



Yaa & another v National Land Commission & 4 others; Chogo (Interested Party) (Environment and Land Case 151 of 2016 & 180 of 2017 (Consolidated)) [2025] KEELC 6495 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 151 OF 2016 & 180 OF 2017 (CONSOLIDATED)
FM NJOROGE, J
SEPTEMBER 30, 2025**

BETWEEN

KARISA JEFWA YAA PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR-KILIFI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

CHRISTINE NIKAJE 4TH DEFENDANT

AND

LAWRENCE KAZUNGY CHOGO INTERESTED PARTY

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 180 OF 2017

BETWEEN

CHRISTINE NIKAJE EPHRAIM (SUING AS ADMINISTRATOR OF THE ESTATE OF DINA MSHENGA - DECEASED) PLAINTIFF

AND

KARISA JEFWA YAA DEFENDANT

AND

LAWRENCE KAZUNGU CHOGO INTERESTED PARTY



RULING

1. The Applicant's Amended Notice of Motion dated 17/2/2025 filed under the provisions of sections 1A, 1B, 3, 3A, 7, 8, 63(e), 80 of the *civil Procedure Act*, Order 1 Rule 3, Order 12 Rule 7, Order 34 Rule 3 and Order 45 Rule 1 of the Civil Procedure Rules Cap 21 Laws of Kenya and Section 13 of the *Environment and Land Court Act* is the subject of this ruling. The reliefs sought therein are:
 1.Spent;
 2. That in the interest of justice, leave be granted to Lawrence Kazungu Chogo the Applicant herein to be enjoined in ELC Case No. 151 of 2016 as the 4th Defendant and in ELC Case No 180 of 2017 as the 2nd Defendant;
 3. Spent;
 4. That the judgment delivered on 15/1/2025 herein be varied, reviewed and set aside on its entirety;
 5. That ELC Case No. 151 of 2016 and ELC Case No. 180 of 2017 be struck out and or be dismissed with costs because they are res judicata, misuse and abuse of the court process;
 6. Cost of the application.
2. The application is based on the grounds set out in the notice of motion. It is further supported by an affidavit sworn by the Applicant on an even date, wherein he deposed that he became aware of this suit on 16/1/2025 after the impugned judgment was delivered on 15/1/2025. He averred that there is discovery of new evidence and error apparent on the record; that the judgment is conflicting the judgment delivered on 17/4/2015 in Mombasa ELC No. 5 of 1979 Lawrence Kazungu Chogo v Karisa Jefwa Yaa, Dina Mshenga, Land Registrar, Kilifi, the Land Adjudication and Settlement Officer, Kilifi, the Settlement Fund Trust and the Attorney General, over the same subject land Kilifi/Mtwapa/1, where he was declared the owner of the said property. The judgment was exhibited and marked LK4.
3. The Applicant asserted that he temporarily allowed Karisa Jefwa Yaa to remain on the suit property as a squatter and not as a caretaker for Dina Mshenga as he alleged in this suit. He maintained that the 2015 judgment has never been set aside or successfully appealed against, therefore, the present suits were an abuse of the court process, res judicata and should be struck out with costs. He asserted that he is a crucial party in the consolidated suit and should be joined as a defendant.
4. The Plaintiff filed a replying affidavit which he swore on 29/1/2025, in support of the application.
5. The 4th Defendant, Christine Nikaje Ephraim, opposed the application. She denied the existence or authenticity of a judgment allegedly delivered by the late Hon. Justice S.R. Mukunya on 17/4/2015 in Mombasa ELC Case No. 5 of 1979.
6. She averred that no error exists on the face of the record nor has any new evidence been discovered to justify the application. The 4th Defendant avers that there is no record in the Mombasa registry confirming the filing or hearing of the alleged 1979 case and states that upon inquiry, she was referred to the Malindi ELC registry. Although she found a file bearing similar parties and number, it lacked handwritten judgment notes, and the attached typed judgment had not been certified.
7. She further contested the accuracy of the court proceedings, particularly the claim that her late mother testified in 1979, stating that her mother was bedridden with cancer at the time. She also discredits the



existence of a person named Ruth Mshenga, who is alleged to have substituted her mother in the suit, stating that no such family member exists. She added that the Attorney General, who is also alleged to have acted for the 3rd, 4th, 5th and 6th Defendant in the said 1979 case appeared unaware of the said suit and judgment; that had such a case been heard and determined as indicated in the copy judgment, the Attorney General would have been aware and would have raised an objection under Section 7 of the Civil Procedure Act.

8. The Respondent contends that neither she, her sister, nor her father, who was alive at the time, was aware of any such case and that the Plaintiff did not disclose the alleged prior proceedings during the trial. She alleged collusion between the Applicant and the Plaintiff to fabricate the judgment and proceedings and called for a forensic examination of the handwritten court notes to determine their authenticity.
9. The application was canvassed by way of written submissions.

Applicant's Submissions Dated 17/2/2025

10. Counsel for the Applicant reiterated the contents of the supporting affidavit. He submitted that the doctrine of res judicata in effect allows a litigant only one bite at the cherry. It prevents a litigant claiming under the same title from returning to court to claim further relief not claimed earlier. The doctrine, he submitted is catered for under Section 7 of the Civil Procedure Act. He argued that by virtue of Mombasa ELC 5 of 1979, the parties were not entitled to institute the present consolidated suit, and that the suits are therefore res judicata. To support his arguments, counsel relied on the case of Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] eKLR.
11. On the prayer for joinder, counsel cited Order 1 Rule 3 of the Civil Procedure Rules and submitted that the Applicant has demonstrated sufficient cause to allow him be joined to these proceedings. He added that it is in the interest of justice that the stay orders be extended and the judgment set aside. He relied on Order 12 rule 7 to buttress this proposition.
12. Counsel added that the authority and grounds for review are outlined under Section 80 of the Civil Procedure Act, and Order 45 rule 1 of the Civil Procedure Rules respectively. He argued that the Applicant has met all the grounds and that the proceedings in this suit were irregular, incurable bad, void and a nullity and ought to be struck out.
13. Counsel further relied on the cases of Michael Maina and another v Stanley Kigara Kagombe Civil Appeal No. 109 of 1996 and Mac Foy v United Africa Co. Ltd [1961] All ER 1169.

