

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO.73 OF 2005 (OS)

ETHICS AND ANTI - CORRUPTION COMMISSION APPLICANT

VERSUS

MOHAMED HAMISI MWACHUMBA .. PLAINTIFF/RESPONDENT

ALI MWADARASHI MWAGARICHE .. PLAINTIFF/RESPONDENT

HON ATTORNEY GENERAL DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION DEFENDANT/RESPONDENT

REGISTRAR OF TITLE MOMBASA .. DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion dated 26th May 2025, the Ethics and Anti-Corruption Commission (the Applicant) prays for orders that:

- 1) Spent;**

- 2) The Honourable Court be pleased to re-open the instant suit and the Judgment entered by this Honourable Court on 15th November, 2007 be set aside;**

- 3) The Applicant be joined to the proceedings as 4th Defendant or in any other capacity that the Court may deem fit;**
- 4) The Court be pleased to take additional evidence orally and cross-examination of the witnesses be allowed;**
- 5) In the alternative to prayer 4 above, the Court be pleased to direct that the additional evidence in the Applicant's possession be taken by the trial Court; and**
- 6) Costs of the Application be provided for.**

2. The Application is supported by an Affidavit sworn by Abuid Onyango an Investigator with the Commission and is premised on the grounds:

- i) That the Applicant was not a party to the proceedings before this Court;**
- ii) That the Applicant received a Complaint on 1st April 2025 on illegal allocation of public land alienated and reserved as Monument pursuant**

to Section 4 of the Monuments and Antiques Act Chapter 215 Laws of Kenya (now repealed) to the 1st and 2nd Respondents following a Judgment that had been delivered by this Honourable Court on 15th November 2007;

- iii) That by the time the complaint was received, Judgment had been entered by the Court on 15th November 2007;**
- iv) That pursuant to the said complaint, the Applicant immediately undertook investigations and established that Land Reference No. 13445 situated at Tiwi in Kwale County fell within an area that was gazetted and preserved as a Monument of historical and cultural interest;**
- v) That the issuance of the lease and Certificate of Grant for the said parcel of land was therefore irregular and illegal as the suit property has never ceased being public property;**
- vi) That the illegal alienation of the suit property for private purposes was clearly contrary to the provisions of the Antiques and Monuments Act,**

The Government Land Act (now repealed) and the Registered Land Act (also repealed);

vii) The Applicant seeks to provide additional evidence to show the nullity of the title documents issued to the 1st and 2nd Respondents since the same stem from a title that was illegally obtained;

viii) That the finding by this Court that the 1st and 2nd Respondents have acquired the suit property by way of adverse possession was made out of misrepresentation of facts thereby leading to miscarriage of justice in light of the additional evidence in possession of Applicant; and

ix) It is in the public interest that the suit be re-opened, the Judgment be declared a nullity and set aside and the Applicant be enjoined to the proceedings and be allowed to present evidence.

3. The two Plaintiffs are opposed to the application in a Replying Affidavit sworn on their behalf by Mohamed Hasimi Mwachumba (the 1st Plaintiff), the two aver that it has been 20 years since this case was filed in the year 2005 and 18 years

since the judgment was delivered. It is therefore their case that there has been an inordinate and unreasonable delay in bringing the instant application. The Plaintiffs aver that the documents relied upon by the Applicant are documents which were well within their knowledge and the complaint dated 1st April 2025 by Paul Mwangi & Co. Advocates cannot be used as an excuse.

4. The Plaintiffs further aver that the reopening of the suit at this stage will cause them to suffer immense prejudice. They aver that the judgment issued by the court on 15th November 2007 has already been complied with and perfected and the application is therefore coming too late in the day.
5. Further, the Plaintiffs assert that the Application herein is sub-judice as the Applicant has filed another suit being Kwale ELC No. E043 of 2025 and that the issues raised therein are similar to those in the present application.
6. In addition to the Replying Affidavit, the Plaintiffs have filed a Notice of Preliminary Objection dated 7th July 2025 wherein they object to these proceedings on the grounds that:

- 1) This Honourable Court lacks jurisdiction to hear and determine the Application because this is a High Court case and the judgment which the Applicant seeks to set aside was delivered by the High Court. The Environment and Land Court can only hear and determine this case after a formal application and order is made to transfer it to this Court from the High Court;**
- 2) The Applicant - Ethics and Anti-Corruption Commission is not a party to this suit and has just planted itself in the heading of the case as an Applicant without first obtaining leave to be joined as a party hereto;**
- 3) The issues raised in the Application are sub judice since the same issues are raised by the Applicant in a substantive suit being Kwale ELC Case No. E043 of 2025; Ethics and Anti-Corruption Commission -Vs- Mohamed Hamisi Mwachumba, Ali Mwadarashi Mwagariche & Sammy Mwaita Komen which is currently pending determination;**
- 4) The subject matter does not fall within the jurisdiction of this Honourable Court.**

5) The Application offends the provisions of Section 4(4) of the Limitation of Actions Act;

6) The Judgment has been perfected and is legally not capable of being set aside hence the Application has been overtaken by events; and

7) The Application offends the doctrine of *vigilantibus non dormientibus, jura subveniunt* and the doctrine of Interest *reipublicae ut sit finis litium*.

