



Shugwaya Welfare Association v National Land Commission & 4 others (Environment & Land Petition 12 of 2022) [2023] KEELC 17196 (KLR) (5 May 2023) (Ruling) (with dissent)

Neutral citation: [2023] KEELC 17196 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 12 OF 2022
MAO ODENY, J
MAY 5, 2023
IN THE MATTER OF SECTION 32 AND 40 OF THE PHYSICAL AND LAND USE
PLANNING ACT (NO 13 OF 2019) LAWS OF KENYA
AND
IN THE MATTER OF SECTION 87, 88 AND 102 OF THE COUNTY
GOVERNMENT ACT (NO 17 OF 2012)
AND
IN THE MATTER OF SECTION 5 AND 10 OF THE LAND ADJUDICATION ACT
CAP 284 LAWS OF KENYA
AND IN THE MATTER OF ARTICLE 62, 63 AND 67 OF THE CONSTITUTION
OF KENYA
AND
THE RIGHT TO EQUALITY BEFORE THE LAW AND FREEDOM FROM
DISCRIMINATION
AND
IN THE MATTER OF SECTION 15 OF THE NATIONAL LAND COMMISSION
ACT AS AMENDED BY SECTION 38 OF THE LAND LAWS (AMENDMENT)
ACT 2016
BETWEEN

BETWEEN
SHUGWAYA WELFARE ASSOCIATION PETITIONER
AND



NATIONAL LAND COMMISSION	1 ST RESPONDENT
THE COUNTY GOVERNMENT OF LAMU	2 ND RESPONDENT
THE PERMANENT SECRETARY, MINISTRY OF LAND AND PHYSICAL PLANNING	3 RD RESPONDENT
THE ATTORNEY GENERAL	4 TH RESPONDENT
CORDISONS INTERNATIONAL (K) LIMITED	5 TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated 24th May 2022 the 5th Respondent on the following grounds:
 - a. That the Petitioner Shungwaya Welfare Association is a society registered under the [Societies Act](#), and as such it does not have legal capacity under the provisions [Societies Act](#) Cap 108 Laws of Kenya, to sue or be sued in its own name and the proceedings herein are bad in law and ought to be struck out.
 - b. That this Honourable Court lacks jurisdiction to hear and determine this suit as the Petitioner’s suit is res judicata as there is a prevailing Ruling issued by a competent court in Malindi ELC Petition No. 18 of 2016, [Omar Abdalla Mohamed & 20 others v County Government of Lamu & others](#) [2018] eKLR,
 - c. That this Honourable Court lacks jurisdiction to hear and determine the application and the Petition as the issues raised squarely falls within the jurisdiction of the National Land Commission pursuant to Article 67 (1) (2) and (3) of the [Constitution](#) of Kenya, 2010 and sections 5 and 6 of the [National Land Commission Act](#) No. 5 of 2012;
 - d. That the petitioner is under an obligation to exhaust the local dispute resolution mechanism as availed by the said National Land Commission pursuant to Article 67 (1) (2) and (3) of the [Constitution](#) of Kenya, 2010, and sections 5 and 6 of the [National Land Commission Act](#) No. 5 of 2012; and lastly,
 - e. That the instant Application is premature, incompetent and an abuse of the process of the Court and is only fit for striking out with costs to the 5th Respondent.
2. Counsel agreed to canvas the Preliminary Objection by way of written submission which were duly filed.

5th Respondent’s Submissions

3. Counsel identified four issues for determination as follows;
 - a. Whether the Petitioner has capacity to sue or be sued on its own name?
 - b. Whether the Petitioner’s suit is res judicata? And if yes, whether this Honourable Court has jurisdiction to re-open and determine the suit?
 - c. Whether this Honourable Court is the proper forum to hear and determine the Petitioner’s complaint/objection arising from the National Land Commission General Notice of



intention to allocate public land as published on 18th March, 2022 on the Daily Nation News Paper?

