



REPUBLIC OF KENYA



KENYA LAW
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**Merry Beach Limited v General & 17 others (Environment & Land
Case 5 of 2011) [2022] KEELC 2360 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2360 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 5 OF 2011**

MAO ODENY, J

JULY 5, 2022

BETWEEN

MERRY BEACH LIMITED PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, KILIFI 4TH RESPONDENT

THE DIRECTOR OF PHYSICAL PLANNING 5TH RESPONDENT

THE DIRECTOR OF SURVEYS 6TH RESPONDENT

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 7TH
RESPONDENT**

THE COUNTY GOVERNMENT OF KILIFI 8TH RESPONDENT

**THE OFFICER COMMANDING POLICE DIVISION, MALINDI 9TH
RESPONDENT**

GIMALOWI COMPANY LIMITED 10TH RESPONDENT

EXEMPLER LIMITED 11TH RESPONDENT

SHARIFF M MOHAMED 12TH RESPONDENT

P.M. NDOLO 13TH RESPONDENT

LA MARINA LIMITED 14TH RESPONDENT

MALINDI MUSKETEERS LIMITED 15TH RESPONDENT

SHARRIF N HABIB 16TH RESPONDENT



HILDEGARD JUNG 17TH RESPONDENT

DANIEL RICCI 18TH RESPONDENT

RULING

1 This ruling is in respect of a Notice of Motion dated May 7, 2021, by the Petitioners seeking the following orders: -

1. That Judgment delivered herein on the 30th day of October 2015 be deemed as judgment in Malindi HCCC N. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No. 31 of 2009 and Malindi HCCC No. 40 of 2011.
2. That the decree issued herein be deemed as the decree in Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No 31 of 2009 and Malindi HCCC No. 40 of 2011.
3. That the execution of the decree herein be deemed as execution in Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No 31 of 2009 and Malindi HCCC No. 40 of 2011.
4. That there be stay of any further proceedings, orders or execution if any in Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No 31 of 2009 and Malindi HCCC No. 40 of 2011.
5. That costs to this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Petitioner/applicant's Submissions

- 2 The applicant's case is based on the grounds on the face of the application together with the Supporting Affidavit of Walter Kilonzo sworn on May 7, 2021 where he depones that the suits Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No 31 of 2009 and Malindi HCCC No. 40 of 2011 were all stayed pending the hearing and determination of this Petition. Mr. Kilonzo deposed that all parties in the aforementioned suits were made parties to this Petition which was heard and determined on October 30, 2015.
- 3 That before this Petition was heard and determined, the court in HCCC No. 52 of 2007 had adopted a consent Judgment dated 23rd September 2011. That a company identified as Itakey Investment Limited, which had unsuccessfully sought to be joined herein, then commenced proceedings in Malindi HCCC No. 52 of 2007 where it obtained a stay of execution on 16th October 2019, of the warrants to give possession issued in this Petition.
- 4 It is the Petitioner's case that the stay order issued in HCCC 52 of 2007 has since stayed all operations of all the other parties in the suits since the suit properties have become inaccessible.
- 5 Counsel submitted that the main issue for determination is whether or not this Petition is a test suit for Malindi HCCC No. 52 of 2007, Malindi HCCC NO. 69 OF 2007, Malindi HCCC NO. 48 of



2008, Malindi HCCC No. 56 of 2008, Malindi HCCC NO. 31 of 2009 and Malindi HCCC NO. 40 of 2011.

- 6 Counsel described a test suit according to legal dictionary as a case that tests the validity of a particular law and establishes the legal rights or principles and thereby serve as precedents for future similar cases.
- 7 Mr. Otara submitted that by staying all these suits pending the determination of this Petition, this Petition became the test suit for all the stayed suits and urged the court to allow the application as prayed.

