

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC APPEAL NO. E026 OF 2025

TONY NJOROGE
APPLICANT/RESPONDENT

VERSUS

MUKOMBE SAID MWAGANDI
RESPONDENT/APPLICANT

RULING

1. Vide a notice of motion application dated 19/8/2025 premised under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rule 1 and Order 51 Rule (unstated) of the Civil Procedure Rules as well as the provisions of Section 63 of the Civil Procedure Act, the applicant seeks orders that the court do review its judgment by setting it aside to enable new evidence to be adduced, that the irregularities on the face of the record of the judgment be rectified, that the court do rectify or denounce its order to the effect that the plaintiff is the lawful owner of the suit land, and also review the order that he demolishes the illegal structures thereon within 60 days at his own expense. It is urged that the court failed to identify that the title had many holders and that the plaintiff respondent did not tender any evidence of a sale agreement, consent, transfer or payment of stamp duty.
2. The application is based on the grounds set out in the supporting affidavit of the defendant/applicant sworn on an even date.
3. The respondent filed a replying affidavit dated 26/8/2025. The gist of his response is that the application is *res judicata* the earlier application dated 17/7/2024(should be 18/7/24); that by reason of the applicant filing a Notice of Appeal lodged on 16/6/2025, the applicant is barred from filing an application for review, and such application is judicial lottery and an abuse of the process; that if a party chooses to file an appeal he automatically loses the right to review; that the threshold for review has not been met by the applicant in that there is no new evidence presented

that points to the applicant being the owner of the suit property; that there is evidence of transactions vide which the land was conveyed through a series of persons up to the respondent's name; that Sections 24, 25 and 26 guaranteed indefeasibility of his title since he holds a certificate of lease; that the plot number in the sale agreement referred to by the applicant differs from the number of the subject property; that the applicant had admitted that he has no title deed to the suit land; that the purported transfer of the suit property to the applicant was officiated by the area chief contrary to the laid down laws on the transfer and registration of interest in property.

4. The present application can be disposed of on the basis of only one issue, *res judicata*, if the court finds in favour thereof. the doctrine of *res judicata* is embodied in the law in Kenya in Section 7 of the Civil Procedure Act which provides as follows:

"7. *Res judicata*

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.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

5. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) the Supreme Court stated as follows:

“For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former judgment or order which was final;
- b) The judgment or order was on merit;
- c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)”

6. This court notes that an earlier application for review had been filed, dated 18/7/2024, seeking review of the same judgment in this case. That application was brought under Order 45 Rule 1 of the Civil Procedure Rules, among others. It was dismissed on 28/5/2025. The parties in that application were the same parties herein. This court exercised its rightful jurisdiction over the application. that jurisdiction has not been challenged.

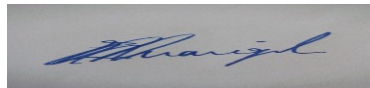
It delivered a ruling on the merits of that application; the application was not struck out on a technicality.

7. The *res judicata* rule applies to suits as well as applications. Under Section 7 of the Civil Procedure Rules, any matter that ought to have been raised by way of offence or defence in a suit or application but which was not raised then can not be raised in that manner in a fresh suit or application. This rule bars a multiplicity of suits on the same subject matter and ensures finality in litigation.
8. There is no justification for the present applicant's failure to raise in that previous application dated 18/7/2024 any issue now being proposed to be agitated in the present application. In **John Florence** (supra) the court cited *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”
9. In the present case there is no ground to justify the bringing of a second review application by the same party. It would be wrong to drag a decree holder through a second application for review even if there is truth that some matters that ought to have been subject of review were left out of the first review application. The respondent ought not be made to suffer for the defaults of the applicant.

10. This court is of the view that the applicant in the present application is intent on having two bites at one cherry. Consequently, I find that the application dated 19/8/2025 is *res judicata* and it is hereby struck out with costs.

Dated, signed and delivered at Malindi on this 12th day of November, 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**