo v Anas Hassan Musa & 3 others* (Odeny J. Dr.) has already decided on the issues raised herein, particularly the ownership of the suit property which is the subject of litigation here. This Court cannot purport to injunct a decision of a competent Court of jurisdiction. It will amount to an appeal from the back door. It will be a recipe for lawlessness and chaos. I need not delve into the factors to consider before invoking res judicata. In so far as the current suit purports to discuss issues raised in a matter already decided by a competent Court of jurisdiction, I do not see a prima facie case with a probability of success here.

12. The principles stated in the Giella case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraba Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

13. I need not discuss the other limbs, as the applicant has failed to achieve the prima facie test. The application dated 30 January 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 11TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Shujaa, for the 1st Defendant

Happy: Court Assistant

In the Absence of:

Mr. Kiroga Kuria for the Plaintiff

AG for 2nd and 3rd Defendants