1st 2nd 3rd 4th 5th 6th 7th And 9th Respondents' Submissions

- 8 The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th Respondents opposed the application through the office of the Attorney General and filed Grounds of Opposition dated 2nd July 2021.
- 9 In the Grounds of Opposition counsel submitted that on the 30th October, 2015, Judgment Justice Angote delivered a Judgment in Malindi HCCC No. 5 of 2011. However, the Judgment was expressly mute on the outcome of the proceedings in Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No. 31 of 2009 and Malindi HCCC No. 40 of 2011 which had been stayed earlier.
- 10 That a consent judgment by parties in Malindi HCCC No. 52 of 2007 was adopted as an order of the Court by Hon. Lady Justice H.A Omondi on 23rd December, 2011 prior to filing of this case. Counsel also stated that the Petitioner was not even a party in HCCC 52 of 2007 and that the Defendants in the stayed suits were neither parties in this Petition nor the instant application.
- 11 Ms Lutta submitted that the Judgment in this Petition was res judicata the consent Judgment in HCCC 52 of 2007.
- 12 Ms Lutta identified two issues for determination as follows: -
- a. Whether the Petition herein can be deemed to be a test suit with respect to Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007 Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No. 31 of 2009 and Malindi HCCC No. 40 of 2011.
 - b. Whether judgment herein delivered on 30th October, 2015 could bind all parties in Malindi HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007 Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No. 31 of 2009 and Malindi HCCC No. 40 of 2011.
- 13 On the first issue, therespondents relied on the definition of a test suit as captured in the Cambridge English Dictionary to mean a case in a court of law that establishes principles in relation to which other similar cases are considered in the future.
- 14 Ms Lutta submitted that this definition is in conformity with Order 38 Rule 1 of the *Civil Procedure Rule* and that for a suit to be deemed a test suit, a party had to make an application by way of motion when the matter was still ongoing and not when the matter has been concluded.
- 15 Counsel relied on the case of *Joseph Murage Weru v Stephen Kariuki Kabubi* [2014] eKLR where the court held that an application for selection of a test suit cannot be made in an already determined suit.
- 16 On the second issue, counsel submitted that the Petitioner ought to have filed an appeal to the consent judgment delivered in HCCC 52 of 2007 instead of this Petition as per Section 34 of the Civil Procedure Act. That a valid court judgment could not be challenged by filing another suit and relied



on the cases of *Virnekas Mwanabarusi Nihazi v Boniface Kabindi Katana & 2 others* [2019] eKLR; *DML V ML* [2016] eKLR; and *Eutybus Mwangi Karanja & other v KTDA & another* [2014] eKLR.

Analysis And Determination

17 This application seeks that the judgment in this Petition applies to HCCC No. 52 of 2007, Malindi HCCC No. 69 of 2007, Malindi HCCC No. 48 of 2008, Malindi HCCC No. 56 of 2008, Malindi HCCC No. 31 of 2009 and Malindi HCCC No. 40 of 2011 which were stayed pending the hearing and determination of this Petition. The application seeks that this Petition be deemed as a test suit in respect of the above suits.

18 Selection of a test suits is covered by Order 38 of the *Civil Procedure Rules*, which provides as follows: -

1. Staying several suits against the same defendant [Order 38, rule 1.]

Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.

2. Staying similar suits upon application by defendant [Order 38, rule 2.]

Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues.

19 Rule 1 above is very clear that the defendant in the suits must be similar and the issues to be tried also similar for an order to be granted that one of the suits be tried as a test suit. In this case, the parties in these suits have no similarities with the current Petition which the petitioner wants the court to adopt as a test suit *ipso facto*. A perusal of the said judgment delivered in this petition, indicates that only the 10th and 11th Respondents herein were parties in HCCC 52 of 2007. Neither the petitioner nor the other respondents were parties therein.

20 Counsel argued that staying of the other suits implied that the present Petition was a test suit which in my view does not hold any water. An order for staying suits and identifying one to be a test suit must be specifically granted and such directions given. The parties must also agree on which case amongst the cases should be the test case.

21 In the case of *Joseph Murage Meru v Lucy Wangui Chege & another* [2013] eKLR the court emphasized that such selection of a test suit must be made through a formal application. The court held as follows: -

Although it is clear that the Applicant combined the Application for leave to issue third party notices with the application for consolidation, it is not so clear whether an application for test case was made. While the application for consolidation could even be made orally in court, the selection of a test suit does not afford such latitude; the court has to be moved through a formal application. Such an application does



not seem to have been filed even though parties are at consensus that a test suit was, nevertheless, selected.”

- 22 The same court in a different ruling cited by the respondents *Joseph Murage Meru v Lucy Wangui Chege & another* (*supra*) aptly explained Order 38 above as far as when a selection of test suit could be made. Ngaah J held: -

According to this rule, as I understand it, an application for selection of a test suit presupposes that there are pending issues for determination in the suits out of which one is sought to be selected as a test suit. Where a suit has been determined it can certainly not be selected as a test suit and neither can it be a subject of an application for selection of a test suit. The reason is fairly simple to see from this rule; there are no pending issues to be tried in such a suit.

- 23 In view of the provisions of Order 38 rule 1, an application made for selection of a test suit in an already concluded suit would appear to me to be misconceived.”
- 24 The petitioner has not demonstrated that there was a formal application made and granted, declaring this Petition a test suit. The court cannot impose a judgment to apply to parties who were neither parties nor participated in the proceedings that culminated into the judgment. This would be taking away the parties right to be heard.
- 25 I have considered the application together with submissions by Counsel and find that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

