



REPUBLIC OF KENYA



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**A.A Bayusuf & Sons Limited v Bahola & another (Civil Appeal
E019 of 2023) [2026] KECA 622 (KLR) (25 March 2026) (Judgment)**

Neutral citation: [2026] KECA 622 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E019 OF 2023
SG KAIRU, AK MURGOR & P NYAMWEYA, JJA
MARCH 25, 2026**

BETWEEN

A.A BAYUSUF & SONS LIMITED APPELLANT

AND

FREDRICK JOHN BAHOLA 1ST RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 2ND RESPONDENT

(An appeal from the Ruling and Order of the Environment and Land Court of Kenya at Malindi (M.A. Odeny, J.) dated 17th February 2023 in ELC No. E047 of 2022)

JUDGMENT

1. In a ruling delivered on 17th February 2023, the Environment and Land Court (ELC) (M.A. Odeny, J.) upheld preliminary objections raised by the respondents and struck out the appellant's suit. In doing so, the learned Judge pronounced:

“Having found that this suit is similar to both Petitions Nos 18 of 2012 and 25 of 2019 and ELC No. 168 of 2012 which were determined by this court, it follows that this suit is res judicata and the same is struck out with costs to the respondents. The preliminary objections are hereby upheld.”

2. The appellant has challenged that decision on grounds that the learned Judge erred in upholding the preliminary objections which did not meet the threshold set in the case of Mukisa Biscuits Manufacturers Limited vs. West End Distributors Limited [1969] EA 696. Other complaints are that the learned Judge ignored the relevant documentary evidence on record that distinguished the causes of action in the different suits; erred in holding that the previous suits were similar to ELC No. E047 of 2022 when they related to different subject matters, causes of action and parties distinct from the



appellant's suit ELC No. E047 of 2022; and that the finding that the appellant's suit was res judicata is erroneous.

3. During the hearing of the appeal, learned counsel Mr. Kiarie Mungai appeared for the appellant and relied on the appellant's written submissions dated 12th May 2025. Learned counsel Mr. Binyenya for the 1st respondent relied on the 1st respondent's written submissions that had been presented before the ELC in urging the Court to uphold the decision of the learned Judge of the ELC. There was no appearance for the 2nd respondent despite notice of hearing having been served.
4. We have duly considered the appeal and the submissions. The main issue for our consideration is whether the preliminary objections based on which the appellant's suit, ELC No. E047 of 2022, was struck out met the required threshold. But first the contextual background.
5. On 18th August 2022, the appellant instituted a suit by way of plaint before the ELC, being ELC No. E047 of 2022, in which he named the respondents herein as the 1st and 2nd defendants respectively. The appellant pleaded that it was the allottee of Land Parcel Number TRCC/HOL/C/470 under Part Development Plan (PDP) No. TRD/312/2004/91 for Hola Town and dutifully paid the rates demanded and the beacons were duly pointed out to it by the District Surveyor. That on 15th July 2022 while mobilizing machinery to erect a perimeter wall on the property, it found the 1st respondent had commenced construction on the property and efforts to stop the 1st respondent from trespassing failed.
6. In the suit, the appellant sought an order for demolition of the 1st respondent's structures on the property; a permanent injunction to restrain the 1st respondent from constructing or doing anything on the property; an order against the 2nd respondent to rectify its records, if the same had been tampered with, to reflect the appellant as the owner of the property.
7. In his statement of defence, the 1st respondent pleaded that the property was allocated to the appellant under a letter of allotment by the defunct County Council of Tana River who failed to adhere to the mandatory conditions of the allotment, on account of which the 2nd respondent asked the appellant to vacate the property by a letter dated 13th February 2019.
8. The 1st respondent pleaded further that the suit property together with another plot bordering it belongs to "the petitioners in Malindi Petition No. 18 of 2012 and the plaintiff in Malindi E & LC Suit No. 168 of 2012" and that in a judgment delivered on 15th April 2016 the ELC made declarations concerning "parcels of land measuring 15 acres or thereabouts situated at Hola Town" to the effect that the same belongs to "the petitioners and the plaintiff" in Malindi Petition No. 18 of 2012 and Malindi E & LC Suit No. 168 of 2012 which were consolidated. The 1st respondent averred that no appeal or review application was made in relation that judgment of 15th April 2016. The 1st respondent asserted that the ELC did not therefore have jurisdiction to entertain ELC No. E047 of 2022.
9. The advocates for the 1st respondent then filed a preliminary objection dated 9th September 2022 contending that the issues in suit were res judicata having been directly and substantially in issue in Malindi Petition No. 18 of 2012 and Malindi E & LC Suit No. 168 of 2012 and that the court therefore lacked jurisdiction to determine ELC No. E047 of 2022 "the same having been decided by a fellow judge of concurrent jurisdiction" in the stated suits.
10. The advocates for the 2nd respondent also filed a notice of preliminary objection dated 12th September 2022 contending that the suit contravened Sections 6 and 7 of the *Civil Procedure Act*; that the suit was res judicata in view of Malindi ELC Petition No. 25 of 2019 between the appellant and the respondents.



