



REPUBLIC OF KENYA



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**Musembi & 9 others v Attorney General & 12 others (Petition E007 of 2025)
[2025] KEELC 7582 (KLR) (Environment and Land) (5 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND**

PETITION E007 OF 2025

EK WABWOTO, J

NOVEMBER 5, 2025

**IN THE MATTER OF: ENFORCEMENT AND PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS PURSUANT TO ARTICLE 23 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: PROTECTION OF THE RIGHT TO OWN
PROPERTY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: APPLICATION BY SQUATTERS FOR PROTECTION
OF THEIR RIGHTS OVER PLOT NUMBERS TAVETA/TAVETA SCHEME
PHASE 1/001-2339 SCHEME NUMBER 889, AND PLOT NUMBERS
TAVETA/TAVETA SCHEME PHASE 2/001-3205 SCHEME NUMBER 890**

AND

**IN THE MATTER OF: EQUALITY AND FREEDOM FROM
DISCRIMINATION CONTRARY TO ARTICLE 27 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: COMPULSORY ACQUISITION OF LAND TO SETTLE
THE LANDLESS OR TO FACILITATE ACCESS TO ADEQUATE HOUSING
AND SANITATION UNDER ARTICLES 40 AND 47 AND CARE FOR
THE OLDER PERSONS UNDER ARTICLE 57 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: POLITICAL PARTIES MANIFESTO AND THE LEADERSHIP
AND INTEGRITY, CHAPTER 6 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: APPLICATION BY PETER NZIOKA MUSEMBI AND 9 OTHERS
ON BEHALF OF MEMBERS OF TAVETA SUB-COUNTY, TAITA TAVETA COUNTY**



BETWEEN

PETER NZIOKA MUSEMBI 1ST PETITIONER
DUNCAN KIOKO MUTISYA 2ND PETITIONER
DAVID KIOLI NGALA 3RD PETITIONER
STEVEN NYAKI STONEY 4TH PETITIONER
RIRIMBO HASSAN IKHOMI 5TH PETITIONER
JOSEPH TUMAINI MSHAMBA 6TH PETITIONER
DAVID KYALO MALII 7TH PETITIONER
LEONARD NDAMBUKI 8TH PETITIONER
BENEDICT MWANIA MUSYOKI 9TH PETITIONER
FESTUS MUTINDA JOHN 10TH PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
NATIONAL POLICE SERVICE 3RD RESPONDENT
THE COUNTY COMMANDER, TAITA TAVETA COUNTY . 4TH RESPONDENT
THE OFFICER COMMANDING STATION, TAVETA 5TH RESPONDENT
DEPUTY COUNTY COMMISSIONER, TAVETA SUB-COUNTY 6TH
RESPONDENT
COUNTY GOVERNMENT OF TAITA-TAVETA 7TH RESPONDENT
KENYA KWANZA COALITION 8TH RESPONDENT
SPEAKER, NATIONAL ASSEMBLY 9TH RESPONDENT
SPEAKER, THE SENATE 10TH RESPONDENT
THE MEMBER OF PARLIAMENT TAVETA CONSTITUENCY 11TH
RESPONDENT
THE SENATOR, TAITA TAVETA COUNTY 12TH RESPONDENT
JOSIAH MALOMBE SUED AS THE REPRESENTATIVE OF TAITA FARMERS
ASSOCIATION 13TH RESPONDENT

RULING

1. The Petitioners instituted this Petitionvide a Petitiondated 8th July 2025 seeking for various reliefs against the Respondents.



