



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 19 OF 2020

ATHMAN RAMADHAN KOMBO

ABOUBAKAR MICHAEL KAZUNGU.....PLAINTIFFS

VERSUS

1. JOSEPH MBITHA KADENGE

2. ALI MOHAMED ALI (DECEASED)

3. DENMAN PROPERTIES LIMITED

4. THE HON. ATTORNEY GENERAL

5. KILIFI COUNTY LAND REGISTRAR.....DEFENDANTS

RULING

1. By this Notice of Motion dated 19th February 2020, Athman Ramadhan Kombo and Aboubakar Michael Kazungu pray for orders framed as follows: -

1.

2. *That the Honourable Court be pleased to order any titles issued subsequent to the title Number Kilifi/Jimba/34 measuring approximately 1.3 Ha registered in the names of 1st, 2nd and 3rd Defendants respectively is null and void as per the recommendation of the National Land Commission;*

3. *That the Honourable Court be pleased to order that the Applicants/Plaintiffs are the legal owners of title Number Kilifi/Jimba/341 measuring approximately 1.3 Ha illegally registered in the names of the 1st, 2nd and 3rd Defendants respectively vide the recommendation of the National Land Commission, and the Land Registrar Kilifi be and is hereby ordered to proceed and issue (a) title deed to Mr. Athman Ramadhan Kombo and Abubakar Michael Kazungu the Plaintiffs herein (as) the absolute legal owners of title Number Kilifi/Jimba/34; and*

4. *Costs be in the cause.*

5. The application which is supported by an affidavit sworn by the 1st Plaintiff-Athman Ramadhan Kombo is premised on the grounds that: -

i) The Applicants herein are the absolute owners of the said parcel of land whose title was illegally issued to the 1st Defendant before being transferred to the 2nd and 3rd Defendants;

ii) That the two Plaintiffs are the lawful owners of the said property as per the Kenya Gazette Notice issued by the National Land Commission on 15th February 2019;

iii) There is no prejudice that the Respondents will suffer if the orders sought are granted.

6. Joseph Mbitha Kadenge and Ali Mohamed Ali, sued herein as the 1st and 2nd Defendants neither entered appearance nor filed a response to the Plaintiffs' application. On their part, the Honourable the Attorney General and the Kilifi County Land Registrar sued as the 4th and 5th Defendants did file a Memorandum of Appearance herein on 10th March 2020 but did not respond to the application.

7. However, Messrs Denman Properties Ltd (the 3rd Defendant) is opposed to both the application and the suit as filed by the Plaintiffs. In a Replying Affidavit sworn by its shareholder and Director Sophia Abdullahi Chacha and filed herein on 27th July 2020, the 3rd Defendant affirms that it is the registered proprietor of a freehold interest in the said Title No. Kilifi/Jimba/341.

8. The 3rd Defendant further asserts that vide **Malindi Petition No. 11 of 2012**, it did together with other parties seek the grant of certain declarations and Judicial review orders in relation to various parcels of land, including the suit property herein. Following an advertisement in the newspapers notifying the Respondents of the filing of the said **Petition No. 11 of 2012**, the 1st Plaintiff herein filed a Chamber Summons application dated 28th May 2013 seeking inter alia, leave to be enjoined therein as an Interested Party and that the Judgment in the said Petition in reference to the suit property be applied in **Malindi ELC No. 11 of 2013**.

9. The 3rd Defendant further avers that by a consent recorded in Court on 13th May 2013, the 1st Plaintiff was enjoined as the 32nd Interested Party in **Malindi Petition No. 11 of 2012** and he subsequently filed an affidavit in opposition to the Petition on 21st June 2013.

10. In a Judgment delivered on 8th May 2015 in the said **Malindi Petition No. 11 of 2012**, the Court granted orders as follows; -

a) A declaration be and is hereby issued that the issuance of Certificate of Leases based on the Report of the Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2020 and the letter by the Hon, Gideon Mung'aro dated 20th August 2010 was in violation of Articles 3, 10, 27, 40 and 47 of the Constitution and Sections 10, 33 and 143 of the Registered Lands Act, Cap 300 of the Laws of Kenya (Repealed) hence unconstitutional, null and void ab initio.

