



**Omar v Seif & 5 others (Environment and Land Petition
E005 of 2025) [2025] KEELC 7153 (KLR) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION E005 OF 2025
SM KIBUNJA, J
OCTOBER 22, 2025**

BETWEEN

HAMISI ABDALLA OMAR PETITIONER

AND

SAID SEIF 1ST RESPONDENT

MOHAMED HASHIM 2ND RESPONDENT

THE REGISTRAR OF TITLES, MOMBASA 3RD RESPONDENT

THE COMMISSIONER OF LANDS 4TH RESPONDENT

THE NATIONAL LAND COMMISSION 5TH RESPONDENT

THE DIRECTOR OF SURVEYS 6TH RESPONDENT

RULING

1. The petitioner, vide the notice of motion dated 27th May 2025, seeks for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to issue an order barring the 1st and 2nd respondents by themselves, their agents, servants or any other person acting under their authority from evicting, demolishing the Petitioner's structures, alienating, disposing off or in any other manner interfering with the Petitioner's quiet use, enjoyment and occupation of all that parcel of Land 331 Section I/MN CR No. 1729 and Plot No. 17906 Section I MN CR No. 51801, situate at Utange, Barawa area within Mombasa County pending the hearing and determination of this petition.



- d. That this Honourable Court do issue a conservatory order barring the 3rd Respondent, The Registrar of Titles from making any entries in respect to the suit properties herein being Parcel of Land No. 331 Section I/MN CR No. 1729 and Plot No. 17906 Section I MN CR No. 51801 situate at Utange, Barawa area, Mombasa County, pending the hearing and determination of this petition.
- e. That this Honourable court be pleased to issue orders, conservatory in nature that may be fair and just in the circumstances.
- f. That costs of this application be provided for.

The application is premised on the eleven (11) grounds on its face marked (a) to (k) respectively, and supported by the affidavits of Hamisi Abdalla Omar, the petitioner, sworn on 27th May 2025 and 13th June 2025, in which he deposed inter alia that he was born in 1982 at Utange, Barawa village; that his father who has been living on land known as 331 Section I MN (CR 1729/15, the suit property, since pre-independence period was buried on that land in 2001; that the suit property is government land, and its original title was issued under the Land Titles Ordinance in 1907, and last entry was a transfer back to the crown on 1st August 1950; that sometime in 2010 there was a fraudulent transfer of the land to one Wale Gona, and thereafter to the 1st respondent; that the then Commissioner of Lands and Registrar of Titles attempted to sanitize the above act by issuing a letter of allotment dated 7th September 2010 to the 1st respondent, though he was not a resident of Utange; that the 5th respondent discovered the above anomaly and recommended revocation of the above letter of allotment vide a letter dated 24th May 2023; that the 1st and 2nd respondent have incessantly harassed him by use of hired goons and backed up by security agencies threatening to evict him; that he was informed that the 2nd respondent has subdivided the suit property with intention of selling the smaller plots; that this dispute is actively before the 5th respondent who summoned some residents on 14th February 2025 for hearing and a ruling is pending though no date has been given; that he has made numerous complaints through advocates, human rights organizations but it bore no fruit, and unless the court grants the conservatory orders, the 1st respondent has demonstrated an imminent threat to sell of the suit property rendering him homeless; that several plots, that is MN/I/24201, 24208 and 2409 also known as CR 85196,85197 and 51801/5 respectively, had been advertised for sale, and it is clear that conservatory orders ought to be granted; that it justiciable and equitable that the sale is prohibited pending hearing and determination of the petition.

