



Mwatsuma & 4 others (Suing in Their Capacity as the Bona Fide Occupants and Owners of Land No 368/11 /Mn, 370/11/Mn and 367/11/Mn Utange Mombasa) v Karama & 12 others (Constitutional Petition E004 of 2024) [2025] KEELC 6192 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E004 OF 2024**

JO OLOLA, J

SEPTEMBER 25, 2025

**IN THE MATTER OF: ARTICLES 22 (1), (2) 6, 23 (1), (3)
165 (3) AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF ARTICLE 2 (1)
(5), 19 (1), (2), (3), 35 (1)(2), 40 (1), (3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 16 AND 24
OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS (ACHPR)**

AND

**IN THE MATTER OF: LAND PARCEL NO. 368/11/MN UTANGE MOMBASA
MEASURING 2.74 ACRES, 370/11/MN MEASURING 2.18 ACRES**

AND

IN THE MATTER OF: THE REGISTERED LAND ACT 300 LAWS OF KENYA

BETWEEN

**ONESMUS MWATSUMA 1ST PETITIONER
JAPHET MWATSUMA 2ND PETITIONER
KAHINDI MWATSUMA 3RD PETITIONER
KADZO MWATSUMA 4TH PETITIONER
JOSEPH KALAMA MWATSUMA 5TH PETITIONER
SUING IN THEIR CAPACITY AS THE BONA FIDE OCCUPANTS AND
OWNERS OF LAND NO 368/11 /MN, 370/11/MN AND 367/11/MN UTANGE
MOMBASA**



AND

ARIF KHAMISI KARAMA	1 ST RESPONDENT
ABUBAKAR KHAMISI SWALEH	2 ND RESPONDENT
FARJALWA SHADAU AHMED	3 RD RESPONDENT
ESTATE OF AHMED BIN MATANO	4 TH RESPONDENT
BULKON BUILDERS LTD	5 TH RESPONDENT
ZOLA GARDENS LTD	6 TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA	7 TH RESPONDENT
CHIEF LAND REGISTRAR MOMBASA	8 TH RESPONDENT
NATIONAL LAND COMMISSION	9 TH RESPONDENT
COUNTY SURVEYOR MOMBASA	10 TH RESPONDENT
OMAR MOHAMED AHMED MATANO	11 TH RESPONDENT
SHAIBU MOHAMED AHMED	12 TH RESPONDENT
ADAWIYA MOHAMED AHMED	13 TH RESPONDENT

RULING

1. There are two applications before the court. In the first application dated 28th October 2024, Bulkon Builders Ltd (the 5th Respondent) prays for orders:-
 1. That the Petition dated 26th **January 2024 be struck out;**
 2. That such consequential orders be made as this Honorable court deems fit; and
 3. That the costs of the application be to the 5th **Respondent**
2. The Application which is supported by an Affidavit sworn by a director of the 5th Respondent – Nileshikumar Bhimji Harii is premised on the grounds: -
 - i. That the 5th Respondent is sole registered and beneficial owner of the land registered as No. 367/II/MN;
 - ii. That the Petitioners have no locus standi to file the Petition as against the Respondents as trespassers to the suit property;
 - iii. That the 2nd Petitioner had instituted ELC Case No. 113 of 2019; Japhet Mramba Mwatsuma & 20 Others –vs- Bulkon Builders Ltd, claiming that they had acquired the suit property by way of adverse possession but the same was dismissed on 31st January 2024
 - iv. That the Petitioners are forum shopping in different divisions of the High Court seeking to have a favourable judgment for their unlawful occupation of the suit property;
 - v. That this Honorable Court has no jurisdiction to grant the prayers as sought in the Petition; and