11. The preliminary objections, alongside the appellant's application for interlocutory injunction which had been filed together with the plaint, were canvassed before the learned Judge by way of written submissions.
12. Upholding the preliminary objections, the learned Judge reproduced the reliefs pronounced by the court in its judgment of 15th April 2016 in Malindi Petition No. 18 of 2012 and Malindi E & LC Suit No. 168 of 2012, as well as the orders granted in a ruling delivered on 5th November 2020 in Malindi ELC Petition No. 25 of 2019 before stating as follows:
 - “28. It is unfortunate that the applicant has been litigating on the same subject matter in the same court without finality. The judgement in both petitions Nos 18 of 2012 and 25 of 2019 and ELC No 168 of 2012 had the same outcome of which the applicant was aggrieved (sic) then he should have filed an application for a review or filed an appeal in the Court of Appeal.
 29. Courts do not have the luxury, time and resources to hear matters that are purely an abuse of the court process. Where a party is aggrieved with the outcome of his/her case, then they are procedures for review or appeal. That is why there are hierarchy of courts for redress.”
13. The Judge also found that the appellant was guilty of non- disclosure of material facts for “not disclosing that there are previous suits” and ultimately upheld the preliminary objections and, as already indicated, concluded that the appellant's suit was res judicata and struck it out.
14. Counsel for the appellant submitted that in reaching that decision, the learned Judge ignored the relevant documentary evidence on record that distinguished the causes of action in ELC 168 of 2012 and Petition No. 18 of 2012 as opposed to ELC Petition No. 25 of 2019 and ELC No. E47 of 2022; and that the appellant was not a party in ELC 168 of 2012. Counsel drew the Court's attention to the record for the pleadings in the separate actions in submitting that while the subject matter of the actions was different, the prerequisites for the application of the doctrine of res judicata were not met.
15. Moreover, counsel submitted, the facts were highly contested with parties filing affidavits in an attempt to clarify opposing positions and the threshold for upholding a preliminary objection was not met.
16. As already indicated, counsel for the 1st respondent not having filed submissions in the appeal, asked the Court to rely on the submissions tendered before the ELC which, though supporting the findings by the learned Judge, do not speak directly to the challenges raised against those findings.
17. We return now to consider the question whether the preliminary objections based on which the appellant's suit ELC No. E047 of 2022 was struck out met the required threshold.
18. Having considered the appeal and having reviewed the material on record, this is what emerges. Civil Suit No. 168 of 2012 was instituted before the High Court at Malindi on 1st November 2012. It would appear it was subsequently transferred to ELC. The plaintiff in that suit was Bahola Mkalindi Rhigho. The defendants were Michael Seth Kaseme, Fammy Mwangi and County Council of Tana River. The subject matter of that suit as pleaded in paragraph 4 of the plaint was an “un-surveyed and unregistered parcel of land in Hola town within Tana River County adjacent to Redeemed Church Hola, Laza Primary School and Laza polytechnic...”. The plaintiff in that suit, Bahola Mkalindi Rhigho, sought to be declared the owner of that property.
19. It is immediately clear that the appellant was not a party to that suit. And on the face of it, there is no telling whether there is any relationship between the parcel of land described in that suit,



and the parcel of land “Number TRCC/HOL/C/470 under Part Development Plan (PDP) No. TRD/312/2004/91 for Hola Town” claimed by the appellant in ELC No. E47 of 2022, the suit leading to this appeal.