2. The 1st & 2nd respondents opposed the application through the replying affidavit of Said Seif, the 1st respondent, sworn on 25th June 2025, deposing inter alia that the application is a demonstration of the petitioner's penchant to abuse the court process; that this court though differently constituted rendered a decision on the issues raised in both the application and petition; that in Mombasa ELCPET 6 OF 2018, Abdulrahman C. Kirao & 3 Others versus Said Seif & 3 Others, formerly H.C Constitutional Petition 85 of 2012, the same issues that are raised here, specifically his ownership to MN/I/7906 (formerly the suit property) C.R 51801, were raised; that the petitioners in that said petition had pleaded that they had brought the case on behalf of their families and other people in occupation of the land and themselves, and claimed that he obtained title irregularly and illegally; that he explained the due process he followed in his replying affidavit sworn on 20th September 2012, and the court vide a judgment delivered on 14th January 2019 dismissed the petition; that this petition is therefore res judicata to the previous petition; that the petitioner together with others filed Mombasa CMELC 449 of 2023, Mwanahamisi Abdalla & 2 Others versus Said Self & 2 Others challenging his title to the suit property on the same grounds raised in the earlier petition and the current one; that he filed a defence and preliminary objection and after the plaintiffs failed to prosecute their case, it was dismissed on 21st August 2024; that the petitioner then filed the current petition without disclosing



the previous litigations, and both the petition and application should be struck out for being an abuse of court process.

3. The record show that the learned counsel for the 3rd & 6th respondents conceded to prayer 4 of the application, which specifically touched on the 3rd respondent. The conservatory order in terms of prayer [4] was granted on 16th June 2025 and remains in force pending the hearing and determination of the petition.
4. The court wish to take judicial notice that the 4th respondent ceased to exists, and its role was taken over by the 5th respondent. That fact may most probably be the reason why there was no appearance made for the 4th respondent. I am also doubtful that the petitioner has traced the 4th respondent for service of the petition and application.
5. The 5th respondent entered appearance through the notice of advocate dated 1st July 2025, but no replies or documents have been filed to date.
6. The court issued directions on filing and exchanging submissions on 14th July 2025, and consequently the learned counsel for the petitioner and the 1st & 2nd respondents filed their submissions dated on 21st July 2025 and 10th July 2025 respectively, which the court has considered.
7. The issues arising for determination by the court are as follows:
 - a. Whether the issue of ownership of the suit property raised in this petition has been determined as between the parties or those they claim under before another court of competent jurisdiction. Alternatively paraphrased, whether this petition is res judicata in view of the previous litigations.
 - b. Whether the petitioner has met the threshold for injunction/conservatory orders prayed to issue.
 - c. Who bears the costs?
8. The court has carefully considered the grounds on the application, affidavit evidence tendered, submissions by the learned counsel, superior court decisions cited thereon and come up with the following determinations:
 - a. The doctrine of res judicata has been codified under section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya that provides as follows:

“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”

The doctrine of res judicata has been the subject of discussion in several cases ad nauseum. In the case of Charity Njanja Mwaniki (Suing on her behalf and 8 other siblings) versus James Mwaniki Gaturu & Another [2017] KEELC 119 (KLR) the court stated as follows:

“19. The doctrine of res judicata is important in adjudication of case and serves two important purposes;



- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
 - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
20. In order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. what issues were really determined in the previous case;
 - ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
21. The test in determining whether a matter is res judicata as stated was summarized in Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR, as follows that:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.”

The 1st & 2nd respondents have in their replying affidavit deposed that the question of ownership of the suit property has been the subject matter in two previous litigations, that is firstly, Mombasa ELCPET No. 6 OF 2018, Abdulrahman C. Kirao & 3 Others versus Said Seif & 3 Others, formerly H.C Constitutional Petition 85 of 2012, and secondly, Mombasa CMELC No. 449 of 2023.

- b. The previous petition, Mombasa ELCPET No. 6 OF 2018, Abdulrahman C. Kirao & 3 Others versus Said Seif & 3 Others, formerly H.C Constitutional Petition 85 of 2012, was touching on a subdivision plot 17906 of the suit property and the court in its judgment on 14th January 2019, held inter alia that the petitioners could not claim adverse possession on land that belonged to the government and that they failed to apply for allocation once it was available. It is not lost on this court that parcel 17906, that was the subject matter in that petition is also subject matter in the current petition, and being a subdivision of the suit property would definitely be affected by any orders issued in this petition.
- c. The Supreme Court in the case of John Florence Maritime Services Limited & Another versus Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) cited with approval Wigram, V-C in the case of Henderson versus Henderson (1843) 67 ER 313 and held as follows:

“The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:... where a given matter



becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].”

