



**Chalalu & Others v Tana & Athi River Development Authority (TARDA) & Others
(Environment & Land Case 322 of 2015) [2022] KEELC 3773 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3773 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 322 OF 2015

M SILA, J

JULY 7, 2022

BETWEEN

LAWRENCE CHALALU & OTHERS PLAINTIFF

AND

**TANA & ATHI RIVER DEVELOPMENT AUTHORITY (TARDA) &
OTHERS DEFENDANT**

*(Question whether the suit herein is res judicata; court determining
that the suit is res judicata given the judgment in the suit Malindi
ELC Petition No. 2 of 2015; suit struck out but no orders as to costs)*

RULING

1. This suit was commenced sometimes in the year 1994. It was originally filed against Tana and Athi River Development Authority (TARDA), the County Council of Tana River, and the Commissioner of Lands respectively. The plaintiffs averred that they have filed the suit on behalf of about 6,000 persons, residents of Kulesa, Wema and Hewani Villages in Tana River District which they contended comprised of Kulesa and Chunoni Trust Lands and/or Government Land. They pleaded that the trust land land was vested in the County Council of Tana River, holding it as trustee for the benefit of the residents therein. Their complaint was that the 1st defendant, TARDA, had taken over large portions of their trust land, which had not been set aside for its use, when they implemented the Tana Delta Irrigation Project (TDIP). They contended that the Commissioner of Lands issued to TARDA a letter of allotment which contained land occupied by the plaintiffs. The plaint was amended on 28 January 2022. The amendments were necessitated partly by the institution of the County Council of Tana River and the office of the Commissioner of Lands being rendered obsolete following the 2010 Constitution. These were substituted by the County Government of Tana River and the National Land Commission. Also at the time of filing suit, what TARDA had was only a letter of allotment. In the course of time, they were issued with a title, being LR No. 28026 registered as IR No. 152049.



The *Community Land Act*, was also enacted, and part of the law is that the former trust lands held by County Councils, is now community land under the County Governments. The claim however remains the same, that the land that TARDA has title to, covers land that ought to belong to the plaintiffs, formerly under the Trust *Land Act*, and now under the *Community Land Act*.

2. The amended plaint contains a disclosure of another suit, being Malindi ELC Constitutional Petition No. 2 of 2015, where it is said that the County Government of Tana River instituted suit against TARDA and the National Land Commission seeking revocation of TARDA's title to LR No. 28026, IR No. 152049. It is pleaded that judgment was delivered by Angote J, on 14 September 2016, which led to the revocation of this title. The plaintiffs contend that despite the order of revocation, the 1st defendant still continues to carry out farming activities on the land. In their suit, the plaintiffs seek the following orders :-
 - a. An order restraining the 1st defendant, its agents or servants from entering, occupying and/or carrying on any farming or other activities on any part of Kulesa and Chunoni Trust Community land.
 - b. A declaration that the 1st defendant has no power or authority to encroach upon or to carry on any farming or other activity on the community land.
 - c. An order restraining the 2nd defendant, its servants or agents from permitting or allowing the 1st defendant to carry out any farming or other activities in the said community land.
 - d. A declaration that the 3rd defendant the successor of the Commissioner of Lands cannot allocate and/or grant to the 1st defendant any part or portion of the land occupied by the plaintiffs and the residents of Hewani, Wema and Kulesa villages as the same constitutes community land to be appropriated and utilized by the residents of the said communities.
 - e. A declaration that grant No. LR 28026 registered as IR No. 152049 was issued unlawfully and irregularly and that the same be cancelled, revoked and/or annulled by this court.
 - f. An order compelling the 4th defendant to investigate and recall the entire process of the allocation and alienation of grant No. LR 28026 registered as IR No. 152049 and declare the same unlawful and unprocedural and proceed and initiate the process of registering the subject land in favour of the plaintiffs and the residents of Hewani, Wema and Kulesa villages under the *Community Land Act* in conjunction with the 2nd and 3rd defendants.
 - g. General damages.
 - h. Costs and interest thereon at court rates.
 - i. Such further or other relief as this court may deem fit to grant.
3. The suit in Malindi was filed in the year 2015 by the County Government of Tana River with TARDA being the 1st respondent and the National Land Commission the 2nd respondent. The petitioner averred that in the year 1995 the Commissioner of Lands issued to TARDA a letter of allotment, and in 2013, issued a lease, contrary to the laid down procedures and laws governing community land. The petitioner contended the project undertaken by TARDA has deprived thousands of people of their land. It asserted that the land was community land held in trust for the people of Tana River by the defunct County Council of Tana River. The case was heard and the petition was allowed with the following orders being made :-
 - a. A declaration be and is hereby issued that the actions of the 1st and 2nd respondents described in the petition are in contravention of articles 10, 40 and 56 of the *Constitution*.



