



**Ali & another v Mbatia & 3 others; Public Trustee & another (Interested Parties)
(Environment & Land Case 108 of 2019) [2023] KEELC 18861 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 108 OF 2019**

**EK MAKORI, J
JULY 12, 2023**

BETWEEN

**KHAMIS MOHAMED ALI 1ST PLAINTIFF
THE ESTATE OF HAMADI ALI KIJUVI AKA AHMED BIN ALI
(DECEASED) (SUING THROUGH ITS ADMINISTRATOR KHAMIS
MOHAMED ALI) 2ND PLAINTIFF**

AND

**JOSEPHINE NAISENYA MBATIA 1ST DEFENDANT
BAHATI M. SAGA & MOHAMMED A MUHALE 2ND DEFENDANT
THE REGISTRAR OF TITLES, MOMBASA 3RD DEFENDANT
DIRECTOR OF SURVEYS 4TH DEFENDANT**

AND

**THE PUBLIC TRUSTEE INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY**

RULING

1. There are two Interlocutory Applications, for the determination of the court. The Court directed that the same be heard together and parties canvass the same by way of written submissions.
2. There is the application by the Plaintiff dated 1st February 2023 and the 2nd Defendant's dated 14th February 2023.
3. The Plaintiff's Notice of Motion Application dated 1st February, 2023 sought the following for the relief(s):



- a) Spent.
 - b) Pending the hearing and determination of this Application, a temporary injunction be and is hereby issued restraining all the Defendants and the interested parties; either by themselves, their servants, agents, and/or any other person(s) claiming under/through/from them from conducting a survey, subdividing, alienating, dispossessing, disposing, selling, registering, issuing any title (s) or in any other way interfering with the Plaintiffs' quiet possession of the suit parcels of land including demolishing their structures and/or evicting them from the property known as L.R. No. MN/III/540 C.R. No. 35716, L.R. No. MN/III/541 C.R. No.35717 and L.R. No. MN/III/542 C. R. No. 35718.
 - c) Upon inter parties hearing of this Application, a temporary injunction be and is hereby issued restraining all the Defendants and the interested parties; either by themselves, their servants, agents, and/or any other person(s) claiming under/through/from them from conducting a survey, subdividing, alienating, dispossessing, disposing of, selling, registering, issuing any title (s) or in any other way interfering with the Plaintiffs' quiet possession of the suit parcels of land including demolishing their structures and/or evicting them from the property known as L.R. No. MN/III/540 C.R. No. 35716, L.R. No. MN/III/541 C.R. No.35717 and C.R. No. MN/III/542 C. R. No. 35718 pending the hearing and determination of the main suit herein.
 - d) The Officer commanding Mtwapa Police Station to ensure compliance with the court orders.
 - e) Costs of this Application be provided for.
4. The 2nd Defendant's Notice of Motion Application dated 14th February 2023 prayed for nine reliefs. The most significant being that the current application and suit is res judicata and should be struck out in limine.
 5. The application by the 2nd Defendant insofar as it seeks to have the current application and suit by the Plaintiff struck out, should go first.
 6. The 2nd Defendant contended that Section 7 of the *Civil Procedure Act* provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially dealt with 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.
 7. The 2nd Defendant has cited the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, where the Court held as follows:
 - i. What issues were really determined in the previous Application;
 - ii. Whether they are the same in the subsequent Application and were covered by the Decision.



iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”

8. 2nd Defendant averred that the Plaintiffs instituted a Petition at the Mombasa Court vide ELC No 95 OF 2015 where the parties were Ali Mohamed Kijuvu & The Estate of Hamadi Ali Kijuvu AKA Ahmed Bin Ali (deceased) Through its Administrator Ali Mohamed Kijuvu were the Petitioners v The Registrar of title Mombasa, Director of Surveyors, The Attorney General as the Respondents and Josephine Naisinya Mbatia, The Estate of Kalume Muhale AKA Kalume Muhale Kwanguro (deceased) through its joint administrators Bahati Saga & Mohamed A. Muhale as the Interested parties.

