



Salim & another v Dina Management Limited & 6 others (Environment & Land Petition 30 of 2011 & Environment & Land Case 153 of 2010 (Consolidated)) [2023] KEELC 19838 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 30 OF 2011 &
ENVIRONMENT & LAND CASE 153 OF 2010 (CONSOLIDATED)
SM KIBUNJA, J
SEPTEMBER 20, 2023**

BETWEEN

HASNA EBRAHIM SALIM PETITIONER

AND

DINA MANAGEMENT LIMITED 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE PRINCIPAL REGISTRAR OF TITLE 4TH RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 153 OF 2010**

BETWEEN

HASNA IBRAHIM ALI PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

BAWAZIR & COMPANY [1993] LIMITED 2ND DEFENDANT

ALI RAMADHAN 3RD DEFENDANT



RULING

1. The petitioner sought for ten (10) prayers vide their petition dated the 18th May 2011 inter alia;
 - a. Injunction order restraining the 1st respondent from continuing to construct the permanent barrier and walls across the public access road.
 - b. Mandatory order for 1st defendant to demolish the barriers or walls erected across the public road of access.
 - c. Injunction restraining any dealings on LR No. MN/1/6053.
 - d. Order that the alienation of LR No. MN/1/6053 was illegal and that the property is a public property forming part of the public beach.
 - e. Order to 4th respondent to cancel the illegal title in respect of LR No. MN/1/6053.
 - f. Order prohibiting the 3rd and 4th respondents from issuing any titles under the Registration of Titles Act chapter 281 of Laws of Kenya or any other legislation over the land between the petitioner's property and the high water mark along the beach.
 - g. Any other relief to enforce or secure the provisions of Articles 19, 20, 21, 22, 23, 40, 42, 69, and 70 of the Constitution of Kenya in relation to the petitioner.
 - h. Damages for loss suffered in respect of the violations of the petitioner's rights, title and interest in the suit property.
 - i. Costs.
2. In the plaint dated 11th April 2007, the plaintiff in ELC Case No. 153 of 2010, who is also the petitioner in the petition, seeks for the following prayers among others;
 - a. A declaration that the creation and subsequent allocation of plot numbers MN/1/6053, MN/1/11677, and MN/1/11516 are void ab initio.
 - b. An order for revocation/cancellation of the titles of plot numbers MN/1/6053, MN/1/11677, and MN/1/11516.
 - c. Damages for loss of value of the plaintiff's plot No. MN/1/1909.
 - d. Costs and interest.
 - e. Any other relief.

This suit was consolidated with the petition vide the order of 3rd September 2020. The 2nd defendant filed its statement of defence dated the 18th March 2008 among others averring that it had acquired interests in the suit property through a transfer for valuable consideration; that it transferred plot No. MN/1/6053 to Dina Management Limited for valuable consideration on the 11th July 2006 vide a transfer dated the 23rd June 2006; that the plaintiff lacks locus to sue over plot No. MN/1/6053; that the 2nd defendant is a stranger to the other two plots. The 1st defendant filed their statement of defence dated the 30th November 2011 denying any illegalities and seeking for the suit to be dismissed with costs. The record confirms that the learned counsel for the parties appeared before the court on the 2nd