2. Subsequently thereafter upon service of the said Petition to the Respondent, the 13th Respondents filed a Preliminary Objection dated 4th August 2025. The Preliminary Objection was raised on the following terms:-
 - i. That by dint of the judgment of this Court, delivered by Justice Munyao on 23.1.2023 in Mombasa ELC Petition No. 6 of 2019 Between Mathenge Ramathani Kamozu & 2 Others v The Hon. Attorney General & 7 Others wherein the facts and questions for determination were directly and substantively in nature, similar to those raised herein, this Court is therefore barred from exercising and/or assuming jurisdiction by the doctrine of res judicata.
 - ii. That by dint of this Court's decision in Mombasa ELC Petition No. 6 of 2019 Between Mathenge Ramathani Kamozu & 2 Others v The Hon. Attorney General & 7 Others and the same having been rendered in rem, this Court has conclusively pronounced itself on the issues raised herein and its functus officio.
 - iii. That the Court of Appeal in Mombasa, in Mombasa Civil Application No. E058 of 2023 Between Simon Mwangi & 5 Others v The Hon. Attorney General & 7 Others is now seized with the matter and this therefore renders this Court functus officio and ousts its jurisdiction.
 - iv. That in toto, the Petition in its entirety is frivolous, vexatious and an abuse of the Court process and the same should be dismissed with costs to the 13th Respondent.
3. Pursuant to the directions issued by this Court, parties were directed to file written submissions and upon which they were granted an opportunity to highlight the same. The 13th Respondents filed written submissions dated 7th October 2025 and Learned Counsel Mr. Motuka made oral highlights on their behalf. The 9th Respondent filed written submissions dated 22nd September 2025 and Learned Counsel Ms. Amolo also submitted orally on its behalf. The Petitioners filed written submissions dated 14th October 2025 and Reply to the Preliminary Objection dated 19th October 2025. Learned Counsel Mr. Munyithya submitted on their behalf.
4. The gist of the 13th Respondents' submissions is that this court lacks jurisdiction to entertain the Petition by dint of it being res judicata and functus in respect to Mombasa E.L.C Petition NO. 6 OF 2019 Mathenge Ramathani Kamozu & 2 OTHERS v THE HON. A. G & 7 OTHERS.
5. It was submitted that on 23rd January 2024, Hon. Justice Munyao Silas in Mombasa E.L.C Petition No. 6 OF 2019 Between Mathenge Ramathani Kamozu & 2 OTHERS =VS= THE HON. A. G. & 7 OTHERS pronounced himself on all issues comprehensively. The decision applies across and in rem. To date the said Court's decision is valid and enforceable.
6. The issues in question, including the prayers sought and the parties are similar to those in Mombasa ELC Petition No. 6 of 2019 and to that extent the doctrine of res judicata applies to bar this court from exercising its mind and jurisdiction on the present matter.
7. The change and/or inclusion of more parties i.e. the Petitioners and the National Land Commission, National Police Service, The County Commander – Taita Taveta County, The Officer Commanding Taveta Police Station, Deputy County Commissioner, County Government of Taita Taveta, Kenya Kwanza Coalition, The National Assembly, the Senate, the Area Member of Parliament – Taveta Constituency and the Senator – Taita Taveta County does not cure the fatality in the application and Petition herein.
8. It was submitted that the Court in Mombasa ELC Petition No. 6 of 2019 Mathenge Ramadhan Kamozu & 2 Others v The A.G & 7 Others considered the following issues for determination:-



