

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCEPCC NO. E005 OF 2025

SIMEON PATRICK HINZANO
PLAINTIFF

VERSUS

PINK PROPERTIES LTD & 9 OTHERS
DEFENDANT

RULING

1. The Notice of Motion dated 9th of October 2025 seeks the following orders:
 - a. *That this suit be struck out in its entirety as this court lacks jurisdiction to hear and determine the same;*
 - b. *That the costs of the application be provided for.*

2. The grounds on which the motion is premised are that the suit property was registered in favour of the 1st defendant on 6th June 2011 with the knowledge of the plaintiff herein and who took no action for a period of about 14 years in clear contravention of **Section 7** of the Limitation of Actions Act; that the suit is also in contravention of **Section 4(4)** of the same act because it seeks to enforce the judgment in *Mombasa Judicial Review No 1 of 2007 R vs Kilifi land Registrar & another, Ex Parte Simeon Patrick Hinzano* about 18 years after 21st December 2007 when it was delivered; that then issues herein are *res judicata* *Mombasa Judicial Review No 1 of 2007 R vs Kilifi land Registrar & another, Ex Parte Simeon Patrick Hinzano*; that the claim based on fraud is time barred by the provisions of **Section 4(2)** of the Limitation of Actions Act.

3. The application is supported by the sworn affidavit of **Anna Catani**, the third defendant, who is also a director of the 1st defendant, which reiterates the grounds set out herein above.
4. The Motion is opposed by the plaintiff through his sworn replying affidavit dated 31/10/2025. He states in that the title held by the applicant originates from the 4th defendant who obtained it fraudulently and sold it to the 1st applicant; that the application raises contested issues of fact; that the issues can only be resolved by way of adduction of evidence; that the date of fraud and the identity of who committed the fraud are matters of fact; that the plaintiff was allotted the suit land in 1997; that he moved to court to compel the 7th and 9th defendants to issue him with title in the Judicial Review application case cited by the applicant; that the court in that case issued an order compelling the 7th and 8th defendants herein to issue him with title; that he realized in **2011** that the applicant was constructing on the suit land; that the national Land Commission in the year **2025** confirmed the fraud of the applicant and concluded after carrying out proceedings that the land was the plaintiff's; that the plaintiff filed another case in **2016** seeking the implementation of the **2007** Judicial Review judgment and the court declined the same on the basis that he had allegedly sold the suit land to *Stanlaus Ngala Mwangandi* (now named as 4th defendant herein); that however the question of ownership was not addressed in the said Judicial Review application for contempt, which only sought to compel the performance of a public duty by a

public official, the Land Registrar, and in any event the issue of ownership cannot be decided in such a proceeding; that there are new parties to this matter and it is a wrongful view that the applicant has taken that the present suit is for the enforcement of the **2007** order; that the present suit is an fresh cause of action; that as such *res judicata* does not arise;

5. The plaintiff mentions another suit filed against the National Land Commission by the 1st defendant /applicant herein, to wit no ***Malindi ELC 43 Of 2018 - Pink Properties Limited Vs The NLC And 2 Others***, and this court has perused the record and found that the suit was allowed and the claim allowed as prayed. The 1st defendant had sought the following remedies in that case:

“(a)A declaration that the Plaintiff is the legal and equitable proprietor of LR No. Chembe Kibabamshe/272;

(b)An order of permanent injunction (to) be issued against the Defendants to restrain them jointly and severally whether by themselves, servants, agents, employees and/or officers from vesting the property to (the) 3rd Defendant or any other person, revoking the title of the Plaintiff, entering, trespassing, taking possession, wasting, damaging or in any other way interfering with the Plaintiff’s quiet possession of LR No. Chembe/Kibabamshe/272 including the entire improvements within the said property.

(c)Costs of this suit; and

(d)Any other remedy the Court deems fit to grant to meet the ends of justice.”

ANALYSIS AND DETERMINATION.