- February 2022 and Ms. Langat for Attorney General sought and obtained leave to amend the defence in light of the consolidation.
3. The Deputy Civil Litigation Counsel for the 2nd and 4th respondents filed their response to the petition containing a preliminary objection that;
 - a. The suit is res judicata as the dispute has been heard and determined in Mombasa ELC Petition No. 8 of 2017: *Dina Management Limited v The County Government Of Mombasa* [Consolidated with Petition No. 12 of 2017: *County Government Of Mombasa v Dina Management Limited & 5 Others*].
 - b. That the prayers sought by the petitioner herein were also subject matter of an appeal to the Court of Appeal in Mombasa Civil Appeal No. 130 of 2019: *Dina Management Limited v The County Government Of Mombasa & 5 Others*.
 - c. That the petition and plaint herein be struck out with costs to the 2nd and 4th respondents.
 4. The record further confirms that on the 27th July 2022, counsel for the parties appeared before the court and Ms. Nzamza for the petitioner notified the court that the decision of Omollo J, in Petition No. 8 of 2017, consolidated with Petition No. 12 of 2017, that was against Dina Ltd had been confirmed by the Court of Appeal in CA No. 150 of 2019. The court directed counsel to file documents on all material facts and serve the other counsel. During the subsequent mention of the 27th February 2023, the court directed the learned counsel to file their submissions after which the court would render its ruling.
 5. The learned counsel for the petitioner/plaintiff and that for the 2nd and 4th respondents filed their submissions dated the 9th April 2023 and 12th July 2023 respectively which the court has considered.
 6. The following are the issues for the court's determinations on the issues raised by the petitioner/plaintiff and preliminary objection by the 2nd and 4th respondents;
 - a. Whether the issues in the petition and plaint have already been determined in the previous litigation, and if so whether the previous litigation was over the same subject matter, same parties or parties in privity with the previous ones.
 - b. Whether the issues in the petition and plaint are res judicata.
 - c. What orders commend themselves to be issued in respect of the petition and suit herein.
 - d. Who pays the costs.
 7. The court has carefully considered the ground on the 2nd and 4th preliminary objections, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions;
 - a. That the pleadings in this petition and ELC No. 153 of 2010 and the prayers therein are clearly related in that they revolve around illegality or otherwise of LR No. MN/1/6053. There are two other parcels MN/1/11677, and MN/1/11516 in the ELC No. 153 of 2010. The other prayers of injunction, cancellation of the titles and damages are common in both matters. The parties are more or less the same as it is apparent Dina Management Ltd title to MN/1/6053 is traceable to Bawazir & Company Ltd. The similarity in parties, subject matter, and prayers/reliefs must have been what informed the decision to consolidate them on 3rd September 2020.
 - b. It has not been disputed that ELC Petition No. 8 of 2017 as consolidated with ELC Petition No. 12 of 2017 were over parcel LR MN/1/6053. The parties were Dina Management v County Government of Mombasa, Chief Land Registrar & 4 Others and the matters were heard and decided vide the court's judgement delivered on the 19th September 2019 inter



alia declaring LR No. MN/1/6053 a public land forming part of the beach property, and its alienation and transfer to be void ab initio. That Dina Management Ltd appealed the decision in Mombasa Court of Appeal CA No. 150 of 2019 which appeal was dismissed on 4th June 2021.

- c. The court takes judicial notice that a further appeal was preferred to the Supreme Court of Kenya in *Dina Management Ltd v County Government of Mombasa & 5 Others* Petition No. 8 (E010) of 2021, and in a recent judgement delivered on the 21st April 2023, the appeal was dismissed. The court at paragraph (111) held that;

“ Article 40 of the *Constitution* entitles every person to right to property, subject to the limitations set therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

The petition and suit over MN/1/6053 are therefore res judicata. The fact that the highest court in the country has pronounced itself in respect of the illegality in the alienation of LR No. MN/1/6053, which is the same subject matter in this petition and one of the suit properties in ELC No. 153 of 2010, and the similarities/privity of the parties herein and the previous litigations, and the reliefs sought leads the court to only one conclusion, that the issues herein have already been decided by courts of competent jurisdiction.

- d. The two other parcels, LR No. MN/1/11677, and MN/1/11516 in ELC No. 153 of 2010 are not in issue in the petition and the previous litigations and the determination in the previous litigations do not make the suit over the said parcels res judicata. The litigation over the two properties should therefore be allowed to proceed to its logical end in accordance with the law. To do so, then there is need to deconsolidate the suit from the petition.
- e. The 2nd and 4th respondents’ preliminary objection on the ground of res judicata is therefore meritorious and is hereby upheld in respect of issues over LR No. MN/1/6053. This partially settles ELC No. 153 of 2010 and wholly ELC Petition No.30 of 2011.
- f. That having come to the conclusion that the issues in the petition and part of the suit herein are res judicata, and noting that the courts decisions in the previous litigations were made in the years 2019, 2021 and 2023 when these matters were already pending in court, then it is only fair and just for each party to bear their own costs in both matters as consolidated.
8. In view of the above conclusions on the submissions by the counsel for the petitioner/plaintiff and preliminary objection by the 2nd and 4th respondents, the court finds and orders as follows;
- a. That the court on its own motion hereby sets aside the order to consolidate ELC No. 153 of 2010 to this petition made on 3rd September 2020 and direct the two matters to proceed separately forthwith.
- b. That the 2nd and 4th Respondents’ preliminary objection that the issues in the petition are res judicata the previous litigation is upheld, and ELC Petition No. 30 of 2011 hereby struck out with each party bearing their own costs.



- c. That further, the plaintiff's claim in ELC NO. 153 of 2010 in respect of LR No. MN/1/6053 is equally *res judicata* the previous litigation and the 2nd and 4th respondents' preliminary objection is also upheld limited as such. The plaintiff be at liberty to amend their pleading to leave out LR No. MN/1/6053 and proceed with the remainder of the suit in accordance with the law. The attendant costs to be in the cause.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 20TH DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

