



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 63 OF 2020**

**MWADZAYA WACHANDA CLAN WELFARE**

**REGISTERED TRUSTEES & 58 OTHERS.....PLAINTIFFS**

**VERSUS**

**1. PETROL OIL KENYA LTD**

**2. SAID ZEMBE BADI**

**3. SALAT ABDULLAHI MOHAMED**

**4. JAVICK & COMPANY**

**5. THE LAND REGISTRAR, KILIFI**

**6. THE DIRECTOR OF SURVEYS**

**7. THE ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. I have before me for determination a Notice of Motion application dated 18<sup>th</sup> August 2020 as well as a Notice of Preliminary Objection dated 15<sup>th</sup> September 2020.

2. By the said Motion, the Mwadzaya Wachanda Clan Welfare Registered Trustees and 58 Other Plaintiffs pray for orders that: -

*3. The Honourable Court be pleased to issue an order of temporary injunction directed to the Defendants/Respondents jointly and severally restraining them from in any manner acting by themselves, or through their agents, nominees, heirs, cronies and/or anyone purporting to act with their authority from evicting them, displacing them, alienating further their land comprised formally in Kilifi/Madzimbani/Mitangoni/160 now sub-divided to Kilifi/Madzimbani/Mitangoni/841, a sub-division of Kilifi/Madzimbani/Mitangoni/834 registered in the name of the 1<sup>st</sup> Respondent, Kilifi/Madzimbani/Mitangoni/842, a sub division of Kilifi/Madzimbani/Mitangoni/834 registered in the name of the 4<sup>th</sup> Respondent, Kilifi/Madzimbani/Mitangoni/852, a sub-division of Kilifi/Madzimbani/Mitangoni/843 and so to sub-division 851 both registered in the name of the 2<sup>nd</sup> Respondent and Kilifi/Madzimbani/Mitangoni/836 registered in the name of the 5<sup>th</sup> Respondent, pending the hearing and determination of this suit;*

**4. Costs of the Application; and**

**5. Any other order that the Honourable Court may deem fit to grant to meet the ends of justice in this matter.**

3. The application is supported by an affidavit sworn by one Mohamed Menza Yama (the 2<sup>nd</sup> Plaintiff) who describes himself as one of the Trustees of the 1<sup>st</sup> Plaintiff and is premised on the grounds that: -

*i) The Plaintiffs are members of the Mwadzaya Wachanda Clan of the Duruma Tribe who are the ones in possession of the disputed parcel of land;*

*ii) At the time of adjudication, the Plaintiff representative, one Mgandi Mambo Mgambo was noted on the initial adjudication proposed Plot No. Kilifi/Madzimbani/Mitangoni/160 after boundaries were established by the Adjudication Officer and the 2<sup>nd</sup> Defendant was shown to hold a portion of their interest whose boundaries are known to-date;*

*iii) The Plaintiffs have been involved in several disputes over land with the 2<sup>nd</sup> Defendant and that the dispute led to the death of one of them in the year 2015;*

*iv) The Plaintiffs houses and the graves of their loved ones who have departed, stand on the land hence an eviction therefrom will be a grave injustice unless done for lawful reasons;*

*v) Unknown to the Plaintiffs, their land has been sub-divided without their consent and knowledge and without a Surveyor going to the ground;*

*vi) The Plaintiffs were surprised to see a notice issued by the 1<sup>st</sup> Defendant pinned on an electricity post setting a time frame to evict people from land parcel Nos. Kilifi/Madzimbani/Mitangoni/835 and 841;*

*vii) The Plaintiffs have never sold their land to anyone and hence the need to grant the orders sought pending the determination of the suit;*

*viii) The balance of convenience lies in the Plaintiffs favour as they are the ones in possession and have their homes on the land.*

4. The application is however opposed by Petrol Oil Kenya Ltd (the 1<sup>st</sup> Defendant). In a Replying Affidavit sworn and filed herein on 15<sup>th</sup> September 2015 by its Advocate on record Gikandi Ngibuini, the 1<sup>st</sup> Defendant avers that the dispute herein has been the subject of the following cases; -