9. The 2nd Defendant further stated, the parties in the present suit are similar to the former suit, ELC No. 95 of 2015, with the only addition being the Public Trustee. The failure to add the Public Trustee by the Plaintiffs cannot be a bar for res judicata to attach since the parties and issues raised in this suit and the former suit are similar.

10. The 2nd Defendant alleged that in the former suit, ELC No 95 of 2015, the Plaintiff sought prayers 1 to 8 in the Petition. The Court in its judgement dated 5th November 2019 noted as follows under paragraphs 17 and 18:

“In my view, the allegations in the petition herein are too general and the petition has not passed the test established in the above-cited case. The Petitioners have not included the public Trustee who was a crucial party to this case. The petitioners have also made general allegations of fraud but have failed to prove the same.

In the result, I find that the Petition lacks merit and the same is dismissed.”

11. The 2nd Defendant submitted that the Petitioners herein failed to establish any element of fraud which they were alleging against the parties in the case. The Court in its judgment dismissed the Petition. The Plaintiffs are seeking similar prayers in the present suit as they had in the former suit.

12. The 2nd Defendant further stated that the Plaintiffs have based their foundation on allegations of fraud in the present suit which is similar to the same allegations in the former suit where the Court held that they failed to prove the same.

13. 2nd Defendant continued to state that the Court in the former suit was competent and within its jurisdiction to hear and determine the former suit. Thus, the judgment of the Court in the former suit was final and binding upon the parties and therefore the Plaintiffs ought to respect the outcome and end the litigation.

14. The Plaintiffs in rejoinder on the issue of res judicata stated that the 2nd Defendant misconstrued the judgment of the Court In Mombasa Elc Petition No 95 of 2015 which ideally never addressed the dispute before it but rather advised the parties on what they should do to address their case, and that is exactly what the Plaintiff has done by filing the instant suit. A careful reading of the judgment of the Court in ELC Petition 95 of 2015 will reveal that the Court’s decision was advisory in nature rather than resolving the dispute with a finality. The suit cannot be said to have become res judicata since the competing interests in the suit land were not resolved with the desired finality. Whereas the Constitutional Court became functus officio, the suit never became res judicata. Moreover, this is the



reason the Plaintiff approached this court to bring the issues raised to the desired conclusion. The Plaintiff extracted an excerpt of the Court's judgment and left it for Court's interpretation:

“I do not think the issues of ownership can be resolved conclusively through this petition.....
In this regard, I agree with the Respondent's submission that in this case, there are competing interests of right of ownership of the suit land, which require the addition of oral evidence for the court to determine with certainty those competing interests. I would therefore direct the parties to file a civil suit to agitate their respective rights and for evidence to be adduced to enable the court reach a just determination on merits.”