- vi. That the Petition is an abuse of the court process, time and resources and ought to be struck out *ex debito justitiae*.
3. In the second application dated 19th February 2025, Arif Khamis Karama and Abubakar Khamis Karama (the 1st and 2nd Respondents respectively) similarly pray for orders as follows:
 1. That this Honorable Court be pleased to strike out the Petition as the same constitutes an abuse of the court process;
 2. That to avert further abuse of the court process and bring litigation to an end this Honorable Court be pleased to exercise its discretion and order the Petitioners to vacate the suit property being a parcel of land known as Plot No. 368 Section 11 Mainland (sic) within 30 days from the date of its ruling failure of which the 1st and 2nd Respondents under the supervision of the Officer Commanding Bamburi Station be at liberty to evict the Petitioner at their own costs; and
 3. That the Petitioners be compelled to pay the costs of this application.
4. The second application is supported by an affidavit sworn by the 2nd Respondent and is premised on the grounds:
 - a. That there has been a multiplicity of court proceedings between the parties in respect of the suit property.
 - b. That the 1st and 2nd Respondents filed Civil Case No. 179 of 2014 against the Petitioners in respect to the suit property being a suit for trespass.
 - c. That before the determination of the said suit, the Petitioner and others instituted Civil Case No. 3030 of 2016 against the 1st and 2nd Respondents in respect to the suit property and the same was struck out on 19th October 2017.
 - d. That consequently on 23rd November 2018, a judgment was delivered in respect of Civil Case No. 179 of 2014 wherein the court upheld the Petitioners' claim for adverse possession. The said judgment was however overturned by the Court of Appeal on 22nd July 2022; and
 - e. That in the circumstances it is clear that the instant Petition has been brought to defeat the Court of Appeal judgment of 22nd July 2022 and to continue abusing the court process.
5. The Petitioners are opposed to the first application. In a Replying Affidavit sworn on their behalf by Japheth Mramba Mwatsuma (the 2nd Respondent) on 5th May, 2025, the Petitioners categorically deny that the Petition constitutes an abuse of the court process or that it amounts to duplicity or multiplicity or proceedings.
6. The Petitioners aver that the proceedings in Mombasa Civil Case No. 179 of 2014 and Civil Case No. 303 of 2016 are materially and substantially different from the present Petition both in their legal foundation and in terms of the reliefs sought. They assert that this Petition raises constitutional and/or administrative law violations including breaches of various Articles of *the Constitution* and that the said issues have not been previously canvassed or determined in any other forum.
7. The Petitioners further aver that even though related or parties may overlap, the legal issues raised herein are novel and were not and could not have been fully addressed in the prior or pending proceedings. They assert that the doctrine of sub-judice and res judicata do not apply in the manner stated by the Respondents as no court has previously heard and determined the issues raised herein.



8. I have carefully perused and considered the two applications as filed by the 1st, 2nd and 5th Respondents as well as the responses thereto by the Petitioners. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
9. The five (5) Petitioners have approached this court by way of a Constitutional Petition dated 26th January 2024 alleging violation of their fundamental rights and freedoms under Articles 19, 20, 21, 22, 23, 35 and 40 of *the Constitution* of Kenya, 2010 and corresponding rights under the African Charter on Human and Peoples' Rights.
10. The Petitioners contend that they have been for decades in uninterrupted occupation and possession of the parcels of land known as Plot Nos. 368/II/MN, 370/II/MN and 367/II/MN located in Utange within Mombasa County. The Petitioners assert that over the said decades, they have developed permanent houses, raised families and established their livelihoods on the said properties. It is the Petitioners' case that the Respondents have fraudulently procured titles to the suit properties and have since sought to evict them without offering them due process or observing constitutional safeguards and thereby, infringing upon their rights to property, fair administrative action and access to information.
11. By the two applications before me the 1st and 2nd Respondents on the one hand as well as the 5th Respondent on the other urge the court to strike out the Petition on various grounds. The crux of the argument by the Respondents is that the present Petition constitutes an abuse of the court process as the issues raised therein have been the subject of other court proceedings and that the same have been previously adjudicated and conclusively determined. The Respondents submit that the Petitioners are by this Petition attempting to re-litigate matters that have already been determined by courts of competent jurisdiction.
12. The Petitioners do not deny that there have been other proceedings relating to the same parties and the subject properties herein. It is however their case that even though some facts or parties may overlap, in regard to the previous proceedings and the present Petition, the legal issues raised herein are novel and were not and could not have been fully addressed in the prior or pending proceedings. It is accordingly the Petitioners' position that the doctrines of sub-judice and res judicata do not apply in the circumstances herein.
13. The doctrine of res judicata is captured under Section 7 of the Civil Procedure Rules as follows:

“No court shall try any suit or issue in which the matter 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 subsequently been raised and has been heard and finally decided by such court.”
14. Arising from the foregoing, it is clear that the doctrine operates as a bar to subsequent proceedings where there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy.
15. From the material placed before the court, it was not in dispute that the 5 Petitioners are the offspring of one Mzee Mwatsuma Mramba Malingi who passed away on 7th April 2016. Sometime in the year 2014, the 1st and 2nd Respondents instituted Mombasa ELC Case No. 179 of 2014 against Mzee Mwatsuma and one Daniel Mwatsuma seeking the following reliefs:
 - a. A declaration that the Defendants actions are illegal;



- b. A mandatory injunction to compel the Defendants to pull down to the ground the structures they have illegally erected on the Plaintiffs' Plot No. 368 Section II Mainland North situated at Utange within Mombasa County and to remove any debris or waste from the suit property;
 - c. An order to restrain the Defendants from fencing, alienating, wasting, trespassing, upon or in any other way interfering or dealing with the Plaintiffs' Plot No. 368 Section II Mainland North;
 - d. Damages for trespass; and
 - e. Costs of and incidental to the suit.
16. In their Statement of Defence filed in court on 22nd September 2014, the two Defendants denied that the 1st and 2nd Respondents herein were the registered proprietors of the said parcel of land pleading instead that they have been in occupation of the same since time immemorial and that they had acquired interest over the same. The Defendants further pleaded that they would be raising a counterclaim on adverse possession for having lived on the land since 1963.
 17. Upon hearing the suit and in a judgment rendered on 23rd November 2018, the court dismissed the 1st and 2nd Respondents' case stating that by their long stay thereon, the Defendants had acquired rights thereon. The court further directed the 1st and 2nd Respondents to hand over and execute transfer of title documents in favour of the Defendants forthwith.
 18. Aggrieved by the said determination, the 1st and 2nd Respondents instituted Mombasa Court of Appeal Civil Appeal No. 61 of 2019 seeking to overturn the decision. In a judgment delivered on 22nd July 2022, the Court of Appeal set aside the judgment of the ELC delivered on 23rd November 2018 and substituted the same with an order allowing the Appellant's suit as prayed in their Plaint dated 14th July 2014.
 19. By that decision, the Court of Appeal had clearly declared that the Petitioners acts on the suitland were illegal and issued a mandatory injunction compelling them to pull down to the ground the structures they had illegally erected on the 1st and 2nd Respondents' Plot No. 368/II/MN. In addition, the court issued an order restraining the Petitioners from fencing alienating wasting trespassing upon or in any other way interfering or dealing with the suit property.
 20. Similarly, it was evident from the material placed before the court that on 25th June 2019, the 2nd Petitioner herein suing on his own behalf and on behalf of 20 others had instituted ELC Case No. 113 of 2019 against the 5th Respondent herein claiming to have acquired title to Land Parcel No. 367/II/MN by way of adverse possession. The Petitioners have not denied that the said suit was dismissed on 31st January 2024.
 21. Some 5 days before the dismissal of the said ELC Case No. 113 of 2019, the Petitioners instituted this Petition asserting that they are the occupants of Plot Nos. 368/II/MN, 370/II/MN and 367/II/MN wherein they have built permanent houses. The Petitioners accuse the Respondents of fraudulently obtaining titles to the parcels of land and illegally erecting a perimeter wall over the same.
 22. By their Petition herein, the Petitioners aver that the thirteen (13) Respondents denied, violated, infringed upon and threatened their constitutionally guaranteed rights and urge this court to:
 - i. Make a declaration that the 1st, 2nd and 3rd Respondents pursuant to the transfer and sale of land described as 368/II/MN, 370/II/MN and 367/II/MN Utange Mombasa was not lawful;