20. In Malindi ELC Petition No. 18 of 2012, (the petition is at page 182 of the record), there were nine petitioners who asserted to be “members of the family of Mkalindi Righo” and members of Uta Clan. The petitioners there asserted ownership over “all that Parcel of Land measuring 15 acres or thereabouts and situated at Hola Town...near the Hola Water supply site and next to Laza primary School whose boundaries and dimensions are clearly demarcated on the ground...”. Again, the appellant is not privy to that action and neither is it plain that the property described in that petition is the same or has any relation to the parcel of land “Number TRCC/HOL/C/470 under Part Development Plan (PDP) No. TRD/312/2004/91 for Hola Town” the subject of the appellant’s suit in ELC No. E47 of 2022.
21. Based on the foregoing, apart from the fact that the appellant herein was not privy to those actions, evidence would have been required to link the properties, the subject of those actions, with the property claimed by the appellant in ELC No. E47 of 2022. Considering, as we do, that evidence to prove the link between the subject matter in the different actions would need to be called and interrogated, it is not a matter that lends itself to disposal by way of a preliminary objection within the principle in set out *Mukisa Biscuits Manufacturers Limited vs. West End Distributors Limited* (above).
22. Furthermore, in as far as the doctrine of *res judicata* is concerned, the Supreme Court of Kenya in the case *John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) stated that:

“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.” [Emphasis added]
23. In this case, the parties in ELC No. 168 of 2012 and ELC Petition No. 18 of 2012 and ELC No. E47 of 2022 are different and the subject matter and cause of action, unless proved otherwise at trial, would appear to be different.
24. There is then, the appellant’s ELC Petition No. 25 of 2019. (Petition at page 94 of the record). The respondents named by the appellant in that petition were County Government of Tana River (the 2nd respondent herein) and Fredrick John Bahola (the 1st respondent herein). The parties there are the same as in the present matter. Similarly, whilst there are slight variations in the description of the property in ELC Petition No. 25 of 2019 and in the ELC No. E47 of 2022, it seems to us that the same property was the subject matter in both actions.
25. In ELC Petition No. 25 of 2019, the appellant described itself as “the owner of a parcel of land in Hola Town known as plot No. TRCC/HO/C/470(PDP No. TRD/312/2004/91...and was issued with part Development Plan No. TRD/312/2004/91 and an allotment letter No. 009444 by the 1st respondent’s predecessor”. While in the ELC No. E47 of 2022, the appellant described the parcel of



land as “Number TRCC/HOL/C/470 under Part Development Plan (PDP) No. TRD/312/2004/91 for Hola Town”. There is not much difference in as far as we can tell.

26. That said, ELC Petition No. 25 of 2019 was struck out in a ruling delivered on 5th November 2020 (at page 117 of the record) on the strength of a preliminary objection taken that the issues that were raised were res judicata, the same having been directly and substantially in issue in ELC No. 168 of 2012 and ELC Petition No. 18 of 2012. However, given the conclusion we have reached with respect to the subject matter in ELC No. 168 of 2012 and ELC Petition No. 18 of 2012 vis a vis ELC No. E47 of 2022, we think the question whether ELC No. E47 of 2022 is res judicata on account of the ruling in ELC Petition No. 25 of 2019 is one that must be determined upon trial in ELC No. E47 of 2022. We will say not more lest we embarrass the trial court that will ultimately hear and determine ELC No. E47 of 2022.
27. Enough said, there is merit in this appeal. The ruling of the High Court delivered on 17th February 2023 upholding the respondents’ preliminary objections is hereby set aside. We substitute there for an order dismissing the preliminary objections. ELC No. E47 of 2022 is remitted back to the ELC for hearing and determination on merits before a Judge other than M. A. Odeny J.
28. The appellant shall have the costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MARCH 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