15. The 2nd Defendant submitted that It comes out very clearly that the Constitutional Court simply declined to resolve the dispute before it on the basis that, the case having been brought by way of a Constitutional Petition, evidence was by way of Affidavits. Court found such evidence to be unsuitable for a case where there are competing rights over land ownership, which requires additional oral evidence thus directing the parties to bring their case through a civil case where witnesses could be tested through cross-examination and that is the reason the Plaintiffs instituted the current suit. 2nd Defendant concluded that the Constitutional Petition suit suffered a technical blow but did not conclusively resolve the dispute between the parties. From the plain reading of the judgment, the intention of the Court comes out very boldly, which does not require petitioning the High Court for the interpretation.
16. The 2nd Defendant further submitted that the avalanche of the reliefs sought in the Application cannot be granted through an Interlocutory Application. If indeed the 2nd Defendant maintains that the suit was decided with finality and the dispute between the conflicting sides resolved, then there would be no need for him to seek all those prayers sought. The fact that the Applicant is asking the Court to declare him the owner of the land and that a permanent injunction be placed on the title to protect him means that the actual issues that were litigated upon at the Constitutional court were never resolved. These issues cannot be resolved through an Application. The 2nd Defendant should hold his horses and allow the case to proceed to full trial, His attempt to take an unfair advantage of the case is uncalled for. There is no shortcut in litigation, he invited the court to call all the parties at the hearing so that they present their cases once and for all.
17. The pieces of legislation that the Applicant has placed his reliance upon whilst seeking the Orders of dismissal of the case are untenable. Section 63 (c) of the [Civil Procedure Act](#) and Order 40 Rules 1-3 of the Civil Procedure Rules, 2010 empowers the court to grant the relief of temporary injunction, a relief that has not been sought by the Applicant.
18. On the law, the Plaintiff reasoned that the provisions of Section 7 of the [Civil Procedure Act](#) prohibit a court of law from hearing a suit that has been litigated over by another court of competent jurisdiction between the same parties over the same issues and the issues between the parties having been laid to rest. It is important at this juncture it be reckoned the judgment by Yano J. in paragraph 15 did not settle the issues between the parties fully and finally.
19. The Plaintiff referred this court to various authorities expounding on the applicability of the doctrine of res judicata - Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others [2017] eKLR, Okiya Omtatah Okoiti v Communications Authority of Kenya & 14 Others, Petition No.59 of 2015.
20. The Plaintiff argued that from this authority, it is clear that the doctrine of res judicata can only be invoked when the controversy or dispute between the parties was conclusively resolved. However, from the judgment of Yano J. it is clear that the dispute was never resolved but rather the court advised the



Plaintiff to file a civil case to have the parties testify orally and their testimony tested through cross-examination.

21. Plaintiff concluded that having discharged the issue of res-judicata as raised by the 2nd Defendant, it automatically follows that, the rest of the underlying prayers fail since most of them could only be issued after a hearing.
22. After considering the material placed before me and the submissions by the warring parties the only issue largely raised by the application by the 2nd Defendant is whether the current suit is res judicata.
23. The authorities cited by the parties on the doctrine of res judicata were relevant and germane and captured the correct position of the issue under discussion the only divergent views are the opinions taken by the parties on the interpretation of the same. The doctrine of res judicata is captured in section 7 of the [Civil Procedure Act](#) 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.”

24. This Court has severally interpreted the same in various pronouncements for example in In Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others [2017] eKLR where the court cited with approval the case of Okiya Omtatah Okoiti v Communications Authority of Kenya & 14 Others, Petition No.59 of 2015, where the court was emphatic on the applicability of the doctrine of res judicata in the following terms:

“For res judicata to be invoked in a civil matter, therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of Karia and Another v the Attorney General and Others [2005] 1EA 83).

[18] The rationale behind the provisions of Section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined, or decided by a competent Court, it cannot be reopened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in Omondi vs National Bank of Kenya Ltd and Others [2001] EA 177.

25. The former suit we are dealing with is Mombasa ELC Petition 95 of 2015 significantly paragraph Yano J. held as follows:

“I do not think the issues of ownership can be resolved conclusively through this petition..... In this regard, I agree with the Respondent’s submission that in this case, there are competing interests of right of ownership of the suit land, which require additional oral evidence for the court to determine with certainty those competing interests. I would



therefore direct the parties to file a civil suit to agitate their respective rights and for evidence to be adduced to enable the court to reach a just determination on merits.”