*i) Mombasa High Court Misc Civil Application No. 172 of 2009; Mohamed Menza & Others –vs- Mwanhanje Zembe & Zaidi Zembe Badi (Representative of the Estate of Badi Zembe Fondo) & Another;*

*ii) Kaloleni Senior Resident Magistrate Civil Case No. 23 of 1998; Mwanhanje Zembe & Zaidi Zembe Badi (Representatives of the Estate of Badi Zembe Fondo) –vs- Ndurya Katana;*

*iii) Mombasa High Court Civil Appeal No. 45 of 1998; Ndurya Katana –vs- Kaloleni Land Dispute Tribunal Case No. 25 of 1998; Mwanhanje Zembe & Zaidi Zembe Badi (Representatives of the Estate of Badi Zembe Fondo);*

*iv) Mombasa High Court Civil Suit No. 326 of 2007; Ndurya Katana –vs- Said Badi Zembe;*

*v) Kaloleni Land Disputes Tribunal Case No. 25 of 1998; Mwanhanje Zembe & Zaidi Zembe Badi (Representative of the Estate of Badi Zembe Fondo) –vs- Ndurya Katana;*

*vi) Appeal to the Minister Lands Adjudication, Appeal Case No. 216 of 2017; David Munyika Dalu & Others –vs- Saidi Zembe Badi; and*

*vii) Kaloleni Land Disputes Case No. 160 Mohamed Menza Yama –vs- Saidi Badi Zembe.*

5. Accordingly, the 1<sup>st</sup> Defendant avers that this suit and the application filed herein is res judicata and an abuse of the Court process and urges the Court to dismiss the same with costs.

6. Further and in addition to the Affidavit in reply, the 1<sup>st</sup> Defendant has raised a Preliminary Objection dated 15<sup>th</sup> September 2020 objecting to both the application and the suit on the ground that: -

*(1) This suit amounts to res-judicata as the issues raised herein have already been decided in several suits (as listed in the Replying Affidavit) and as such, this suit is an abuse of the Court process.*

*(2) In light of the above, this Honourable Court is divested of jurisdiction to hear and/or issue determination on the application and the suit.*

7. By a further Replying Affidavit sworn by the 1<sup>st</sup> Defendant's Chief Executive Officer Benjamin Kingori and filed herein on 28<sup>th</sup> October 2020, the 1<sup>st</sup> Defendant avers that sometime in the year 2017, it did approach Said Zembe Badi (the 2<sup>nd</sup> Defendant) who is the beneficial owner of the parcel of land known as Plot No. 160 Madzimbani/Mitangoni Adjudication Section with a view to purchasing the same.

8. The 1<sup>st</sup> Defendant avers that it did conduct due diligence and found that the 2<sup>nd</sup> Defendant's father had a dispute with the Plaintiffs' representatives regarding the suit property. Via a **Land Award Case No. 23 of 1998**, the Kaloleni Land Disputes Tribunal determined that the 2<sup>nd</sup> Defendant's family were the rightful occupants of the property. That award was subsequently adopted as an order of Court in **Kaloleni SRMCC Case No. 23 of 1998; Mwanhanje Zembe & Another –vs- Ndurya Katana**.

9. The 1<sup>st</sup> Defendant avers that the Plaintiffs were not happy with the award and their representatives then lodged **Appeal No. 301 of 2004** to the Provincial Appeals Tribunal. That Appeal was dismissed on 29<sup>th</sup> November 2007. In the meantime, the Plaintiffs had also appealed the decision adopted in **Kaloleni SRMCC Case No. 45 of 1998**. That Appeal was dismissed by the Court on 3<sup>rd</sup> May 2004.

