



**Mayenga & 2 others v Khamis & another (Environment and Land Appeal
E024 of 2024) [2025] KEELC 5500 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E024 OF 2024**

**JO OLOLA, J
JULY 24, 2025**

BETWEEN

**MAXMILLAH MAYENGA 1ST APPELLANT
SAMUEL GICHUHI KIBANDI 2ND APPELLANT
THOMAS MWAI NDALO 3RD APPELLANT**

AND

**SALIM ABEID KHAMIS 1ST RESPONDENT
RACHEL NDANUI 2ND RESPONDENT**

JUDGMENT

1. This is an Appeal arising from the Ruling of the Honorable G. Sogomo, PM delivered on 10th May, 2024 in Mombasa CMELC case No. 56 of 2018.
2. By a Notice of Motion application dated 22nd September, 2023, Maximillah Mayenga, Samuel Gichuhi Kibandi and Thomas Mwai Ndalo describing themselves as Intended Defendants (the Appellants herein) sought for orders that the Court be pleased to set aside the warrants that had been issued in the said matter in the Lower Court and dated 20th September, 2023.
3. The Application was supported by an affidavit sworn by one of the Applicants and is premised on the grounds *inter alia*, that:
 - i. The Appellants had applied to be joined in those proceedings but their application was dismissed by the Court on 31st October, 2022;
 - ii. The Appellants then chose to just pursue their interest in Malindi ELC. Case No. 53 of 2018 (OS); *Jackson Mwangome Ngome & 4 Others v Robin Staurt Macdonald & 55 Others*.



- iii. In a ruling delivered on 11th November, 2022 in the said Malindi Case, the court issued an order that the *status quo* be maintained in regard to the subject parcel of land pending the hearing and determination of the suit;
 - iv. On 21st September 2023, the Appellants were surprised to find warrants of eviction dated 20th September, 2023 pinned on their doors;
 - v. The warrants of eviction are illegal as they cannot supersede the orders issued by the Judge in the Malindi case. In addition, the Defendants were not parties in the suit and the warrants could not issue against themselves;
 - vi. There was a real threat that the Appellants' houses could be demolished pursuant to the warrants issued; and
 - vii. It is therefore in the interest of justice that the said warrants be stayed.
4. Salim Abeid Khamis (the Respondent) was opposed to the application. By his Grounds of Opposition dated 11th October, 2023, the Respondent who was the Plaintiff in the matter before the lower court opposed the application on some five (5) grounds listed as follows:
1. That the Application is unfounded and ungrounded;
 2. That the Applicants are seeking to enjoin this suit through the back door despite dismissal of their application for joinder on 31st October, 2022;
 3. That the decree issued herein included agents of the Defendant herein namely Rachel Ndanui;
 4. That the Applicants are invaders, without any lawful claim, to the parcel of land out to frustrate the execution of the decree in this suit; and
 5. That the application ought to be dismissed with costs accordingly.
5. In addition to his Grounds of Opposition, the Respondent also filed a Notice of Preliminary Objection dated the same 11th day of October, 2023 objecting to the hearing of the Appellants' application on the grounds:
1. That the intended 2nd, 3rd and 4th Defendants application dated 22nd September, 2023 is Res Judicata as the prayers sought therein had already been dealt with vide their initial application dated 6th January, 2022 and determined by this Honorable Court on 31st October, 2022; and
 2. That this Honorable Court therefore lacks jurisdiction to entertain the application dated 22nd September, 2023 as prayers sought therein had already been initially raised, canvassed and determined by this Honorable Court on 31st October, 2022.
6. Having heard the parties and in his Ruling rendered on 10th May, 2024 aforesaid, the Learned Principal Magistrate upheld the Respondent's Preliminary Objection and dismissed the Appellant's application with costs.
7. Aggrieved by the said determination, the Appellants moved to this court and lodged the Memorandum of Appeal dated 9th June, 2024 urging this court to set aside the said Ruling and to instead allow their Notice of Motion dated 22nd September, 2023 on the grounds that:
1. The Learned Magistrate erred in law and fact by holding that the Notice of Motion dated 22nd September, 2023 was res-judicata;