- b. The grant in respect to land land registered as IR 152049 being LR No. 28026 and issued to the 1st respondent be and is hereby revoked.
 - c. A permanent injunction be and is hereby issued restraining the 1st respondent, its servants, employees, agents or contractors from dealing with the suit land in any manner whatsoever.
 - d. The respondents to pay the costs of the petition.
4. After the amended plaint was filed, I asked counsel to address me on whether this suit is res judicata given the suit Malindi ELC Petition No. 2 of 2015 and the subsequent judgment. This ruling is in respect of that question.
 5. It is the view of counsel for the defendants in this suit, that given the above, this suit is res judicata. Counsel for the plaintiffs however argues that the present suit is not res judicata, inter alia because the plaintiffs herein were not parties in that suit and further, that the plaintiffs herein have a constitutional right to be heard. It is argued that dismissing this suit after 28 years, and after the plaintiffs have gone through the trouble of amending and further amending the plaint, is prejudicial and unfair, and goes against the tenets of a fair hearing.
 6. I have taken note of all the arguments presented.
 7. The rationale behind the res judicata principle is that a court does not need to pronounce itself more than once on an issue, and where the issue in the suit was already decided in a previous suit, then the latter suit ought not to continue. There is sound reasoning in this principle and a very rational policy for it. First, and I think most importantly, you do not want a situation which can lead to a conflict of decisions. Where you end up having two or more different decisions, then you will introduce confusion into what order ought to be applied and which ought to be ignored. Secondly, you protect against double jeopardy and abuse of court process; essentially, a party should not be dragged to court over subject matter that has already been decided, to answer to the same question that he answered in previous litigation, and which question has already been decided. Thirdly, the principle applies in order to save resources, not just of the parties, but of the court as well; there is no need of wasting court's time, and resources of the parties, to have the court hear a dispute that has already been decided.
 8. In Kenya, the res judicata principle is well brought out in section 7 of the *Civil Procedure Act*, chapter 21, Laws of Kenya, which provides as follows :-

7. Res judicata

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.

Explanation.— The expression “former suit” means a suit which has been —
 (1) decided before the suit in question whether or not it was instituted before it.

Explanation.— For the purposes of this section, the competence of a court shall —
 (2) be determined irrespective of any provision as to right of appeal from the decision of that court.



Explanation. The matter above referred to must in the former suit have been
— alleged by one party and either denied or admitted, expressly or
(3) impliedly, by the other.

Explanation. Any matter which might and ought to have been made ground
— of defence or attack in such former suit shall be deemed to have
(4) been a matter directly and substantially in issue in such suit.

Explanation. Any relief claimed in a suit, which is not expressly granted by the
— decree shall, for the purposes of this section, be deemed to have
(5) been refused.

Explanation. Where persons litigate bona fide in respect of a public right or
— of a private right claimed in common for themselves and others,
(6) all persons interested in such right shall, for the purposes of this
section, be deemed to claim under the persons so litigating.

9. From the above it will be seen that the following elements apply, being :-
- i. The matter must have been directly and substantially in issue in the former suit.
 - ii. The former suit must be one between the same parties, or between parties under whom they or any of them claim, litigating under the same title.
 - iii. The matter was heard by a court competent to try the subsequent suit.
 - iv. The matter was heard and finally decided.
10. In my opinion, the above test is met in the circumstances of the suit before me. In the present suit, what the plaintiffs ultimately want is the nullification of the title of the 2nd defendant. It will be recalled that the petition in Malindi also sought the nullification of title of the 2nd defendant. In the petition, the court agreed with the petitioner and nullified the title of the 2nd defendant. The issue of whether or not the title of the 2nd defendant should be cancelled is therefore an issue that was directly and substantially in the former suit and is also the main issue in this suit. On whether or not the former suit was between the same parties or parties under whom they litigate, I have no doubt. The County Government of Tana River was not pursuing the petition for itself, but for the benefit of the plaintiffs herein, who are allegedly the occupants of the land. It is not a must for one to be a party to the former suit for *res judicata* to apply. It is enough that in the former suit, the plaintiff therein was capable of representing the interests of the plaintiff in the subsequent suit, and did present the said interest, which led in a determination of rights affecting the plaintiff in the latter suit. There can be no doubt that the court that heard the dispute and this court are of the same jurisdiction, and there can be no question about the competency of the court that heard the previous suit and the court hearing the present case. The issue of whether or not title should be retained by the 2nd defendant was decided.
11. It will be recalled that counsel for the plaintiff argued that it will be an affront to the plaintiff's right to be heard. My short answer is that the plaintiffs have already been heard in the previous suit through the agency of the County Government of Tana River. Whatever they seek in this suit, which is the cancellation of title of the 2nd defendant, has already been given in the previous suit. What is the point in re-hearing the same dispute? There is no point at all. Need I say more? I don't think it is necessary.
12. It is clear to me that this suit is *res judicata*. It is hereby struck out. I will however make no orders as to costs.



13. Orders accordingly.

DATED AND DELIVERED THIS 7 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