The petitioner herein is different from the petitioners in ELCPET No. 6 of 2018. Despite the 1st & 2nd respondents’ claim that the petitioners had represented all the people in occupation of the land then, no evidence has been presented to support that position.

- d. From the prayers in the petition, the petitioner is challenging the 1st respondent’s title to the suit property by seeking for inter alia, declaratory orders that the allocation and issuance of title was illegal, unconstitutional, null and void; cancellation of the said title; issuance of letters of allotment to him and other persons occupying the land. The recommendation of revocation of title by the 5th respondent was reportedly done on 24th May 2023, which was years after the judgement in ELCPET No. 6 of 2018. Hence, even if the petitioner was aware of ELCPET No. 6 of 2018, the determination by the 5th Respondent dated 24th May 2023 was not there then, and could not have reasonably been produced in court. For the above reasons, the court finds this petition has not run afoul to the doctrine of res judicata.
- e. In the case of Tee Gee Electrics and Plastics Company Ltd versus Kenya Industrial Estates Limited [2005] KLR 97 the Court stated that:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

From the 1st respondent’s deposition, Mombasa CMELC No. 449 of 2023 was dismissed for want of prosecution, and therefore not decided on merit. The objection of the petition on the ground of being res judicata due to the said lower court suit therefore fails.



- f. The substantive prayers in this application are in the nature of conservatory orders. The principles guiding the courts in considering such orders were discussed in the case of Board of Management of Uhuru Secondary School versus City County Director of Education & 2 Others [2015] eKLR where the court stated as follows:

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

Further, the Supreme Court of Kenya rendered itself on conservatory orders in the case of Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others eKLR as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

From the affidavit evidence so far presented, the suit property was once government land. It also came out clearly from the unrebutted deposition by the 1st respondent that in the previous petition, ELCPET No. 6 of 2018, the court held that subdivision plot 17906 belonged to the 1st respondent. It has been reported that the 1st respondent has advertised some plots, which are subdivisions of the suit property, for sale. That as at this interlocutory stage the court is not expected to make any final determinations on facts and laws, and has not therefore settled the questions on whether the said plots arose from the suit property or not, and as to do that would be tantamount to determining the petition prematurely, it is fair and just to safeguard the suit property, pending the hearing and determination of the petition. Therefore, the conservatory orders are allowed.

- f. That as Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where the court for good cause orders otherwise, and even though the petitioner has successfully prosecuted his application, I am of the view that costs abide the outcome of the petition in view of the prayers sought thereon, that are not necessarily for individual benefit.
9. From the foregoing determinations on the notice of motion dated the 27th May 2025, the court find it has merit and orders as follows:
- a. Prayer 3 is granted that the Honourable Court does issue an order barring the 1st & 2nd respondents by themselves, their agents, servants or any other person acting under their



authority from evicting, demolishing the Petitioner's structures, alienating, disposing off or in any other manner interfering with the Petitioner's quiet use, enjoyment and occupation of all that parcel of Land 331 Section I/MN CR NO. 1729 and any resultant subdivision thereof, situate at Utange, Barawa area within Mombasa County pending the hearing and determination of this petition.

- b. Prayer 4 having been conceded to by the 3rd respondent and allowed as shown in [3] above, the prayer does not need further determination.
- c. The costs in the application to abide the outcome of the petition.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF OCTOBER 2025.

S.M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : Mr. Adhoch

Respondents : Mr. Muriithi for Zalid for 1st and 2nd Respondents

M/s Magdalene for 5th Respondent

Kalekye-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