b) A declaration be and is hereby issued that the 1st Petitioner (read the 3rd Defendant) is the legal proprietor of Parcels of Land Known as Kilifi/Jimba/ 342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344;

c) A declaration be and is hereby issued that the 2nd Petitioner is the legal proprietor of the Parcel of Land known as Kilifi/Jimba/312;

d) A declaration be and is hereby issued that the 3rd Petitioner is the legal proprietor for Parcels of Lands known as Kilifi/Jimba/323;

e) A declaration be and is hereby issued that the 4th Petitioner is the legal proprietor of Parcels of Land known as Chembe/Kibabamshe/396, 637, 638, 401, 423, 425, 428, 394 and 379;

f) An order of certiorari be and is hereby issued to bring to this Honourable Court for purposes of being quashed, Leases and Certificates of Lease that were issued in respect of the above suit properties.

e) An order of permanent injunction be and is hereby issued to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the Report of the Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2010 or in any other manner interfering with the Petitioners possession and ownership of their respective suit properties;

f) An order of mandamus be and is hereby issued compelling the 4th Respondent to restore the register in respect of the above mentioned parcels of land and issue to the Petitioners with Certificate of Search on payment of the requisite fees.

11. The 3rd Defendant therefore avers that in accordance with Section 7 of the Civil Procedure Act, the issue on the ownership of the suit property has been heard and finally decided upon and cannot again be reargued and tried. The 3rd Defendant further asserts that no appeal or review was preferred against the said Judgment rendered in **Petition No. 11 of 2012** and the orders of the Court have since been complied with by the Land Registrar Kilifi who has since restored the 3rd Defendant's name as the registered owner of the suit property.

12. In addition, the 3rd Defendant avers that it is a bona fide purchaser for value without notice having purchased the suit property from Ali Mohamed Ali (the 2nd Defendant) who is now deceased on 17th August 2006 at a consideration of Kshs 6,175,000/-.

13. It is further the 3rd Defendants case that vide **Judicial Review Application No. 1 of 2019**, it did together with other parties seek a number of reliefs in regard to the suit property as against the National Land Commission (NLC) and the Honourable the Attorney General. Subsequently, on 11th March 2019, this Court issued stay orders on the enforcement or execution of the National Land Commissions determination in regard to the suit property among others. Those orders were thereafter confirmed by the Court in a Judgment delivered on 17th June 2020.

14. The 3rd Defendant hence accuses the Plaintiffs herein of being guilty of material non-disclosure in failing to inform the Court that the 1st Plaintiff had instituted and been part of the cases wherein a determination was made in favour of the 3rd Defendant in respect of the suit property and urges the Court to dismiss the application with costs.

15. In addition to the Replying Affidavit, the 3rd Defendant has also taken out a Notice of Preliminary Objection dated and filed herein on 27th July 2020 in which it objects to both the application and the suit filed herein on the ground that; -

1. The Honourable Court vide its Judgment of 17th June 2020 in Malindi ELC Judicial Review Application No. 1 of 2019; Republic –vs- National Land Commission & Others Ex-parte Denman Properties Ltd & 2 Others quashed the determination of the National Land Commission on the property;

2. The issues canvassed in support of the Application and suit are res judicata the same having been directly and substantially in issue between, inter alia, the same parties in Malindi Petition No. 11 of 2012; Denman Properties Ltd & 4 Others –vs- The Hon. Attorney General & 6 Others wherein consent orders were recorded in respect thereof on 13th May 2013 allowing the 1st Plaintiff to be enjoined in the Petition as the 32nd Interested Party and the Petition was determined in favour of the 3rd Defendant among others vide the Judgment delivered on 8th May 2015.

3. The issues canvassed in support of the Application and suit are res Judicata the same having been directly and substantially in issue between, inter alia, the same parties herein in Malindi High Court Land Case No. 11 of 2013; Athman Ramadhan Kombo – vs- Denman Properties Ltd & 2 Others which was determined in accordance to the Judgment in Malindi Petition No. 11 of 2012 aforesaid.

16. I have perused and considered both the Plaintiffs' suit and the application as well as the Preliminary Objection thereto as filed herein by the 3rd Defendant. I have similarly taken full consideration of the rival submissions and authorities as placed before me by the Learned Advocates appearing for the said parties in these proceedings.