4th Defendant's Submissions Dated 3/6/2025

14. Counsel for the 4th Defendant submitted that the application is based on falsified and unverified evidence, primarily a judgment purportedly delivered on 17/4/2015 in Mombasa ELC Case No. 5 of 1979 by the late Hon. Justice S. R. Mukunya. It was his position that no credible evidence was produced to prove the existence of such a judgment or the proceedings leading thereto.
15. Counsel contended that the Applicant has not exhibited any title deed or certificate of official search to demonstrate registration as owner of the suit property pursuant to the alleged judgment. Additionally, the only material produced is an uncertified typed copy of a judgment, with no supporting record from the court registry.
16. Counsel questioned why the Plaintiff in this suit, who is alleged to have participated in the former suit as 1st Defendant, would institute the present proceedings on 14/6/ 2016 without mentioning the prior case or raising any objection based on res judicata. He submitted that the Plaintiff's affidavit in support



of the application is suspect, as it was not drawn by his advocate on record and appears to have been prepared jointly with the Interested Party, based on identical formatting and typographical style.

17. Finally, the counsel submitted that the Attorney General, alleged to have acted for several defendants in the earlier proceedings, has not filed any response in the current matter and has not acknowledged the existence of the former suit. He argued that if such proceedings had indeed occurred, the Attorney General would have raised a preliminary objection under Section 7 of the *Civil Procedure Act*.
18. Counsel maintained that the application does not meet the threshold for review under Order 45 of the Civil Procedure Rules, as no error apparent on the face of the record or discovery of new and important matter has been demonstrated. He urged the court to dismiss the application with costs.

Analysis And Determination

19. I have carefully considered the Applicant's amended Notice of Motion, the affidavits and rival submissions filed by the parties, and the applicable legal principles. The main issues for determination are:
 - i. Whether the Applicant is properly before the Court in the absence of a joinder order;
 - ii. Whether the application meets the threshold for review, variation or setting aside of the judgment dated 15/1/2025;
 - iii. Whether ELC Case Nos. 151 of 2016 and 180 of 2017 are res judicata and constitute an abuse of the court process.
20. The Applicant seeks, among other reliefs, to be joined in ELC No. 151 of 2016 as the 4th Defendant and in ELC No. 180 of 2017 as the 2nd Defendant. However, I note that he has throughout referred to himself as an interested party. Pertinent to note that as at the time of filing and canvassing the present application, there is no order on record admitting him as an Interested Party to these proceedings. The court has not issued any ruling allowing such joinder, nor was such prayer addressed and determined at any preliminary stage.
21. It is trite that a party must first be properly enjoined in proceedings before seeking substantive relief therein. Be that as it may, it is evident that Prayer 2 of the amended Motion seeks leave to join the Applicant as the 4th Defendant in ELC 151/2016 and the 2nd Defendant in ELC 180/2017.
22. The jurisdiction to join a party to a case post judgment is exercised only in exceptional and justifiable circumstances. One such exception is where a case has been determined and adverse orders have been issued against a party who was neither given notice of the case nor heard on the issue in dispute.
23. In *Merry Beach Limited –v- Attorney General and 18 others* [2018] eKLR the Court of Appeal outlined the relevant principle as follows: -

“However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party a court would also have to set aside the judgement entered to give him/her an opportunity to be heard.”
24. The Applicant contended that he only became aware of this matter after the judgment was delivered on 15/01/2025. His alleged proprietary claim arises from a disputed judgment purportedly issued in 2015, prior to the filing of these suits. Furthermore, the Applicant's claim is premised on the existence



of Mombasa ELC No. 5 of 1979 and a judgment allegedly delivered on 17/4/2015 by the late Hon. Justice S.R. Mukunya. The authenticity of the judgment remains contested. The version annexed to the Applicant's affidavit is an uncertified typed copy with no corresponding proceedings or registry record to support its existence. The 4th Defendant has cast serious doubt on its genuineness, raising issues such as the implausibility of her late mother's alleged testimony in 1979 while terminally ill and the appearance of fictitious individuals in the proceedings, including one Ruth Mshenga.

25. A party seeking to be joined to proceedings post-judgment must demonstrate that their presence is necessary for the effectual and complete adjudication of the issues in controversy. In the present case, the Applicant has failed to demonstrate such necessity. What is even more perplexing is that the Plaintiff, who is alleged to have been a party in the purported earlier suit, did not disclose its existence at any stage during the trial of this matter. That omission casts serious doubt on the authenticity and relevance of the alleged prior proceedings, the bona fides of the present application. Consequently, Prayer 2 for joinder is without merit and is hereby declined. In the absence of joinder, the Applicant lacks the requisite locus standi to pursue the remaining prayers, all of which are predicated on his participation as a party to the suit.
26. In light of the foregoing, the Amended Notice of Motion dated 17th February 2025 is hereby dismissed in its entirety. The Applicant shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