26. The judge was handling a Constitutional Petition, and he explicitly advised parties on the proper course of action to take to resolve the ownership disputes raised and the fraud allegations made, stating that all of those issues could not be resolved in that forum under the constitutional avoidance doctrine as held, for example, in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR:

[105]. We shall now turn to the Constitutional Avoidance Doctrine. The doctrine is at times referred to as the Constitutional Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

[256].The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

27. Whereas the former suit is similar to the current one, the parties are the same, and the issues raised are the same. The judge avoided resolving all the issues and referred the parties to a civil court under the rule of constitutional avoidance. Therefore, the doctrine of res judicata cannot obtain nor can the orders sought to be granted before a full hearing in this matter, The Application dated 14th February 2023 by the 2nd Defendant is hereby dismissed.
28. I now turn to the Plaintiff’s application dated 1st February 2023, for interlocutory injunction.
29. The Application is supported by the Affidavit of Khamis Mohamed Ali which provides the basis and reasons why the prayers are sought.
30. The 2nd Respondent opposed the Application through the Replying Affidavit dated 5th April 2023 deposed by one Mohammed A. Muhale. The rest of the parties never participated in this Application. The Plaintiff has deposed that the suit land is a family property that devolved to them through inheritance after their ancestors and parents rested. (He annexed a copy of the title to the suit land and marked it as annexure KMA-2). He further deposed that, the threat to the suit property is real and scary since the Defendants have already successfully managed to produce titles to some sub-divisions out of the suit land despite being fully aware of the ongoing suit over this property. (He annexed copies of title documents produced by the Defendants during the subsistence of the suit and marked them as annexure KMA-3).
31. It is the Plaintiff’s case that the Defendants have openly shown a lack of respect and disobedience to the authority of the institution of the Court to the extent that they have the audacity of interfering with a property under active litigation. He invites the Court to stop these activities by issuing the prayers sought. Unless the Defendants’ activities are urgently stopped by this court, the suit land may be wasted thereby rendering the suit an academic exercise.
32. In support of the Plaintiff’s case, the 2nd Respondent through his Replying Affidavit has admitted in paragraph 5 that there was a sale and transfer of title but said that this was done long before the suit



was instituted. However, a keen view of his annexure MAM-1, it is indicated that the title was issued on 5th July 2022, yet this is a suit filed in 2019.

33. The Plaintiff averred that from the 2nd Defendant's admission that the suit land is being subdivided, sold, and new titles produced, the court should see the need to place an injunction to restore order even as we await the hearing of the main suit on its merits.

34. The Plaintiff quoted Order 40 of the Civil Procedure Rules, 2010. As the basis for the issuance of an injunction, Rule 1 stipulates:

1. "Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

(a) Cases in which temporary injunction may be granted [Order 40, rule 1.]

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

35. The Plaintiff submitted that the requirements for the grant of injunction as stated in the case of *Giella v Cassman Brown & Co. Limited* [1973] E.A 358. The court held that:

"Where an applicant shows a prima facie case with a probability of success exists, a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and; if the Court is in doubt, it will decide an application on the balance of convenience."

36. The Plaintiff contended that the parties to this suit have competing interests over the suit land, yet, the 2nd Respondent has admitted in paragraph 5 of his Replying Affidavit that they are subdividing and selling the land. His claims that the sale took place before the institution of this suit should fail because the title attached to his Replying Affidavit was issued on 5th July 2022 whereas the instant case was instituted in 2019. the court to be persuaded, that there is a need to protect the suit land through the issuance of an injunction.

37. The case *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* held as follows;

"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 or rebuttal from the latter."



38. The Court of Appeal in *Central Bank of Kenya & Another Vs Uhuru Highway Development Ltd & 4 Others* held at Page 382 as follows: -

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only for the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules. It is not part of the Court’s function at an interlocutory stage of litigation to try to solve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.” (Underlining ours).