- d. Whether the petitioner is under an obligation to exhaust the local dispute resolution mechanism as availed by the said National Land Commission pursuant to Article 67 (1) (2) and (3) of the Constitution of Kenya, 2010, and sections 5 and 6 of the National Land Commission Act No. 5 of 2012.?
4. It counsel's submission that the Petitioner Shungwaya Welfare Association is a society registered under the Societies Act and as such the Petitioner does not have legal capacity under the provisions of the Societies Act to sue or be sued in its own name hence the Petition herein is bad in law and ought to be struck out.
5. Counsel submitted that at paragraph 1 of the Supporting Affidavit of Mohammed Mbwana Shee dated 19th April, 2022, the Petitioner is described as Shungwaya Welfare Association which is a duly registered Association and goes ahead at paragraph 2 of the Affidavit, to exhibit a copy of certificate of registration which confirms that the Petitioner as a society.
6. Mr Wasuna further submitted that it is trite law that a society under the Societies Act is a non juristic person incapable of suing or being sued in its name. That a society can only sue or be sued through its officers and relied on the cases of Veronica Wanjira Maringa & 26 others v A C K Buxton Diocese of Taita Taveta & another [2022] eKLR, Peter Ngugi Geoffrey & 3 Others vs Mithini SDA Church (2019) eKLR where the court held that a church or a religious organization which is not a body corporate lacks capacity to sue or be sued in its name.
7. Counsel therefore urged the court to find that the Petitioner has no capacity to sue and that the issue of capacity is not a procedural technicality hence the Petition should be struck out with costs to the 5th Respondent.
8. On the issue whether the suit is res judicata, counsel submitted that this Honourable Court lacks jurisdiction to hear and determine this suit as the Petitioner's suit is res judicata as the Application and the Petition offend the mandatory provisions of section 7 of the Civil Procedure Act Chap 21 as there is a prevailing Ruling issued by a competent court in Malindi ELC Petition No. 18 of 2016, Omar Abdalla Mohamed & 20 others v County Government of Lamu & 8 others [2018] eKLR, therefore it would lead to an embarrassment in the administration of justice where conflicting judgments are arrived at.
9. Counsel submitted on the elements of res judicata and stated that the issue which is directly or substantially in issue in the instant Petition No. 12 of 2022 is the issue of ownership of the suit property; whether the Petitioners were entitled to the property or demonstrated the nature of their right in the property.
10. Mr Wasuna submitted that the current issue in this petition is the same issue that was directly and substantially in issue in Malindi ELC Petition No. 18 of 2016, Omar Abdalla Mohamed & 20 others v County Government of Lamu & 8 others [2018] eKLR where the Court dealt with the issue of ownership of the suit property PDP No. LMU/1281/01/16 and found that the suit land is public land which only the National Land Commission could lawfully allocate.
11. Further, that it is undisputed that the PDP No. LMU/1281/01/16 which gazetted and approved for Cordisons International (K) Limited Wind Power Generation is the substratum and the main issue in the Petitioner's instant suit, and it is the same PDP No. LMU/1281/01/16 which was the substratum of the suit in Malindi ELC Petition No. 18 of 2016, Omar Abdalla Mohamed & 20 others v County