7. Given its ramifications, this court will first consider the issues raised by the Plaintiffs in their Preliminary Objection to the application as filed by the Applicant Commission. As Law JA famously stated in ***Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Limited (1969) EA 696:***

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are

bound by the contract giving rise to the suit to refer the dispute to arbitration”.

8. Speaking to the same matter in the same ***Mukisa Biscuits Case (Supra)*** Sir Charles Newbold P added as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.....”

9. As the Supreme Court of Kenya did state in the case of ***Independent Electoral & Boundaries Commission -vs- Jane Cheperenger & 2 Others (2015) eKLR***

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the

preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

10. In the matter before me, the two Plaintiffs have raised their Preliminary Objection to the Applicant’s application on some seven (7) grounds. By their first ground, the Plaintiffs challenge the jurisdiction of this court to hear and determine the Commission’s application.
11. In the celebrated case of ***Owners of Motor Vessel “Lillian S” -vs- Caltex Oil (Kenya) Ltd (1989) 1KLR***, it was held thus:

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given.”

12. In the matter herein, it was not in dispute that this suit was instituted as High Court Civil Suit No. 73 of 2005 (OS) and that judgment was delivered herein by the Honorable Justice J.K. Serگون on 15th November 2007. That was some three (3) years before the Environment and Land Court would be established by virtue of Article 162 (2) (b) of the Constitution of Kenya, 2010. This court derives its jurisdiction by virtue of the said provision and Section 13 of the Environment and Land Court Act No. 19 of 2011.
13. While it was indeed true that since the establishment of this court all matters relating to the use, occupation and title to land fall within the jurisdiction of this court, the matter herein was instituted and concluded before the High Court before the establishment of the Environment and Land Court.
14. That being the case, I was not persuaded by the Applicant's argument that upon the establishment of this court, all matters relating to land were automatically transferred from the High Court to this court. In my considered view, there was no automatic, blanket or general transfer of cases from the High Court to the ELC. The fact of the matter is that cases are

transferred from one court to the other through a formal and express order. In the matter herein, there was neither an application nor an order allowing the transfer of this suit from the High Court to this Court.

15. In the circumstances herein, it was clear to me that for this court to be seized with jurisdiction to handle the matter, the Applicant ought to have first approached the High Court to transfer the matter to this court for hearing and determination. An ELC Court cannot assume jurisdiction over a matter filed before the High Court merely because the same relates to land, and more so, where the matter has been heard and a judgment rendered. Such assumption of jurisdiction would be a recipe for chaos within the justice system and this court declines the invitation to take that root.
16. The other issue raised by the Plaintiffs was that the application was sub-judice since the issues raised had also been raised by the Applicant in a substantive suit being Kwale ELC Case No. E043 of 2025; Ethics and Anti-Corruption Commission -vs- Mohamed Hamisi Mwachumba & 2 Others.

17. In the Replying Affidavit sworn by Mohamed Hamisi Mwachumba on 7th July 2025, the Plaintiffs have exhibited as Annexure 'MM5' a copy of an Amended Plaint filed by the Applicant Commission in the said Kwale ELC Case No. E043 of 2025. A perusal of the said Amended Plaint apparently filed some four (4) days before the application herein was instituted, reveals that the subject matter therein is the same LR No. 13445 (also known as LR No. 29086) situated in Tiwi in Kwale County. In the said suit the Applicant's claim is pegged on allegations of illegality and fraud against the two Plaintiffs herein and one Sammy Mwaita Komen. The Applicant herein makes similar allegations against the Plaintiffs.

18. The doctrine of sub-judice is captured under the provisions of Section 6 of the Civil Procedure Act Cap 21, as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the

same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

19. Considering the doctrine in ***Kenya National Commission of Human Rights -vs- Attorney General & 17 Others (2020) eKLR***, the Supreme Court of Kenya held as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary, 9th Edition as:

“Before the Court or Judge for determination.”
The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject

matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

20. By urging this court to re-open the instant suit while they have instituted another suit before the Kwale Environment and Land Court, the Applicant was clearly acting in abuse of the court process and opening the possibility of two courts of competent jurisdiction issuing conflicting decisions over the same subject matter. This court is imbued with a cardinal duty to stop the abuse of its process.
21. It follows that I am persuaded that there was merit in the Preliminary Objection dated 7th July 2025. The Notice of Motion dated 26th May, 2025 is accordingly struck out.
22. In the circumstances of this case each party shall bear their own costs.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 11th day of December, 2025

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) No Appearance for the Applicants
- c) Mr. Oluga for the Plaintiffs/Respondents**
- d) Mr. Kemei holding brief for Ambetsa Advocate for the 1st and 3rd Respondents**

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