- a. The question as to who the real squatters living on LR No. 5865/2 were.
 - b. The legality of settlement exercise by the Government of Kenya through the Settlement Land Trustee and the issuance of title deeds thereto.
 - c. The question of alleged third parties and not the legitimate squatters who benefitted from the allocation.
 - d. The questions on the right to property, security and livelihood of individuals who claimed to be the legitimate and/or 'original' squatters in L.R No. 5865/2.
 - e. A consideration of the prayer for a permanent injunction on eviction of squatters and illegal allocation of land and title deed to 'strangers' who were not the original squatters.
9. It was further submitted that this Court in VoiELC Petition No. E011 of 2024 David Mwandawiro Mabinka & 203 Others v The Director Of Land Adjudication & 5 Others considered the following issues:
- i. The question as to who the real squatters living on L.R No. 5865/2 were.
 - ii. The legality of the settlement exercise of squatters by the Government of Kenya through the Settlement Land Trustees and the issuance of title deeds thereto.
 - iii. The question of legitimate squatters being left out and 'strangers' benefitting in being allocated land.
 - iv. The questions on the right to property, security and livelihood of individuals who claimed to be the legitimate squatters.
 - v. The question of public participation and the involvement of the people of Taveta during the survey, demarcation and allocation of land.
 - vi. A consideration for the prayer of a permanent injunction against the eviction of squatters and illegal allocation of land and title documents to 'strangers'.
10. It was also submitted that in considering the instant Petition, this Court will notice the following salient issues:-
- i. The petitioners claim to be the original squatters in the mother parcel of land being Plot No. L.R NO. 5865/2.
 - ii. The petitioners confirm that they were involved in the initial settlement process but were left out of the squatters list and other strangers benefitted hence question of who the 'real squatters' are.
 - iii. The petitioners confirm that the initial PLOT NO. 5865/2 which was compulsorily acquired by the Government of Kenya in the year 2007 was subdivided into Taita/Taveta Scheme Phase 1/001 – 2339 and Taita/Taveta Scheme Phase 2/001 – 3205 to settle the then squatters.
 - iv. The petitioners confirm that the initial settlement of squatters was done in a legal, legitimate and valid process and legitimate title deed issued thereto.
 - v. The right to property, security and livelihoods and the need for injunctive orders against eviction and prosecution and allocation of land to 'illegitimate squatters.'



11. Learned Counsel Mr. Motuka reiterated that in view of the foregoing, the issues raised in the instant Petition were adequately canvassed and substantial determination made in Mombasa ELC Petition No. 6 of 2019 and as such the court's jurisdiction is ousted by the application of the doctrine of res judicata.
12. On the Court being functus officio, it was submitted that after the delivery of the judgment in Mombasa ELC No. 6 of 2019 the parties therein invoked the Appellants jurisdiction of the Court of Appeal and filed Civil Application No. E058 of 2023, Simon Mwangi & 1138 Others v The Hon. A. G. & 6 Others.
13. The Court was urged to strike out the Petition with costs to the 13th Respondents.
14. The 9th Respondent submitted in support of the Preliminary Objection.
15. It was submitted that the joinder of the Speaker of the National Assembly violates the doctrine of separation of powers and amounts to an abuse of the court process and further that no reasonable cause of action has been disclosed against the Speaker of the National Assembly.
16. Learned Counsel Ms. Amolo submitted that the Judgment by Justice S. Munyao determined the issues raised in the Petition and this court in Voi ELC No. E011 of 2024 equally addressed the same. The Court was urged not to entertain the current Petition.
17. In opposing the objection, the Petitioners submitted that the grounds raised on the Notice of Preliminary Objection dated 4th August 2025 are misconceived and lack merit as they fail to meet the strict criteria for a valid Preliminary Objection.
18. It was submitted that the prayers sought in the Petition are distinct, they do not challenge the validity of titles or judgment delivered in ELC Petition No. 6 of 2019 but seek declarations on manifesto enforceability as a social contract under Article 10(2) and Chapter 6 of *the Constitution*, declaration on discrimination, the doctrine of compulsory acquisition and a prayer for injunction. ELC Petition No. 6 of 2019 did not address these proved issues nor the ongoing evictions which has the potential of rendering the Petitioner destitute.
19. Learned Counsel Ms. Munyithya submitted that the doctrine of res judicata does not apply herein because the cause of action differs substantially from ELC Petition No. 6 of 2019 since the Petitioners were joined in the said case but never fully participated in the proceedings and thus were not accorded a fair hearing as envisaged under *the Constitution*.
20. Citing the case of Okiya Omtatah Okoti v A. G & 6 Others (2014) eKLR it was argued that res judicata applies sparingly in Constitutional Petitions especially where public interest new dimensions arises.
21. Counsel also submitted that the 13th Respondents reliance on ELC Petition No. E011 of 2024 is misplaced as it involved different parties and was dismissed without substantive determination.
22. It was further submitted that the Petitioners are squatters who have resided on the suit land, originating from L.R No. 5865/2, for over 15 years, having built homes, farms and communities thereon. Some of them applied to join ELC Petition No. 6 of 2019 vide an application dated 13th June 2019, a positive Order was issued on 17th June 2019 but restricted their participation to cross-examination of witnesses only, they were not allowed to adduce evidence or file affidavits. This limited role denied them a full opportunity to prove their residency and rights, rendering them as mere observers and commentators rather than substantive parties.
23. It was also submitted that ELC Petition No. 6 of 2019 challenged the adjudication process and sought nullification of titles, the same was dismissed on 23rd January 2023. This Petition introduces novel