- Government of Lamu & 8 others* [2018] eKLR where the petitioners unsuccessfully sought to bar the National Land Commission from allocating the public land.
12. Counsel relied on paragraphs 27 and 28 of the Ruling of this Court in Malindi ELC Petition No. 18 of 2016, *Omar Abdalla Mohamed & 20 others v County Government of Lamu & 8 others* [2018] eKLR where court addressed the issue of ownership of the suit parcel of land and held as follows;
- “27. The Petitioners have not denied the contention by the 1st Respondent that the land in question is public land. It is however their contention that they have lived on the land for many years after their forefathers moved into the land and that they are entitled to be issued with title deeds since the land has been surveyed and adjudicated upon as per the sketch map annexed to their application.
28. It is evident from the material placed before me as at the time of filing the Petition that the Petitioners had no title to the land they claim and that the same is trust land vested upon the 1st Respondent. Under Article 62(2), the *Constitution* vests public land in the County Government to be held in trust for the people resident in that County. Public land is not, as it were capable of being owned by individuals unless and until the same is duly converted into private land”.
13. Mr Wasuna further submitted that the issue whether or not to grant the Petitioners injunction stopping the processes of the National Land Commission was also heard and determined by this honourable Court in the same decision where the court held at paragraph 30 and 31 that:
- “30. Arising from the foregoing, I am persuaded that the Petitioners have no proprietary interest and/or rights over the suit land to warrant the grant of the orders sought”.
31. In the matter before me the Petitioners have not shown that they are entitled to the property or that they have any legitimate claim to it to enable them invoke the Court’s intervention. In the circumstances herein, I find no merit in the Application dated 20th September 2016.”
14. On the issue as to whether the former suit was between the same parties or parties under whom they or any of them claim, counsel submitted that. the Petitioner in the present suit is Shungwaya Welfare Association and that the Association is said to have membership being the indigenous people living and working for gain in Lamu. They further describe themselves as “the indigenous land owners whose land was allocated to PDP No. LMU/1281/01/16, and residents of Kiongwe area” Counsel therefore submitted that the Petitioners were the same, the residents of Kiongwe area as seen in the ruling.
15. Further that among the Petitioners in Petition No. 18 of 2016, Petitioner No. 7 and 8 were Shum Jabir Khamisi and Zamzam Abdulraham Bakari and the current Petitioner in this Petition No. 12 of 2022 are also members of the current Petitioner, Shungwaya Welfare Association.
16. Mr Wasuna submitted that the previous suit just like the instant suit was brought against the National Land Commission; the County Government of Lamu; the Permanent Secretary, Ministry of Lands and Physical Planning; the Attorney General; and Cordisons International (K) Limited.
17. Counsel relied on the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR on the issue of res judicata



18. Counsel also cited the case of *Islamia Madrassa Society v Zafar Niaz & 8 others* [2021] eKR, where the court cited with approval the case of Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992 where Justice Bosire (as he then was) held that the position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies.
19. Mr Wasuna stated that the honourable court lacks jurisdiction to hear and determine the application and the Petition filed herein as the issues raised are clearly of the nature of a complaint or an objection to the National Land Commission (NLC) General Notice of Intention to Allocate Land dated 16th March, 2022 and published on 18th March, 2022 on the Daily Nation News Paper. That the case is within the jurisdiction of the National Land Commission as established and clothed with jurisdiction under Article 67 (1) (2) and (3) of the *Constitution* of Kenya, 2010 and sections 5 and 6 of the *National Land Commission Act* No. 5 of 2012.
20. Counsel relied on the case of Judicial Review No. 11 of 2017; *Republic v Chairman National Land Commission & 5 others Ex Parte Cordison International (K) Limited* [2018] eKLR where the court discussed at length and confirmed the undisputed powers of National Land Commission over the suit property, public land PDP No. LMU/1281/01/16. The Court cited with approval the decision in the Supreme Court Advisory Opinion Reference No. 2 of 2014; *in the matter of the National Land Commission* (2015) eKLR, to echo the importance of Independent Commissions and position that the National Land Commission is not subject to direction or control by any person or authority, and it cannot be considered an agent of the National or County Government.
21. Counsel further submitted on the doctrine of constitutional avoidance which states that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. This doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. Therefore, the doctrine deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize.
22. Counsel relied on the cases of *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, and Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR where the Court of Appeal elaborately discussed the doctrine of exhaustion.
23. Mr Wasuna urged the court to uphold the objection.

Petitioner's Response

24. The Petitioner filed a replying affidavit in response to the 5th Respondent's preliminary objection and stated that Shungwaya Welfare Association is registered under the *Societies Act* therefore recognized as a person and as such has legal capacity to sue and be sued.
25. The Petitioner further stated that this court has jurisdiction to hear and determine this petition as Malindi ELC Petition No. 18 of 2016, *Omar Abdalla Mohamed & 20 others v County Government of Lamu & 8 others* [2018] eKLR was in respect of allocation of 1282 Hectares of land and that the subject matter of this petition is allocation of 1701 hectares hence the petition is not res judicata.
26. The Petitioner urged the court to dismiss the preliminary objection with costs. The Petitioner did not file submissions as was agreed.



