



REPUBLIC OF KENYA



KENYA LAW
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**Mukirai v Bendende & another (Land Case E036 of 2023)
[2026] KEELC 1911 (KLR) (12 March 2026) (Directions)**

Neutral citation: [2026] KEELC 1911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E036 OF 2023
A OMBWAYO, J
MARCH 12, 2026**

BETWEEN

CHRISTOPHER MATHEA MUKIRAI PLAINTIFF

AND

KAKONO BENDENDE 1ST DEFENDANT

MANG' AINDI MKAUMA KAKONO 2ND DEFENDANT

DIRECTIONS

1. The defendant comes to court under Order 2 rule (sic) (D) Of The Civil Procedure Rules 2010 And Section 3A of The *Civil Procedure Act* Cap 21 Laws of Kenya seeking an order that the subject- matter Plot Number Lr.Mn/V/2534 Plot Number 2534 forms part of plot number 387 which was a subject-matter in issue within the judgment in ELC CASE NO.194 OF 2010 and amongst the plots that were to be cancelled but was inadvertently omitted and hence this court's jurisdiction to deal on a matter that has been determined is ousted and the issue is therefore Res Judicata. That costs of this application be provided for.
2. The application is based on grounds that Plot Number 2534 forms part of Plot Number 387 which was a subject matter in issue within the judgment in ELC CASE NO. 194 OF 2010 and hence this court's jurisdiction to deal on a matter that has been determined is ousted and the issue is therefore Res Judicata and the only remedy for the Plaintiff is to move the court to set aside the judgment delivered in 2014 along with the decree that was perfected in the same year and this Honourable court is functus officio.
3. The application is supported by the affidavit of Kakono Bendende who states that they are decree-holders in the subject-land known as Plot Number 387(Original Number Elc Court Case No.194 Of 2010 Kahindi Charo Kalume & 160thers Vs Cassam Sumar & Haji Dada wherein Hon Justice S.Mukunya delivered a judgment on the 30th October, 2014. That upon delivery of the said judgment,



and issuance of the decree they sub-divided the said plot number 387 and obtained sub division number 2712/V/IVIN Title Number CR.65086 measuring 36.75 HA that was a subdivision of the mother title plot number 387/3 registered under the names Kahindi Charo Kalume And 160 Others. The jurisdictional issues are raised within their statement of defence & counter-claim dated 17th November 2023 being: at para.6 of the statement of defence & counter-claim dated 17th November 2023 -the jurisdiction of this court to deal with the subject-matter is denied since judgments already delivered on the mother title of plot number 387 and this court cannot deal with a matter which has already been determined and finalized.

3. The Plaintiff on the other hand states that this Honourable court has jurisdiction and nothing ousts the jurisdiction of the court as Plaintiffs were not parties in Mombasa ELC NO.194 OF 2010 and neither was the suit land the subject matter in the said Mombasa ELC NO.194 OF 2010 and as such the Plaintiffs suits is not Res Judicata.
4. The 1st plaintiff, Christopher Mathea Mukirai filed a replying affidavit stating that the subject matter in the instant suit is whether or not the Applicants/ Defendants have committed acts of trespass on the Respondent/ Plaintiffs parcel LR NO. MN/IV/2534. CR No. 57135. The Applicants/Defendants denied the claim of trespass and asserted that they own, occupy and possess Plot No 2712/V/MN Title No. CR 65086.
5. The respondents assert that the crux of the Applicants application is the Judgment and Decree in Mombasa ELC Case No. 194 of 2010 Kahindi Charo Kalume & 16 Others Vs Cassam Sumar & Haji Dada where the subject matter was ownership of Parcel LR No. 387/3 and contends that Plot No 2712/V/ MN and LIR No. MN/ IV/ 2534 arose from the mother title No. 387/3 land therefore the suit is res judicata which the respondents deny.
6. He states that he has been advised by counsel that the suit is not res judicata as the Plaintiffs and the Defendants were not parties to the Kahindi Charo Kalume Case and neither was the suit land a subject matter in the Kahindi Charo Kalume case and the issues in this case are totally different from Kahindi Charo Kalume Case.
7. The application therefore does not meet the threshold for res judicata in terms of section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya.
8. The plaintiffs assert that the Applicants admitted in the statement of defense that their names are those described by the Plaintiffs in the Plaint and none of those names appear in the Originating Summons MSA No 194 of 2010, or in the record of witnesses who testified in the (OS) or as Respondents in the Civil Appeal No. E027 of 2020 at Mombasa or in the Decree. The Applicants have not exhibited a title bearing their names as joint owners of plot No. 2712 or Title. CR 65086.
9. The respondent states that the applicants supporting affidavit does not disclose the deponents postal address or address at all and thus offends the express mandatory provision of order 19 Rule 4 of the Civil Procedure Rules which provides as follows:

“Every Affidavit shall state the description , true place of abode and postal address of the deponent, and if the deponent is a minor shall state the age”
10. That the Applicants supporting affidavit does not state at the Jurat where it was sworn and offends the express mandatory provision of Section 5 of the *Oaths and Statutory Declarations Act* and the said Jurat does not comply with the form of the Jurat shown in Third Schedule Under Rule 10 of Oaths and Statutory Declaration Rules. That the instant Notice of Motion is based on a fatally defective supporting Affidavit and should be dismissed.



11. The gravamen of the respondents submissions is that Section 7 of the *Civil Procedure Act* provides for the threshold for Res Judicata thus

“No court shall try any suit which the matter 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”

11. That none of the Applicants were litigants in the (OS) Case of Kahindi Charo Kalume (supra) and neither were they parties or litigants in Mombasa Civil Appeal no. E057 of 2021 Abdul Hakim Abeid Khamis & 2 Others Versus Kahindi Charo Kalume which appeal arose from ELC No 194 of 2010.

12. The respondent relies on the case of Athaman Mohamed Mwachenga Vs Freed Evans Omondi Elc

13. (Os) No. 005 Of 2023 At Kwale at page 4 where Naikuni J cited with approval the case of Independent' Electoral & Boundaries Commission Versus Maina Kiai & Others [2017] 1 Eklr where the Supreme Court held that all the elements outlined in Section 7 of the *Civil Procedure Act* must be satisfied conjunctively for the doctrine of the res judicata to be invoked,

- a) The suit or issue was directly and substantially in issue in the former suit,
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit in which the issue is raised "

14. The applicant submits that the parties and issues in the instant suit are completely different from those in the previous suit referred to by the Applicants. The Applicants do assert that they occupy plot referred No. 2712/V/MN Title No.CR65086 and also admit that the Plaintiffs title has not been cancelled. It is their submission that the substantive issue in this case is whether or not the applicants have trespassed and or encroached on the Respondents/ Plaintiffs parcel LR No.MV/V/2534. CR No. 57135 and consequently it is their submission that this is a proper case where the court should probe the matter by analysis and evaluation of evidence in order to arrive at a just determination.

15. I have perused the e-file and have not seen the applicant's submissions. The application revolves on the principle of res judicata.

16. Res judicata in Kenya, anchored in Section 7 of the *Civil Procedure Act* (Cap 21), is a substantive legal doctrine preventing parties from re-litigating issues or claims already conclusively decided by a competent court. It ensures finality in litigation, prevents abuse of the court process, and protects parties from being harassed by the same suit twice. The Core Requirements for Res Judicata are:-

- 1. Same Parties: The matter in the subsequent suit must be between the same parties or parties under whom they or any of them claim, litigating under the same title.
- 2. Final Decision: The matter must have been directly and substantially in issue in a former suit and finally decided by a court competent to try such a suit



3. "Heard and determined": The issues must have been actually heard and decided by a court of competent jurisdiction.
 4. Substantive Law: It is not merely a procedural technicality but a substantive principle.
17. The legal policy behind the principle is that there must be finality in litigation. It serves the public interest to bring an end to litigation. There must be One Bite at the Cherry and therefore a litigant is generally allowed only one opportunity to litigate a matter. However, a judgment may not be res judicata if it was obtained through fraud, mistake, or rendered by a court lacking jurisdiction. In the case of Independent Electoral & Boundaries Commission Versus Maina Kiai & Others [2017] 1 EKLr where the Supreme Court held that all the elements outlined in Section 7 of the Civil Procedure Act must be satisfied conjunctively for the doctrine of the res judicata to be invoked,
- a) The suit or issue was directly and substantially in issue in the former suit,
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit in which the issue is raised "
18. Applying these principles to this case, I do find that the parties in the previous case are totally different to this case and the record speaks for itself. None of the plaintiffs in Mombasa ELC NO 194 of 2010 are parties in this suit and that none of the defendants in that suit are parties in this suit.
19. Moreover, the dispute herein revolves on 2712/v/mn Title no CR65086 whereas the previous suit revolved on plot no 387/3. The above findings alone are sufficient to dispose of the application which is hereby dismissed with costs.

SIGNED BY/FOR:

HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. MOMBASA ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