2. The Learned Magistrate erred in law and fact by failing to find that the Appellants were not parties in the suit and no warrants of evictions could therefore issue against them;
 3. The Learned Magistrate erred in law and fact by failing to allow the Notice of Motion dated 22nd September, 2023 when all the circumstances are taken into account; and
 4. The trial court erred in law and in fact in arriving at a decision that was wholly against the weight of the evidence, law and justice.
8. This being the first appellate court, it is mandated to re-evaluate the evidence before the trial court as well as the Ruling and to arrive at its own independent judgment on whether or not to allow the Appeal [See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123].
 9. I have accordingly carefully perused and considered both the Record and the impugned Ruling. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
 10. In their Memorandum of Appeal lodged herein, the Appellants have faulted the Lower Court for its finding that their application dated 22nd September, 2023 was res-judicata. It is further their case that they were not parties to the suit and the Learned Trial Magistrate erred in failing to find that no warrants of eviction could therefore issue against them.
 11. By the said Motion dated 22nd September 2023, the Appellants had sought an order to set aside the warrants dated 20th September 2023. In his Ruling dated 10th May 2024, the Learned Magistrate dismissed the same after finding as follows at page 3 of the Ruling:

“This court has anxiously had regard to the subject Motion, Grounds, objections, all pleadings, and the erudite written submissions filed by the disputant parties herein.

The record and the Applicants own admission depicts a previous similar application which was dismissed. In this regard Section 7 of the *Civil Procedure Act* (Cap 21) states as follows:

“No court shall try any suit or issue in which the matter 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 in the suit in which such issue has subsequently been raised and has been heard and finally decided by such court.”

Thus the question as to whether this court should grant the Applicant(s) the indulgence she (sic) craves for must be answered thunderously in the negative.”

12. In their submissions before the court, the Appellants stress the fact that they were not parties to the suit and that the issues raised in their Motion dated 22nd September 2023 were not identical to those they raised earlier in the Motion dated 6th January, 2022. It is accordingly their submission that the doctrine of res judicata did not apply to the matter.
13. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure and 3 Others* (Petition No. 17 of 2015) 2021 KESC 39 (KLR); the Supreme Court of Kenya delved into an in-depth discussion of the concept of res judicata and held as follows:

“54. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from



returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

14. In the matter herein, it was evident that the Plaintiff herein had obtained judgement in regard to the suit properties on 22nd January 2019 and that warrants initially dated 13th October, 2021 were issued. When the Plaintiff attempted to effect the warrants, the three (3) Appellants herein instituted a Notice of Motion dated 6th January, 2022 wherein they sought an order of stay of the said judgment and the warrants for their eviction from the suit property. In addition, they had sought orders to be enjoined as Defendants in the suit and for the judgment to be set aside to allow them to defend the suit.
15. In a Ruling delivered on 31st October, 2022, the Appellants application was dismissed after the court found that the Appellants had filed a similar application before Hon. C.N. Ndegwa who dismissed the same on 18th June, 2020. In dismissing the claim, the court had found that the Appellants who claimed to be in occupation of the suit property had not filed any draft defence to demonstrate that they were entitled to defend the suit land and an order setting aside the judgment.
16. That being the case, it was clear that the application dated 22nd September, 2023 was indeed the third one being made by the Appellants. In the said application, they had sought an order of stay of execution and for setting aside the warrants for their eviction now dated 20th September, 2023.
17. It is the Appellant’s case that when their second application was dismissed, they chose to just pursue their interest through another case filed before the Malindi Environment and Land Court. It is further their case that some time on 11th November, 2022, the Malindi Court had issued orders of status quo and that they were therefore surprised to find the new warrants of eviction pinned on their doors.
18. From a perusal of the record herein, it was evident that the Motion dated 22nd September, 2023 was raising the same issues that the Appellants had raised earlier and which had been dismissed by the court in two instances, being on 18th June, 2020 and 31st October, 2022. The subject matter of the dispute and the parties therein were the same and there was no way the Appellants could escape from the court’s conclusion that the matter was *res judicata*.
19. As the Supreme Court stated in the same *John Florence Maritime Services Limited case (supra)*.

“.....where a given matter becomes the subject of litigation in, and of 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 a 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.”
20. As regards the Appellants’ claim that there was an order of *status quo*, issued in the Malindi Court, it was clear to me that such status as regards the land claimed by the Plaintiff could only mean that the parties were to remain in the position in which they were at the time. That position known to



the Appellants was that the Plaintiff has a judgment in his favour and that there are warrants for their eviction over the same.

21. In the premises, I was not persuaded that there was any merit in the Appeal. I dismiss the same with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 24TH DAY OF JULY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Mwanzia Advocate for the Appellants
- c. Ms. Sidinyu holding brief for Malombo Advocate for the 1st Respondents
- d. No appearance for the 2nd Respondent