10. The 1<sup>st</sup> Defendant further avers that the Plaintiffs once again filed **Mombasa HCCC No. 326 of 2007; Ndurya Katana –vs- Saidi Badi Zembe** seeking a declaration that the proceedings of the Kaloleni Land Disputes Tribunal were illegal and a nullity. That suit was again dismissed on 6<sup>th</sup> June, 1998. The Plaintiff representatives finally instituted **Mombasa High Court Misc Civil Application No. 172 of 2009; Mohamed Menza & Others –vs- Mwahanje Zembe and Others** seeking to quash the warrants to the Court Bailiff to give possession of the land. The said application was dismissed on 2<sup>nd</sup> October 2009.

11. The 1<sup>st</sup> Defendant avers that having been satisfied that the 2<sup>nd</sup> Respondent was the beneficial owner of the property it did enter into a sale agreement dated 30<sup>th</sup> June 2017 in which it purchased six acres of the suit property from the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant is now the registered proprietor of the sub-divisions known as Kilifi/Madzimbani/Mitangoni 835 and 841.

12. The 1<sup>st</sup> Defendant further avers that the Plaintiffs registered the Mwadzaya Wachanda Clan Welfare Registered Trustees (the 1<sup>st</sup> Plaintiff) on 10<sup>th</sup> November 2015 in order to jump the hurdle of res judicata which they knew would catch up with them by virtue of the many cases they have filed.

13. I have perused and considered the Plaintiffs' application as well as the Preliminary Objection as filed by the 1<sup>st</sup> Defendant. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

14. The 59 Plaintiffs herein pray for an order of injunction restraining the Defendants jointly and severally from evicting them from the suit property- Kilifi/Madzimbani/Mitangoni/ 160 together with its various sub-divisions. The 1<sup>st</sup> Defendant has however raised an objection to the jurisdiction of this Court asserting that the subject matter of this dispute has been litigated and determined in various other suits and that the same is therefore, res judicata.

15. The doctrine of res judicata is captured under Section 7 of the Civil Procedure Act as follows: -

***“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.”***

16. The doctrine of res judicata has been explained in a plethora of decided cases. In **Independent and Electoral Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal pronounced itself 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 substantially 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.***

***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.”***

17. That same Court explained 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.”***

18. That being the case, my understanding of the doctrine of res judicata is that it is meant to lock out from the Court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.

19. In their Plaint filed herein on 24<sup>th</sup> August 2020, the 59 Plaintiffs styling themselves as the members of the Mwadzaya Wachanda Clan Welfare Registered Trustees (which is indeed the 1<sup>st</sup> Plaintiff herein) pray for Judgment against the seven Defendants jointly and severally

for orders listed as follows: -

**a) A declaration that the Certificate of Titles issued to the 1<sup>st</sup> to 4<sup>th</sup> Defendants by the 5<sup>th</sup> and 6<sup>th</sup> Defendants are fraudulent and (that) the same be recalled by Court and (be) revoked/cancelled namely:- Kilifi/Madzimbani/Mitangoni/841 registered in the name of the 1<sup>st</sup> Defendant, Kilifi/Madzimbani/Mitangoni/842 registered in the name of the 4<sup>th</sup> Defendant, Kilifi/Madzimbani/Mitangoni/851 and 852 registered in the name of the 2<sup>nd</sup> Defendant and further orders to issue directed to the 5<sup>th</sup> and 6<sup>th</sup> Defendants to rectify the entries in the register to reflect the Plaintiff as the proprietors of the suit property jointly as Plot (No.) Kilifi/Madzimbani/Mitangoni/160;**

**b) The share due to the 2<sup>nd</sup> Defendant whose boundaries are known as at 19<sup>th</sup> July 2012 be demarcated and removed from Kilifi/Madzimbani/Mitangoni/160 and remainder be registered in favour of the Plaintiffs to hold under the Mwadzaya Wachanda Clan Welfare Registered Trustees (the 1<sup>st</sup> Plaintiff);**

**c) A permanent injunction do issue restraining all the Defendants from in any manner evicting, tampering with boundaries, register and/or in any manner whatsoever interfering with the proprietorship rights of the Plaintiffs to the property;**

**d) Damages for trespass due to anxiety caused by the alteration of the register to dispossess the Plaintiffs of their land;**