6. I have considered the application the response and the submissions of the parties herein. The issue that arises for determination is whether the present suit is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements had to be demonstrated:

- a. *there was 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 had to be between the first and the second action identical parties, subject matter and cause of action.*

7. The Judicial Review application filed by the plaintiff herein (*Mombasa Judicial Review No 1 of 2007 R vs Kilifi land Registrar & another, Ex Parte Simeon Patrick Hinzano*) sought to compel the Chief Land Registrar and the Land Registrar Kilifi to issue a title deed to the plaintiff in respect of plot no Chembe/Kibabamshe/272. The Judicial Review application was therefore litigation in public law for vindication of rights of the plaintiff as against the officers of government who had allegedly refused to register him as the owner of the suit land. The outcome thereof was in favour of the plaintiff herein.

8. I reject the applicant's argument that the issues raised herein are *res judicata* for the purported ground that they could have been raised in the suit *Mombasa Judicial Review No 1 of 2007 R vs Kilifi Land Registrar & another, Ex Parte Simeon Patrick Hinzano* since it is trite that matters regarding land ownership disputes can not be

decided in a Judicial Review application. Just as a judicial review application is of limited scope compared to a constitutional petition, it is also of constricted scope in relation to an ordinary suit by way of plaint. In the case of *Republic v Ministry of Roads & another Ex-Parte Vipingo Ridge Limited & another* [2015] eKLR it was stated as follows regarding the nature of Judicial Review:

“29. It is trite law that judicial review does not deal with the merits of the decision but the decision-making process. In Judicial Review by Peter Kaluma, cited by the counsel or the 2nd Respondent at p.47, the learned author, sets out a statement of the Supreme Court Practice on the nature and scope of judicial review as follows:

“The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. ‘It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question’ (Chief Constable of North Wales Police v. Evans (1982) 1WLR 1155), page 1160; [1982] 3 ALL ER 141, page 143, per Hailsham, LC). Thus a decision of an inferior court or public authority maybe quashed (by an order of certiorari made on an application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are

applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury's sense. The Court will not, however, on a judicial review application act as a 'Court of Appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty of usurping power."

9. In *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR the court stated as follows:

"[1] Initially, the scope of judicial review and the remedies which could issue thereunder were set out in the Law Reform Act and Order 53 of the Civil Procedure Rules. The ground(s) upon which such review could be exercised by the High Court was where the administrative decision/action in question was deemed as being ultra vires and/or against the rules of natural justice. Similarly, the judicial review remedies which the High Court could issue were restricted to orders of certiorari, mandamus and prohibition. As Diplock J. had predicted in Council for Civil Service Union vs. Minister for Civil Service [1995] AC 374 there have been developments in judicial review. In his own words, he expressed: -

"Judicial review has ... developed to a stage where ... one can classify under three heads the grounds upon which administrative action is a subject to control by

judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further developments on a case-by-case basis may not in the course of time add further grounds. I have in mind particular the possible adoption in the future of the principle of proportionality.'"

10. In the *Ex-Parte Vipingo Ridge Limited* (supra) the court stated as follows:

"27. In R. v. Constituency Development Fund Board & Anor. ex parte Robert Itaramwa Kochale & 5 Ors. [2012] eKLR, W. Korir, J., after considering the position as set out above, said:

"The second argument that the law and rules governing judicial review proceedings in Kenya do not contemplate cross-examination of deponents on the contents of their affidavits. I agree that indeed there is no provision for cross-examination in our laws. That, however, does not mean that this court cannot exercise its inherent jurisdiction and allow cross-examination if such a step would serve the interests of justice. I believe that the court can invoke its inherent jurisdiction and order cross-examination where it has been established that there is need to cross-examine a deponent on the contents of an affidavit. I, however, believe that the position which prevails in England is the correct position so that allowing applications for cross-examination should be done sparingly. The logic behind this policy is that judicial review proceedings are meant to be fast and quick fix to challenges encountered by citizens in their interaction with the administration. Allowing cross-examination would therefore lead to unnecessary

delays. In any event, judicial review proceedings are ideally meant to proceed on undisputed facts.