prayers for compulsory acquisition under Articles 40(3)(b) and 57, declarations on political manifestos as enforceable social contracts under Article 10(2), and remedies against discrimination under Article 27. These issues are novel to the parties herein, it demonstrates that the current Petition addresses fresh violations and public interest issues not litigated before.

24. In respect to the pending appeal being Mombasa Civil Application No. E058 of 2023, which had challenged the Judgment of ELC No. 6 of 2019, it was submitted that the same does not oust jurisdiction for new breaches.
25. The Petitioners urged the court to dismiss the Preliminary Objection and set down the matter for hearing.
26. The Court has considered the Preliminary Objection, the oral and written submissions made by the parties and the main issues for determination are as follows;
 - i. Whether this Petition is res judicata in view of Mombasa ELC Petition No. 6 of 2019.
 - ii. Whether this court is functus officio.
 - iii. Whether the Speaker of the National Assembly was wrongly joined to these proceedings and ought to be struck out.
27. The Court shall now proceed to address all the issues sequentially.
28. Section 7 of the *Civil Procedure Act* provides that:-

“No court shall try any suit or issue in which the matter directly 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 issue in which such issue has been subsequently raised, and has been heard and finally determined by such court.”

29. Res judicata bars further litigation on issues that have been previously litigated Between the same parties in a court of competent jurisdiction and the court determined the issue with finality. That is, the doctrine of res judicata protects finality in litigation over similar issues Between the same parties in courts of competent jurisdiction.
30. Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another (Motion No 42 of 2014) [2016] eKLR, the Court of Appeal stated with regard to the essence of res judicata:

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....the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.

31. The Supreme Court of Kenya had occasion to deal with the issue of res judicata in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR). At para 57, the Supreme Court cited the words of Wigam V-C in Henderson v Henderson (1843) 67 ER 313 thus:

“Where a given matter becomes the subject of litigation, in and adjudication by, a court of competent jurisdiction, the court requires the parties to the 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 matters which might have been 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 litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.

The Supreme Court then stated:

(58) Whenever the issue of *res judicata* is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction."

32. For the plea of *res judicata* to succeed, it is important that issues in the previous case and the new suit be similar; parties in the two cases be the same or litigating under the same title and issues in the former suit should have been finally determined by a court of competent jurisdiction. In making that determination, the court dealing with the plea of *res judicata* should look at the pleadings and prayers sought in the two suits, the parties named in the suits, the issues raised and the decision of the court in the previous suit to ascertain whether the matter was before a court of competent jurisdiction and the issues were indeed, determined with finality.
33. In the instant Petition the Petitioners seek for various reliefs including a declaration that an enforceability of a manifesto made by the Kenya Kwanza Coalition which formed the Government of the day after the 2022 general elections, a declaration on discrimination by the Respondents who have failed, refused or declined to compulsorily acquire Taita/Taveta Scheme Phase 1 (Scheme Number 889) Plot Number 001 – 2339 and Taita/Taveta Scheme Phase 2 (Scheme Number 890), an Order of mandamus compelling the Government of Kenya to compulsorily acquire Scheme Number 889 and Scheme Number 890 for the purposes of facilitating the Petitioners to access affordable housing and achieve their economic and social rights.
34. In support of the Petition before Court, the Petitioners averred that the beneficiaries of the adjudication and subdivision under location of the original parcel of land being L.R No. 5865/2 had no home or development on the parcel of land allocated to them and further as at the date of judgment in ELC No. 6 of 2019 the Petitioners were residing and had constructed homes and structures on the plots/ parcels given to the members of the 13th Respondents.
35. It therefore follows that it is not in dispute that the Petitioners who have described themselves as squatters participated in Mombasa ELC No. 6 of 2019 which was in respect to L.R No. 5865/2 upon which the Scheme Numbers 889 and 890 emanated from.
36. From the above observation it is evident that the issues raised in respect to the ownership rights of LR No. 5865/2 were canvassed and considered in ELC No. 6 of 2019 and further the reliefs being sought by the Petitioners to a large extent will require the Court to reconsider the same issues before it is satisfied that the Petitioners can be entitled to the reliefs sought.
37. From a careful perusal of the instant Petition as filed by the Petitioners, the issues in question, including the prayers sought and the parties are similar to those in Mombasa ELC Petition No. 6 of 2019. The change and/or inclusion of more parties being the National Land Commission, National Police Service, The County Commander – Taita Taveta County, The Officer Commanding Taveta