**e) Costs of this suit; and**

**f) Any other order the Honourable Court will deem fit to grant to meet the ends of justice in this matter.**

20. Those prayers arise from the Plaintiffs contention that the Plaintiffs are the owners of the parcel of land described as Kilifi/Madzimbani/Mitangoni/160 which has now been sub-divided into various portions known as Kilifi/Madzimbani/Mitangoni/834, 836, 841, 842, 843, 851 and 852. The Plaintiffs aver that they have been in occupation and possession of the said property since pre-independence times and that a dispute arose over the ownership of the land in 1966 and that the same was resolved in their favour by the African Court at Kaloleni in **Case No. 23 of 1966**.

21. The Plaintiffs aver that during the process of land adjudication in their area, a temporary Certificate of Title was issued in the name of one Mgandi Mambo Mgandi (now deceased) and Saidi Zembe Badi (the 2<sup>nd</sup> Defendant) for the suit property. It is their case that the said Mgandi Mambo Mgandi held their interest in the land in trust for their Wachanda Clan while Said Zembe Badi (the 2<sup>nd</sup> Defendant) had a small portion which was marked out and held on behalf of himself and his extended family.

22. The Plaintiffs further aver that they have had a long standing dispute with the family of Said Zembe Badi (the 2<sup>nd</sup> Defendant) and that they recently discovered that the 2<sup>nd</sup> Defendant had secretly sub-divided the land and sold portions thereof to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that titles had been issued to them in collusion with the 5<sup>th</sup> to 7<sup>th</sup> Defendants thereby precipitating the dispute in Court.

23. The 1<sup>st</sup> Defendant however contends that while indeed the parties may have had a long dispute over the property, the issues in contention have been finally adjudicated upon and determined in favour of the 2<sup>nd</sup> Defendant in several other Courts. The 1<sup>st</sup> Defendant therefore urges this Court to find that this present suit has been filed in abuse of the Court process and that the same ought to be dismissed for being res judicata the previous proceedings.

24. In response to that accusation, the Plaintiffs in the Supplementary Affidavit of Menza Mohamed Yama filed herein on 26<sup>th</sup> October 2020 aver at paragraph 8 thereof as follows: -

**“8. That further to the above deposition, all the cases referred to at paragraph 2 (a) – (f) (of Mr. Gikandi Ngibuini’s Affidavit filed on 15<sup>th</sup> September 2020) were decided before the disputed parcel of land came into existence and therefore do not relate to the current dispute in Court. All the Title Deeds held by the Defendants/Respondents came into existence in the year 2019 and 2020. Hence they were not subject matter of the previous suit raised by the 1<sup>st</sup> Respondent in its objection.”**

25. In further reference to the existence of other suits, the Plaintiffs also assert as follows at paragraphs 11 and 29 of their Plaint dated 15<sup>th</sup> August 2020: -

**“11. The Plaintiffs aver that there is a pending suit in the High Court at Mombasa being Civil Suit No. 562 of 2011 Mombasa in which the suit involved the 2<sup>nd</sup> Defendant and Another as Defendants.**

**29. There is a suit pending and there have been previous proceedings in Court between some of the parties herein being Civil Case No. 563 of 2011 (Mombasa) and the cause of action in this Plaint relates to the Plaintiffs named.”**

26. A copy of the Plaint in the said **Mombasa HCCC No. 563 of 2011** is annexed to the Plaintiffs bundle of documents. A perusal thereof reveals that the said suit was instituted by some four (4) Plaintiffs listed therein as follows: -

**1. Ramadhan Ali Mwatsahu (suing as the Legal Representative of the Estate of Ali Mwadzaya- deceased).**

**2. Mgandi Mambo Mgandi.**

3. **Buru Mgandi Nyota and**

4. **Tayari Mwachabu.**

27. The four prayed for Judgment against the two Defendants named therein as Mwahanje Zembe and Said Zembe Badi (the 2<sup>nd</sup> Defendant herein) for: -