11. The Judicial Review proceedings in question occurred long before the present constitution and therefore before the Supreme Court decision in *Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) Neutral citation: [2023] KESC 40 (KLR)* which held that a judicial review court ought to carry out a merit review of a case when a party approaches it under the provisions of the present Constitution.
12. There is thus no indication, and there can be no possibility, that the judicial review proceedings filed by the present plaintiff in *Mombasa Judicial Review No 1 of 2007 R vs Kilifi Land Registrar & another, Ex Parte Simeon Patrick Hinzano* were conducted in any way other than in the traditional manner. Judicial Review proceedings were understood before the advent of the new Constitution of Kenya 2010 and the Fair Administrative Action Act, in order to deal with the merits of the dispute concerning the suit title herein. Without such indication, it can not be deemed that they adequately resolved the issue of ownership of the suit land.
13. The present suit seeks *inter alia* a declaration that the plaintiff herein is the *bona fide* owner and/or rightful proprietor of the parcel of land known as Chembe/Kibabamshe/272 and an order that the 7th defendant the land registrar Kilifi has violated the law by refusing or

declining to register the plaintiff's transfer and discharge of charge and subsequently failure to issue a title deed over the suit land. *Stanlaus Ngala Mwangandi* who allegedly sold the suit land to the 1st defendant has been joined as the 4th defendant.

14. The applicant herein has failed to demonstrate that there is any ordinary suit that has ever been heard and determined regarding whether the alleged sale of the land to it by the 4th defendant was fraudulent. However, the applicant has brought to the court's notice the fact that it was registered as proprietor of the suit land in 2011, and that the plaintiff herein, by writing the letter dated 11/10/2011 to it, evinced knowledge that the land had been transferred in an alleged fraudulent manner to the 1st defendant.

15. The inclusion of that letter in the plaintiff's list of documents in this matter is of interest as it seems to prove that the plaintiff knew of the alleged fraud in the year 2011 soon after the transfer. In this court's view, there is therefore knowledge that the plaintiff knew of the transfer and that he termed it as "*fraudulent*"; in the circumstances, the most reflexive conclusion is that he ought to have immediately filed suit. However, in the midst of all these facts, the question arises as to where should this court place the fact that the plaintiff had a Judicial Review judgment of the court with orders to compel the 7th and 8th defendants to register the plaintiff as the owner of the suit land?

16. In this court's view, the reflexive thought that the plaintiff erred in failing to file suit in 2011 is wrong, for why should a person who holds a judgment he has faith in, that is capable of enforcement by a public officer, and which could resolve his dispute with finality, be required to file yet another suit to obtain yet another judgment in yet another set of proceedings?
17. This court finds that the plaintiff's failure to file suit was excused by his holding of a judgment which he could only enforce through public officers. It is also clear that his attempts to have the two officers committed for contempt failed in the year 2016; that failure to have them punished for contempt did not have the effect of setting aside the original judicial review judgment in *Mombasa Judicial Review No 1 of 2007 R vs Kilifi Land Registrar & another, Ex Parte Simeon Patrick Hinzano*.
18. This court's additional view is that the court in the judicial review applications before it could only make observations regarding the facts surrounding the case and deal only with the issues of procedure as is in all such proceedings, and it could not make a firm determination as to who owned the suit land or what transaction occurred and was conducted by whom.
19. It is also trite that a court of law has a very wide prerogative to grant or reject to grant judicial review orders even where they are deserved.
20. I do not for an instant think that the plaintiff is trying to enforce the judicial review judgment. He tried to enforce the judicial

review judgment long ago in 2016 and failed. Rather, he is attempting to have the matter heard on the merits and he is entitled under our Constitution to do so.

21. Should the fact that the court failed to punish the two government officers for failure to comply with the judicial review order that the plaintiff be registered as owner be marked as the end of the plaintiff's quest for justice? In this court's view, had the registration taken place there would have been no need for the contempt application or probably even the present litigation. It is thus improper for this court to make any firm findings in an application such as the present, on the allegation by the applicant that the claim based on fraud should be declared to be out of time. The same should be a matter for consideration by the court after hearing all the evidence of the parties.

22. The main point made here is that no amount of litigation under the banner of Judicial Review proceedings could have resolved the land ownership dispute between the plaintiff and the 1st defendant on the merits, that it was not the fault of the plaintiff that the Mandamus application succeeded and later the contempt application failed; further, the declarations of right sought in the present suit are far much stronger than the judicial remedies based merely on procedural errors of the land officials sued in the Judicial review matter, for the said declarations will follow the court's in-depth examination of evidence with proper conclusions being made

regarding both the procedure the title held by any of the parties followed and the merits as to who is the rightful owner of the land.