- ii. Make a declaration that the Petitioners who are the occupants of the land described as No. 368/II/MN, 370/II/MN and 367/II/MN who were permitted to live on the land by the owner Ahmed Bin Matano are at liberty to apply for joint ownership title to the registrar of titles Mombasa;
 - iii. Make a declaration that land title CR No. 1000 in the names of the 3rd Respondent be investigated by the DCI Mombasa together with the one in possession of the 1st, 2nd, 3rd, 5th and 6th Respondents and the DCI to file their findings in this court;
 - iv. Make a declaration that the 3rd Respondent had no moral authority and/or permission to transact any business on the land occupied by the Petitioners No. 368/II/MN, 370/II/MN and 367/II/MN Utange Mombasa;
 - v. Make a declaration that the title of ownership in the name of the 1st, 2nd, 3rd, 5th and 6th Respondents was obtained through a flawed and fraudulent process to deprive the Petitioners their constitutional rights which is anchored under Article 22 and 40 of *the Constitution* of the Republic of Kenya 2010; and
 - vi. Make a declaration that the activities of the 1st, 2nd, 3rd, 5th and 6th Respondents on the Petitioners occupied land should cease forthwith and if there are damages required, the 1st, 2nd, 3rd, 5th and 6th Respondents should compensate the Petitioners.
23. From a perusal of the brief facts in support of the Petition, it was apparent that the Petitioners were merely trying to re-litigate the previous cases between them and the Respondents. It was also apparent that despite previous orders of the court that they vacate the suit premises, the Petitioners had stayed put and that they are trying to sanitize their continued occupation thereof through this Petition.
24. The scope of the doctrine of res-judicata has been elaborated in various decisions by the courts. In the case of Kenya Commercial Bank Limited & Another –vs- Muiri Coffee Estate Limited & 3 Others [Motion 42 and 43 (consolidated) [2016] KESC 6 KLR], the Supreme Court of Kenya rendered itself on the doctrine as follows:
- “ 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner’s pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.



53. In *Silas Make Otuke v. Attorney-General & 3 Others*, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v. The AG of Trinidad and Tobago* (1991) LRC (Const.) 1001, in which the Board was “satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of *res judicata*”.
54. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
25. Arising from the foregoing, it was self-evident that the submissions by the Petitioners that the legal issues raised in this Petition were novel and that the same were not and could not have been fully addressed in the previous proceedings were as erroneous as they were misleading.
26. As was stated in the case of *E.T. –vs- Attorney General & Another* (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 which has been resolved by a court of competent jurisdiction. In the case of *Omondi -vs- National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted *Kuloba J.*, in the case of *Njangu –vs- Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)* where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*”
27. In my view the addition of the other Petitioners and Respondents such as the Chief Land Registrar, the County Government of Mombasa and the National Land Commission are mere cosmetic changes which do not affect my conclusion. The issue of who between the Petitioners and the Respondents is entitled to the suit properties is the common thread running through all the suits filed herein. That issue has been resolved by courts of competent jurisdiction and it cannot be re-opened merely by renaming the dispute a Constitutional Petition and packaging the same differently as one concerning the enforcement of fundamental rights.
28. To my mind, the declarations that the Petitioners are seeking herein were essentially *res judicata*. The cosmetic face lift vide addition of new parties and twisting the cause of action did not operate to negate the doctrine of *res judicata*.
29. In the premises, I find merit in the two Motions dated 28th October 2024 and 19th February 2025. I hereby allow both and strike out the Petition dated 26th January, 2024.



30. The Petitioners are hereby directed to vacate the suit properties within 30 days from today failure to which the Respondents under the supervision of the Officer Commanding Bamburi Police Station be at liberty to evict them.
31. The 1st, 2nd and 5th Respondents shall have the cost of Petition and the applications.
32. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 25TH DAY OF SEPTEMBER, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Oyao Advocate holding brief for Obonyo for the Petitioners
- c. Mr. Mwadzoyo Advocate for the 1st and 2nd Respondents
- d. Mr. Ondego Advocate for the 5th Respondent
- e. Mr. Salim Advocate for the 6th Respondent
- f. Ms. Magdaline Advocate for the 9th Respondent