1) **A permanent injunction restraining the Defendants whether by themselves, their servants, agents, employees or otherwise howsoever from evicting the Plaintiffs from, or selling, disposing of or in any manner whatsoever dealing or interfering with, the land at Mitangoni, Mariakani decreed to Ali Mwadzaya (deceased) in Kaloleni African Court Land Case No. 23 of 1966- Ali Mwadzaya –vs- Dunda s/o Kasitu;**

2) **A declaration that the Plaintiffs and members of the family of Ali Mwadzaya (deceased) are the lawful and beneficial owners of the land at Mitangoni, Mariakani decreed to Ali Mwadzaya (deceased) in Kaloleni African Court Case No. 23 of 1966- Ali Mwadzaya –vs- Dunda s/o Kasitu, on 1.11. 1966 entitled to the use, occupation and possession of the said land to the exclusion of the Defendants, their agents, servants and/or any person claiming under them and an order do issue to the Commissioner of Lands to issue or cause to be issued titles to the aforesaid land in favour of the Plaintiffs;**

3) **Costs of and incidental to this suit; and**

4) **Any further relief (the) Court may deem fit and just to grant.**

28. The Plaintiffs who derive their claim to title herein from their association with the 2<sup>nd</sup> Plaintiff in the said case- Mgandi Mambo Mgandi, have not offered any explanation why they abandoned the said suit which they aver is pending, to file this present one seeking very similar orders in regard to the suit property.

29. From a perusal of the material placed before me however, it was apparent that the said **Mombasa HCCC No. 563 of 2011** was instituted to stop an eviction of the Plaintiffs after the 2<sup>nd</sup> Defendant herein emerged successful in a number of litigations that had been on-going between the Plaintiffs through various representatives on the one part and the 2<sup>nd</sup> Defendant on the other.

30. Sometime in 1998 following a dispute between the Plaintiffs parents Ndurya Katana, Kinyama Katana and Tayari Katana on the one side and the 2<sup>nd</sup> Defendant's father one Badi Zembe Fondo over the suitland, the 2<sup>nd</sup> Defendant's father lodged a case before the Kaloleni Land Disputes Tribunal which case culminated in **Kaloleni SRMCC Land Award Case No. 23 of 1998** in favour of the 2<sup>nd</sup> Defendant's father. That award was challenged by the Plaintiffs vide **Mombasa High Court Civil Suit No. 45 of 1998**.

31. From a perusal of the Ruling of the Honourable L. Njagi J delivered at Mombasa on 6<sup>th</sup> June 2008, in **Mombasa HCCC No. 326 2007; Ndurya Katana –vs- Said Badi Zembe**, it is apparent that **Mombasa HCCC No. 45 of 1998** was dismissed for want of jurisdiction. It was also clear that upon the dismissal of the said **HCCC No. 45 of 1998**, the Plaintiffs' representatives instituted **Appeal No. 301 of 2004 in the Coast Provincial Land Disputes Appeals Tribunal** in respect of the award issued earlier in Kaloleni. That Appeal was dismissed however for being filed out of time.

32. Subsequently, the Plaintiffs representatives Ndurya Katana instituted **Mombasa High Court Civil Suit No. 326 of 2007; Ndurya Katana –vs- Said Badi Zembe**. By an application therein dated 18<sup>th</sup> December 2007, the said Ndurya Katana sought orders: -

1. **That (the) Honourable Court be pleased to order stay of execution of any decree emanating from the award of the Kaloleni Land Dispute Tribunal which was adopted by the Kaloleni Court as its own Judgment on the 29<sup>th</sup> June 1998, pending the final determination of this suit;**

2. **That the costs of the application be in the cause.**

33. That application was essentially premised on the grounds that the Applicant had not been summoned at all during the hearing of the Kaloleni Land Dispute Tribunal Case and that all the proceedings before the Tribunal were conducted ex-parte in his absence and that the award was therefore illegal, flawed and unprocedural. Having heard the said application, the Honourable Justice Njagi in his Ruling delivered on 6<sup>th</sup> June 2008 aforesaid determined that the Applicant had appeared before the Tribunal at least three times but had declined to testify unless the then Provincial Commissioner came to testify before the Tribunal. The Learned Judge further determined that the Applicant had filed his Appeal to the Provincial Tribunal out of time and dismissed the application for stay.