39. On irreparable harm, the Plaintiff indicated that they have sought the temporary injunction to protect the property against any possible adverse dealings by the Defendants. The property in question is land whose value appreciates each day. Such property cannot be adequately compensated for by award of damages. To support the assertion the Plaintiff has quoted the case of *Tritex Industries Limited & 3 Others v National Housing Corporation & Anor* [2014] eKLR, Muriithi J. in granting an injunction, held at page 5 that:

“This adequacy of damages test is common denominator in the prima facie test of *Geilla v. Casman Brown* and the balance of convenience test of *American Cyanamid* because under both tests an injunction will not be granted if the injury or loss complained of may adequately be remedied by an award of damages. As held in *Mbuthia v Jimba Credit*, supra, in matters of land it is usual to grant injunctions to protect the parties’ profound interest in ownership of land whether as a residential property or as a capital asset of production”.

40. On the balance of convenience, the Plaintiff contended that this tilts in favour of the grant of the orders sought. This is because there is a confession that indeed the land is being wasted. Therefore, the injunction will help stop this vice temporarily pending the hearing of the main suit. Regarding the balance of convenience, Lesit J. stated on pages 4 and 5 in the case of *Meru H.C.C. No. 12 of 2010: Thomas Mungiria & 9 Others v Joseph Mutuma & 4 Others* thus:

“The case can also be determined on a balance of convenience. This being an interlocutory application, I have cautioned myself that I should not make conclusive findings...The plaintiffs have deposed that they are in possession of their respective parcels of land and the defendants have not controverted that fact. The plaintiffs seek specific orders in the plaint. That ground is the precise reason why any further dealing in the lands in question should be halted or prevented in order to give the parties in the suit to be heard on the merits.”

41. The 2nd Defendant largely relied on the submissions supporting the application dated 14th February 2023, which sought the entire matter herein dismissed in limine under the doctrine of *res judicata*. The court has already made a finding in that application dismissing it.

42. However, there is a replying affidavit in opposition to the application deposed by one Mohammed A. Muhale, stating that the application is an abuse of the court process. There was a Mombasa ELC Petition No 95 between the same parties, which was heard, and determined.

43. The 2nd Defendant deposed that the Plaintiffs have no legal claim over the suit property. The property was inherited via transmission and now the ownership rights inhere in them and not the Plaintiff.



44. The 2nd Defendant further swore that the Plaintiffs have nothing to lose, and their only intention is to seek a share of the suit property which they have no right over.
45. I have considered the materials, submissions, and averments from the parties. The issue to decide is whether injunctive relief(s) can issue at this stage.
46. It cannot be gainsaid that the parties herein have been engaged in a wrangle over the suit property and there have been active court cases over the subject matter. The Plaintiffs claim the suit property is ancestral and each of the parties has a right to inherit or get a share of it. All are living and depend on it for survival. With the material I have and this being a land matter, whereas it could be germane to issue an injunction at this stage, it does not fit the circumstances I have on the ground. Under the Environment and Land Court Practice Directions 2014, this court has been granting status quo orders to preserve the subject matter pending full determination of the suit see for example Onguto J. in Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 others [2015] eKLR:

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of Mugah v Kunga [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice directions vide Gazette Notice No. 5178/2014 have followed suit. Practice Direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for the status quo to be maintained until the determination of the case. I however take note that the Gazette Notice was issued before this court’s July 16th 2014 decision.

The end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders: see *Texaco Ltd – v- Mulbery Ltd* [1972]1 WLR 814, but also when the court is of the view that as a case management strategy, it would be more proportionate and appropriate without prejudicing one party but both, to issue a “status quo” order.”

47. Whereas the Applicants had sought injunctive orders at this stage which orders differ from those of status quo to my mind the situation I have commends for issuance of status quo orders and therefore the instant application succeeds to that extent and I hereby issue the same to preserve the substratum of the suit property and based on the materials placed before me as follows:
- a) Parties to stick to the respective portions in occupation with no further development until this matter is heard and determined.
 - b) That there e will be no further sale of the suit property and subdivisions therefrom till this matter is heard and determined.
 - c) Each party is to bear own costs concerning the two applications.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 12TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of:

Mr. Yose for the Plaintiff

Mr. Lisanza for 2nd Defendant



Court Clerk: Happy