23. It is also this court's view, considering that the disputed land falls within the Chembe/Kibabamshe area where in the words of my brother Judge Makori in another case, nothing appears to be certain regarding many a title. In that case *Republic v Chief Land Registrar; Kamau (Ex parte Applicant); Guyo & 4 others (Interested Parties) [2023] KEELC 21242 (KLR)* the Judge stated as follows:

"25. First, both the 2nd Interested Party and the ex-parte applicant all lay claim to the property which is the subject matter herein which led to the review of the dispositions by the 5th interested party. It will be necessary to interrogate the validity of the said claims by oral evidence.

26. The dealings in the Chembe /Kibabamshe Adjudication Section leave a bitter taste in the mouths of the landowners and are so convoluted that the titles issued do not reflect the true spirit and principles of the Torrens System..."

24. This court has also encountered first hand the complexity of the Chembe/Kibabamshe and other land adjudication sections in Kilifi in other litigation before it. Commenting on that very theme in *Watamu Men Fridays Limited v Attorney General & 4 others (Environment and Land Case E104 of 2019) [2026] KEELC 895 (KLR) (17 February 2026) (Ruling) Neutral citation: [2026] KEELC 895 (KLR)*, it stated as follows:

"The applicant's replying affidavit is a veritable ode to the long-standing complexity of the Kilifi Jimba, Madeteni, Kibabamshe adjudication sections' disputes, borne of

unfortunate governmental adjudicative and administrative misadventures that dogged them since the 1980s, which were known to the applicant even 7 years ago when its defence was filed. Perhaps the only contrast to its somnolent past is that the applicant now has counsel who is able to dissect in very minuscule details the intestinal anatomy of that complexity with apparent aplomb, and for this Mr. Munyao is to be credited.”

25. In *Watamu Men Fridays Limited (supra)* also, numerous parties are engaged in a decades long tussle over one parcel in Chembe Kibabamshe.

26. This court, having taken judicial notice of the confusion in the Chembe Kibabamshe section, considers that there are extenuating circumstances that make this court prefer the preservation of the present suit for trial on its merits is the ultimate cure to the dispute between the plaintiff and all the defendants herein.

27. **Article 50(1)** of the Constitution provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

28. In *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)* the Supreme Court addressing fair trial, noted the provisions of **Article 50** of the constitution and observed as follows:

“38. The African Commission on Human and People’s Rights established general principles to all legal proceedings

applicable by Member States, of which Kenya is one. Therefore, the principles are binding under article 2(5) and (6) of the Constitution, and include the following:

"General principles applicable to all legal proceedings:

1.Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2.Fair Hearing

The essential elements of a fair hearing include:

...

(e)adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f)an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

...

(i)an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and


(j)an entitlement to an appeal to a higher judicial body."

29. Having regard to the provisions of **Article 50(1)** of the Constitution, it can not be stated categorically, on the basis of the judgments in the Judicial Review cases affecting the suit land, that the plaintiff's grievance has been tried on its merits in a fair and impartial hearing. **Article 159(2)(d)** was enacted to dispel the apprehension that the technicalities of procedure could override the interests of substantive justice. The confusion and delay borne of

the evident and prolonged and *bona fide* attempts to enforce the Judicial Review judgment in *Mombasa Judicial Review No 1 of 2007 R vs Kilifi Land Registrar & another, Ex Parte Simeon Patrick Hinzano* may have contributed to the situation the plaintiff finds himself in. He can not be blamed alone for failure to secure compliance with the court order that compelled registration of the title in his name without hearing his evidence. In an era where the Constitution has emphasized on substantive justice, it would be quite harsh to invoke the provisions of **Cap 22** in this particular dispute to state that his claim is statutorily time barred at this interlocutory stage without hearing his evidence of what has been happening from the time he obtained the Judicial Review Judgment.

30. Consequently, I find that the plaintiff is entitled to be heard on the merits of his claim and I disallow the application dated **9/10/2025**. Consequently, I order that the present suit shall go to full hearing on its merits. The parties shall file their trial bundles, duly indexed and paginated, the plaintiff within **14** days from today and the defendant within **14** days from the date of expiry of the period granted to the plaintiff; the parties shall appear before this court for pretrial on **18th June 2026**.

Dated, signed and delivered at Malindi on this 12th May 2026.



MWANGI NJOROGE

JUDGE, ELC MALINDI.