34. A few months later and without waiting for the conclusion of the said **Mombasa HCCC No. 326 of 2007**, some seven Applicants herein) namely Mohamed Menza (now the 2<sup>nd</sup> Plaintiff herein), William Kinyama (now the 7<sup>th</sup> Plaintiff herein), Jackson Marahaba, Hamisi Tayari (now the 4<sup>th</sup> Plaintiff), Tom Mgandi Ndurya (the 12<sup>th</sup> Plaintiff), Said Kinyama, and Shadrack Katana (the 22<sup>nd</sup> Plaintiff) moved to Court vide **Mombasa High Court Civil Application No. 172 of 2009** against one Mwahanje Zembe and the 2<sup>nd</sup> Defendant herein seeking judicial review orders as follows: -

1. **An order of certiorari to issue from (the) Honourable Court to remove to this Court for purposes of being quashed namely:**

a) **Warrant to the Court Bailiff to give possession of land issued by the Senior Resident Magistrate Kaloleni Law Courts dated 24/2/2009.**

b) Decree dated 25/8/2004 by DM II (Prof)

c) Map drawn by S.K Juma dated 12/03/2009.

2. An order of prohibition to issue to prohibit the Respondents whether by themselves, their agents, servants or assigns from evicting the applicants from their homes and abode.

3. An order of prohibition to issue to prohibit the Resident Magistrates Court at Kaloleni to stop the same Court from issuing execution order attaching plots belonging to the Applicants.

35. The application for Judicial review orders was again dismissed on 2<sup>nd</sup> October 2009 for having been brought out of time. In her Ruling dismissing the application, the Honourable Justice M. Odero observed as follows in summary of the dispute at pages 2 to 3 of her Ruling: -

**“This dispute which began way back in 1998 involves the suitland which is situated at the Mitangoni Area of Mariakani. The Kaloleni Land Disputes Tribunal did conduct hearings and determined that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were the proper occupants of the suit land vide Land Award No. 25 of 1998. This award was duly adopted as a Judgment of the Court by its Judgment dated 29/6/1998. The Applicants filed an appeal against this decision vide Civil Appeal No. 45 of 1998 at Mombasa High Court. This appeal was dismissed by Hon. Lady Justice Joyce Khaminwa on 3/5/2004. Six years went by and the Applicants filed an appeal against the first award before the Provincial Land Disputes Tribunal. This was struck out on the basis that it was time-barred on 29/11/2007. Following that the applicants filed a suit in the Mombasa High Court No. 326 of 2007 which remains unconcluded to-date. The applicants continued to file several other objections and applications before the Kaloleni Resident Magistrates Court all of which were dismissed. They have now finally come to Court seeking to quash the decision of the Land Tribunal by way of Judicial Review. Before I proceed to analyse the merits or otherwise of this present application it is important to state that the applicants herein are not the original litigants who appeared in 1998 in Kaloleni. They are the sons of the original defendants in Land Award No. 25 of 1998 one Ndurya Katana. Likewise, the Plaintiff in that original case Badi Zembe Fondo is now deceased and his brother and son Mwahanje Zembe and Saidi Zembe Badi having obtained Letters of Administration ad litem in respect of his estate are the Respondents in this matter.”**

36. It was apparent that following the refusal to grant the Judicial review orders, the Respondents therein sought to enforce the warrant in possession of the Court Bailiff and hence the institution of **Mombasa HCCC No. 563 of 2011** which the Plaintiffs make reference to. While as stated they have not given reasons for their failure to follow through with the case, it is apparent from the analogy given by the 2<sup>nd</sup> Defendant in his pleadings that the Plaintiffs once again abandoned those proceedings to pursue land adjudication which was on-going in the area pursuant to orders given in the said case on 5<sup>th</sup> July 2012 and that when that quest failed, they instituted the present proceedings.