17. The Plaintiffs' application is based on their Complaint dated 19th February 2020 as filed herein on 21st February 2020. By the said Complaint, they urge this Court to cancel the 3rd Defendant's title No. Kilifi/Jimba/341 measuring approximately 1.3 Ha and to declare that the two of them are the legal owners thereof pursuant to a recommendation made by the National Land Commission.

18. The basis for this suit can be discerned from Paragraphs 7, 8 and 9 of the Complaint wherein the Plaintiffs aver that: -

“7. At all material times to this suit, the Plaintiffs herein are the absolute legal owner(s) of title Number Kilifi/Jimba/341 measuring approximately 1.3 Ha which title (was) illegally issued to Joseph Mbitha Kadenge then the 1st Defendant herein (sic) who sold and transferred it to Ali Mohamed Ali (the 2nd Defendant) (which) then (sold it) to Denman Properties Ltd (the 3rd Defendant) respectively;

8. That the Plaintiffs aver that on thorough investigations, including perusing records held at the Ministry of Lands the National Land Commission determined that the 1st and 2nd Plaintiffs Applicants herein are the proper legal owners of title Number Kilifi/Jimba/341; and

9. The Plaintiffs aver that the said title bearing the name of the 3rd Defendant as at now in this suit it (sic) had been revoked way back (on) 15th February 2019 by the National Land Commission (which) declared that the 1st and 2nd Plaintiffs are the genuine owners of the said property (which is the) subject matter (of) this suit.”

19. According to the 3rd Defendant however, those issues being raised by the Plaintiffs are res judicata as the same have been directly and substantially in issue between the same parties herein in some two previously filed and determined suits. It is therefore the 3rd Defendant's case that this Court has no jurisdiction to reconsider the same and that the same ought to be dismissed in limine.

20. The doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act as follow: -

“No Court shall try any suit 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.”

21. Explaining the parameters of the doctrine in **Independent Electoral and Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal observed as follows: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms: -

- a) The suit or issue was directly and subsequently in issue in the former suit;**
- b) The 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; and**

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.

22. In that same decision the Court went on to explain the role of the doctrine thus: -

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves. Without it, there would be no end to litigation, and the Judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rests in the public interest for swift, sure and certain justice.”

23. Accordingly, the res judicata principle is aimed at locking out from the Court system a party who, as they say, has had his day in a Court of competent jurisdiction from re-litigating the same issues against the same opponent in the same or a different Court. That being the case it then behoves this Court to examine the present suit vis-à-vis the former suits with a view to establishing if the elements of res judicata have been satisfied.

24. As it were, I was unable to find any pleadings filed by the Plaintiffs in response to the accusation that their pleadings were res judicata. That aspect is neither addressed in their pleadings nor in the submissions filed herein in support of the application. From the material placed before me however, it was not in dispute that the suit property- Kilifi/Jimba/341 was also one of the properties in dispute in ***Malindi ELC Petition No. 11 of 2012; Denman Properties Limited & 4 Others –vs- The Hon. Attorney General & 6 Others.***

25. In the said Petition, the 3rd Defendant among others had sued five National Government entities including what was described as the Ministerial Task Force on Land issues in Coast Province. That Task Force had been set up by the Ministry of Lands and Settlement in order to resolve various complaints on what was said to be irregularities in the allocation and issuance of titles to the 3rd Defendant among other entities.

26. In a report dated June 2010, the Special Task Force concluded that a number of parcels of land within Kilifi/Jimba and Chembe Kibabamshe adjudication areas were irregularly acquired and it proceeded to give a schedule of those parcels in an annexure to the Report. The suit property herein was one of the parcels of land indicated to have been so acquired and it was recommended that a new title be issued to the Plaintiffs herein.

27. Subsequently and by a Chamber Summons application dated 28th May 2013, the 1st Plaintiff sought inter alia leave to be enjoined as an Interested Party in the said ***Malindi ELC Petition No. 11 of 2012*** and that the Grounds of Opposition he had filed to the Petition be deemed as his response. In addition, the 1st Plaintiff sought orders to the effect that ***Malindi ELC Case No. 11 of 2013*** which he had filed against the 3rd Defendant and two others be stayed pending the hearing and determination of the Petition. The 1st Plaintiff equally sought orders to the effect that Judgment in ***Petition No. 11 of 2012*** be applied to the extent that it concerned LR No. Kilifi/Jimba/341, (the suit property) to ***Malindi ELC Case No. 11 of 2013*** filed by himself.