- Police Station, Deputy County Commissioner, County Government of Taita Taveta, Kenya Kwanza Coalition, The National Assembly, the Senate, the Area Member of Parliament – Taveta Constituency and the Senator – Taita Taveta County does not cure the fact that this Court would still be determining the same issues raised in the previous Petition and thus rendering this instant Petition being res judicata.
38. While the Petitioners have tried to craft new reliefs in this Petition, it still remains that the issues raised in their Petition are relevant to what was determined in Mombasa ELC No. 6 of 2019 in which they were joined as parties.
 39. In the case of *Satyadhyan Ghasal v Devajin Debi & Another* 1960 SCR (3) 590 and *Mweresa & 3 Others v Social Health Authority & Another* (2025) KLR, it was held that it is not necessary that the entire subject matter of the subsequent suit be directly and substantially in issue in the former suit. It suffices if the matter in issue is relevant for the determination of the former suit.
 40. Equally in the case of *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* (2014) eKLR where the Court cited with approval the case of *E.T v Attorney General & Another* (2012) eKLR where the Court stated inter alia that:

‘Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit...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...’
 41. While the Petitioners had argued that this being a constitutional petition, the doctrine of res judicata may not apply in view of emerging breaches, this Court having carefully weighed on this position makes reference to the cases of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* (Motion No 42 of 2014) [2016] eKLR and *Mweresa & 3 others v Social Health Authority & another; Law Society Of Kenya & 3 others (Interested Parties) (Petition E524 of 2024) [2025] KEHC 8365 (KLR) (Constitutional and Human Rights) (13 June 2025) (Judgment)* where it was held that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.
 42. Bearing the above in mind, the Petitioners’ contention that the same may not apply to this Petition is misplaced. This Court in determining this Petition would still be required to issue declarations on issues that had already been determined in the previous petition.
 43. In view of the foregoing, it is the finding of this court that the issues raised in the instant Petition are res judicata in view of Mombasa ELC No. 6 of 2019.
 44. In respect to *functus officio*, it is worth noting that the doctrine of *functus officio* is one of the expressions in law on the principle of finality and, according to *Black's Law Dictionary Ninth Edition*, it is defined as: [having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
 45. It is also instructive that a Court becomes *functus officio* upon pronouncement of its judgment. The Supreme Court of Kenya in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832, which reads:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.....The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

46. It is not in dispute that the Petitioners filed an appeal being Mombasa Civil Appeal No. E058 of 2023 challenging the Judgment delivered by Munyao J. in ELC No. 6 of 2019 and as such the Court having rendered its judgment and further the Court of Appeal having been seized of the matter this Court became functus.
47. Having considered those substantive issues, this Court need not address itself on the other issues.
48. In conclusion, it is the finding of this Court that the 13th Respondents Preliminary Objection dated 4th August 2025 is merited and the same is upheld. This Court proceeds to issue the following orders: -
 - i. The Petition filed herein is hereby struck out.
 - ii. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 5TH DAY OF NOVEMBER 2025.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Munyithya for the Petitioners.

Mr. Motuka for the 13th Respondents.

N/A for the other parties.

Court Assistant: Mary Ngoira.