37. From the extract of the orders of the Honourable Lady Justice Mary Katsango issued on 5<sup>th</sup> July 2012, in the said **Mombasa HCCC No. 563 of 2011**, the Court issued orders restraining the Defendants from evicting the Plaintiffs from the suit property for a period of one year. The reasons for the one-year restraint can be discerned from the minutes of the meeting of the 1<sup>st</sup> Plaintiff Clan held on 8<sup>th</sup> July 2012 attached to their List of Documents. A perusal of the minutes reveal that the area in which the suit property was situated had been declared an adjudication area and the Plaintiffs were confident that their claim would be settled through the process.

38. In the Supporting Affidavit to the application before me, the 2<sup>nd</sup> Plaintiff avers at paragraph 3, 7 and 9,10,14 and to 15 on behalf of his Co-Plaintiffs as follows: -

**“3. That on the onset, I wish to bring to the notice of the Court that Mgandi Mambo Mgandi who was also a Trustee of the Mwadzaya Wachanda Clan Welfare Registered Trustees (1<sup>st</sup> Applicant) is deceased. His name is the one that was entered into the register jointly with that of the 2<sup>nd</sup> Defendant/Respondent and a Temporary Certificate of Title was given, as was the practice by the demarcation officer, Madzimbani Mitangoni Section of the Adjudication area Kilifi County. Annexed hereto are copies of the documents marked as MMY- 3” (page 010-011 of List of Documents).**

**7. That the Plaintiffs/Applicants also rely on the Judgment of Court delivered by the African Court at Kaloleni in Land Case No. 23 of 1966 where Judgment awarded the land to the Mwadzaya Wachanda Clan. Annexed hereto, is a Copy marked as “MMY- 6” (page 067-085 of the List of Documents).**

**9. That during Land Adjudication in the area, the Demarcation Officer In-charge of Madzimbani, Mitangoni Adjudication Section, Kilifi, one I.M Sembeya identified the area and marked it out and issued a temporary Certificate of Title in the joint names of Saidi Zembe Badi who is the 2<sup>nd</sup> Respondent and Mgandi Mambo Mgandi (Deceased) as aforesaid herein on 19<sup>th</sup> July 2012 and recorded it as Kilifi/Madzimbani/Mitangoni/160. (Annexed hereto is a copy marked MMY -8 (page 087-088 of List of Documents).**

**10. That Said Zembe Badi is a brother to Rashid Badi who was allowed to reside on a small portion by the Plaintiffs/Applicants “Mbari Elder” who is a Duruma leader known as Ndurya Katana around the year 1988.**

**Rashid Badi was allowed to construct a house on one (1) acre, the consideration was because he had married a Mwadzaya Wachanda Clan Lady. A dispute that arose later was settled by the Chief and his Assistant. (Annexed is a copy of the letter marked as MMY- 8A (page 089 of List of Documents).**

**14. That the 2<sup>nd</sup> Defendant/Respondent was sued in Court by four (4) families including that of Mgandi Mambo Mgandi (Deceased) via High Court Civil Case No. 563 of 2011 (Mombasa) which is still pending in Court. (Annexed hereto marked as**

*“MMY-10” is a copy of the Complaint (page 105-110 of List of Documents).*

**15. That Ruling of an injunction delivered in the above case on 5<sup>th</sup> July 2012 confirmed an injunction however the same has been discharged by lapse of time...**

39. Despite their high hopes, it is apparent that the Plaintiffs were not successful even after they re-submitted the matter to adjudication. From the proceedings of the Madzimbani/Mitangoni Adjudication Committee **Case No. 25 and 174 of 2012**, dated 13<sup>th</sup> September 2012, the Plaintiffs case was dismissed after the Tribunal found in part as follows; -

***“The disputed land has been in various Courts of law from the lowest to the most highest Court thus High Court and in every ruling the Plaintiff Mr. Said Zembe was always awarded depending on facts stated in the proceedings.***