28. On 13th May 2013, the 1st Plaintiff's application was allowed by the consent of the parties and he was thereby enjoined as the 32nd Interested party in the Petition. Subsequently on 21st June 2013, the 1st Plaintiff filed an Affidavit in Opposition to the Petition in which he deponed inter alia that: -

i) The original proprietor of the suit property was one Zainab Musa Said who is step mother and that the said Zainab gave him the suit property in 1990 and since then he has been grazing domestic animals thereof under Giriama Customary Laws;

ii) The 3rd Defendant herein fraudulently and corruptly had the suit property registered in its name and that the 3rd Defendant has never occupied the suit property;

iii) When the area was declared an adjudication area, some unscrupulous people associated with fraudulent activities took advantage of the majority of the illiterate residents of the area such as his step mother Zainab and altered the adjudication records and thereafter became the registered owners of the land; and

iv) That the Court makes a comprehensive decision in Malindi Petition No. 11 of 2012 and that such decision be applied in Malindi ELC Case No. 11 of 2013.”

29. That Petition was subsequently heard and in a Judgment delivered herein by the Honourable Justice Angote on 8th May 2015 the Court determined inter alia as follows: -

i) A declaration be and is hereby issued that the issuance of Certificates of Leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 and the letter by the Hon. Gideon Mung'aro dated the 20th day of August 2010 was in violation of Articles 3, 10, 27, 40 and 47 of the Constitution and Sections 10, 33 and 143 of the Registered Land Act, Cap 300 of the Laws of Kenya (Repealed) hence unconstitutional, null and void ab initio;

ii) A declaration be and is hereby issued that the 1st Petitioner (the 3rd Defendant herein) is the legal proprietor of Parcels of Land known as Kilifi/Jimba/342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344,

iii)

iv)

v)

vi) **An order of certiorari be and is hereby issued to bring to this Honourable Court for purposes of being quashed, Leases, Certificates of Lease that were issued in respect of the above suit properties;**

vii) **An order of Permanent Injunction be and is hereby issued to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing or in any manner whatsoever the report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 or in any other manner interfering with the Petitioners possession and ownership of their respective suit properties; and**

viii) **An order of mandamus be and is hereby issued compelling the 4th Respondent to restore the register in respect of the above mentioned parcels of land and issue to the Petitioners with Certificates of Search on payment of the requisite fees.”**

30. Arising from the foregoing, it was evident to me that the subject matter in the said **Malindi Petition No. 11 f 2012** and the subject matter in the present suit is the same. Other than the 2nd Plaintiff who is said to have authorized the 1st Plaintiff to appear, plead and act on his behalf in this matter, both the 1st Plaintiff and the 3rd Defendant were parties in the previous litigation whose outcome was equally applied to **Malindi ELC Case No. 11 of 2013**. It is also clear to me that the issues in regard to the ownership of the subject parcel of land were clearly determined in favour of the 3rd Defendant.

31. It was not in dispute that no appeal or review has been preferred against the decision in both **Malindi Petition No. 11 of 2012 and ELC Case No. 11 of 2013**. Applying the law to the facts before me it was evident that despite the fact that the 2nd Plaintiff was not a party to the two former suits, he was privy thereto and their suit as filed herein is clearly barred under the doctrine of res judicata. As Mativo J stated in **Sceneries Ltd –vs- National Land Commission (2017) eKLR: -**

*“On the issue of res judicata, as Somervell L.J., stated in **Greenhalgh –vs- Mallard (1943) 2 ALL ER 234** it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. Clearly, the issues now raised by the Applicant touch on the same land, hence the first Interested Party was not only under a duty to disclose the details of previous litigation, but to provide evidence of the determination or status of each case for the Respondent to satisfy itself that the issues before it were not res judicata. A decision arrived at in a matter that has been decided before by a competent Court is open to legal challenge and is obviously tainted with illegality and or abuse of the Court process.”*

37. In the premises, I am satisfied that there is merit in the 3rd Defendant’s Notice of Preliminary Objection dated 27th July 2020. The Plaintiffs’ suit as filed is hopelessly misconceived and devoid of merit. Both the suit and the Motion are dismissed with costs to the 3rd Defendant.

Dated, signed and delivered at Malindi this 28th day of May, 2021.

J.O. OLOLA

JUDGE