Analysis and Determination

27. The issues for determination in this preliminary objection is whether the petitioner has capacity to sue and be sued, and whether the suit is res judicata.
28. The ingredients of preliminary objections were enumerated in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 where it was held;
- “So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
29. The issue of capacity to sue and be sued is a point of law which can be raised by way of preliminary objection and is not a technicality. The quest is whether the petitioner is a juristic person who can sue and be sued.
30. It is not disputed that the petitioner Shungwaya Welfare Association is registered under the *Societies Act*. The Petitioner has described in the petition and the supporting affidavit as an organization duly registered under section 10 of the *Societies Act* with its membership being the indigenous people living and working for gain Lamu County and specifically Kiongwe area.
31. In the case of *Trustees Kenya Redeemed Church & Anor vs Samuel M’Obiya & 5 others* [2011] eKLR it was held that:
- “It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers’ orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”
32. The Petitioner therefore cannot make itself a juristic person by claiming to be one yet the law states otherwise. There is a plethora of judicial authorities on the issue of legal capacity of entities registered under the *Societies Act* to sue or be sued in their names or the names of the officials.
33. Similarly, in the case of *African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor* [2014] eKLR Mwita J held as follows:
- “The plaintiff has pleaded in paragraph 1 of its plaint that it is a duly registered church. At paragraph 3 of the plaint, the plaintiff has described the 2nd defendant as a duly registered church or organization obviously churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names.”
32. The upshot is that the Petitioner has no capacity to sue in its name hence the first limb of the preliminary objection has merit.
32. The test for determining whether a suit is res judicata is provided for under section 7 of the *Civil Procedure Act* and further in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (2017) eKLR, where the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- “(a) The suit or issue was directly and substantially in issue in the former suit.



- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

32. Similarly, in the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the court held that:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably”.

32. On the issue whether this petition is res judicata, it should be noted that the Petitioner admitted that Malindi ELC Petition No. 18 of 2016, *Omar Abdalla Mohamed & 20 others v County Government of Lamu & 8 others* [2018] eKLR was in respect of allocation of 1282 Hectares of land and that the subject matter of this petition is allocation of 1701 hectares. This admission is telling that this suit is res judicata as the suit is in respect of the same subject matter PDP No. LMU/1281/01/16.

33. Further among the Petitioners in Petition No. 18 of 2016, Petitioner No. 7 and 8 were Shum Jabir Khamisi and Zamzam Abdulraham Bakari and the current Petitioner in this Petition No. 12 of 2022 are also members of the current Petitioner, Shungwaya Welfare Association. This is not disputed.

34. It should also be noted that the previous suit just like the instant one was brought against the National Land Commission; the County Government of Lamu; the Permanent Secretary, Ministry of Lands and Physical Planning; the Attorney General; and Cordisons International (K) Limited on the same subject matter which has duly been determined by a competent court

35. In the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR where this court held that:

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”

36. Litigants must bring their claims to court in full and not by instalments to test the waters whether the half claim can succeed. The risk they run is that once the claim is adjudicated upon, then they cannot come to court clothed in different titles and outfits to try their luck. This is a waste of both their precious time and resources including the court’s



37. Further court's do not have time to adjudicate on matters that have been fully heard and determine as this can cause embarrassment of coming up with two conflicting decisions. That is why the doctrine of res judicata is in place to safe guard on such situations.
38. I have considered the pleadings, the preliminary objection, submissions by counsel and the relevant judicial authorities and find that the petitioner has no legal capacity to be sue or be sued in its name being an organization registered under the *Societies Act*, further that this suit is res judicata and is therefore struck out with costs to the 5th Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