***-The defendant of Case No. 174 Mr. Mgandi Mambo on behalf of his representative Mr. Mohamed Menza confirmed and agreed with the Proceedings and rulings of all the documents presented before this Court by his opponent Mr. Said Zembe.***

***- The Sketch Map presented was well described and rubber stamped by the Judge during the Courts ruling at Mombasa.***

***- The case ruling of Kaloleni Case No 23 of 1966 thus Ali Mwatsaya –vs Ndurya Kasitu which Mr. Menza presented to this committee which Ali Mwatsaya won in the ruling, was not accepted by this Court (Committee) since the ruling of the case was in favour of all the people staying in Mitangoni Location, but not for a family of Mgandi Mambo since the same proceedings was presented by Said Zembe Badi.”***

40. The Plaintiffs did not however stop there. Instead, they lodged another objection **No. 283 of 2014** through the 2<sup>nd</sup> Plaintiff and sought a determination in their favour. That objection was dismissed by the Arbitration Board on 7<sup>th</sup> May 2015. Thereafter one David Munyika Dalu lodged an appeal to the Minister pursuant to Sections 29 of the Land Adjudication Act being **Appeal No. 216 of 2017** against the 2<sup>nd</sup> Defendant. That Appeal was once again dismissed in favour of the 2<sup>nd</sup> Defendant on 23<sup>rd</sup> October 2017.

41. As it were, the primary issue raised in this suit is whether or not the Plaintiffs are entitled to the property known as Kilifi/Madzimbani/Mitangoni/160 and or its sub-divisions, being Kilifi/Madzimbani/Mitangoni/834, 841, 842, 843, 851 and 852. Arising from the foregoing analogy, it is evident that the same issues have been raised and have been substantially addressed by the Courts and tribunals that have handled the numerous cases filed herein.

42. While a number of the Plaintiffs in the present proceedings are not the same as those that may have participated in the previous proceedings, it was clear to me that in all their facets, the Plaintiffs have been representing their various family members and that they have all been litigating under the same title as beneficial or historical owners of the suit property. The registration of the 1<sup>st</sup> Plaintiff herein on 10<sup>th</sup> November 2015 was indeed aimed at pursuing their protracted claim on the land.

43. As Majanja J observed in **Edwin Thuo –vs- Attorney General & Another Nairobi Petition No. 212 of 2012 (2012) eKLR**: -

***“The Courts must always be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action that has been resolved by a Court of competent jurisdiction.”***

44. In the circumstances herein, I am in agreement with the submissions of the 1<sup>st</sup> Defendant that the present suit is merely aimed at embarrassing and harassing the Defendants. Having been adjudged in various instances since 1998 as the rightful proprietor of the suitland, the 2<sup>nd</sup> Defendant had every right to dispose of portions of the suitland to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as there was nothing to prohibit any such alienation.

45. The Plaintiffs and/or their representatives have involved the 2<sup>nd</sup> Defendant in particular in at least eight different litigations over the ownership of the suit property and it is incumbent upon this Court to offer him closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by competent Courts and tribunals.

46. At any rate, having tried to bring the dispute within the ambit of the Land Adjudication Act, the Plaintiffs have now exhausted their claim under the said Act. Having filed an objection under Section 26 of the Act, the Plaintiffs had only a period of 60 days to appeal that decision. And having filed an Appeal to the Minister, they must be satisfied with the decision made therein as final pursuant to Section 29 of the Act. In that respect, the Plaintiffs could only be allowed to return to this Court by way of Judicial review and not by a fresh claim as they have done herein.

47. In the premises, I find and hold that there is merit in the Preliminary Objection dated 15<sup>th</sup> September 2020 as filed herein by the 1<sup>st</sup> Defendant. This suit runs a foul the provisions of Section 7 of the Civil Procedure Act. It is not only res judicata but res subjudice **Mombasa HCCC No. 326 of 2007 as well as Mombasa HCCC No. 563 of 2011**. Its institution was done in abuse of the Court process. It is accordingly struck out with costs.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of July, 2021.**

J.O. OLOLA

JUDGE