



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO 12 OF 2017

IN THE MATTER OF ARTICLES 22(1), 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL**

FREEDOMS UNDER ARTICLES 22(1), 23(1) 40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

SHAHZID AHMED YUSUF.....PETITIONER/APPLICANT

= VERSUS =

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

RULING

1. I have before me a Notice of Motion application dated 14th July 2017. The Petitioner/Applicant prays for the following Orders:-

1. Spent

2. Spent

3. **THAT pending the hearing of this Petition, a conservatory orders does issue to restrain the Respondent, by itself, its appointed agents and/or servants from proceeding with the demolition of the properties of the Petitioner that have been identified and marked for demolition on the Portion of land known as Plot Number 5054/116/Kilifi Township situate at Kilifi Town and measuring approximately 0.1128 Ha.**

4. **That the Court be pleased to make any other order fit in the circumstances of this case.**

5. **THAT the cost of this application be provided for.**

2. The application is supported by an Affidavit sworn by the Petitioner Shahzid Ahmed Yusuf on 14th July 2017 and is premised on a number of grounds thereon which are inter alia that:-

- a. *The Petitioner is the registered owner of Land Parcel No. 5054/116/Kilifi Township.*
- b. *The Petitioner has initiated construction of a multipurpose hall and residential block on the said land having obtained the Respondent's approval on 19th November 2014.*
- c. *The Petitioner has obtained all necessary approvals including that of the National Environmental Management Authority (NEMA) and the National Construction Authority.*
- d. *Immediately the construction commenced the Respondent started threatening the Petitioner together with his employees that they would demolish the structures built on the land.*
- e. *The Petitioner stands to suffer irreparable damage and loss if the threatened demolition is not halted forthwith.*

3. The County Government of Kilifi, the Respondent herein is opposed to the grant of the orders sought. By a Notice of Preliminary Objection filed herein on 27th July 2017, the Respondents urge this Court to strike out and/or dismiss the Application for reasons that:-

i. *The matters impleaded by the Petitioner are res judicata and this Court has no jurisdiction to try the same having been directly and substantially in issue in ;*

a. *Malindi ELC NO. 95 of 2006; Shahzid Ahmed Yusuf –vs- The County Government of Kilifi; and*

b. *Malindi High Court Petition No. 2 of 2017; Shahzid Ahmed Yusuf –vs- The County Government of Kilifi.*

ii. *The application as drawn presupposes that the Petitioner has exhausted Section 38 of the Physical Planning Act, which provides an elaborate dispute resolution mechanism to be followed by persons on whom an enforcement notice has been served under subsection 1 and are aggrieved by the notice.*

iii. *The Petitioner has not in anyway followed the elaborate steps provided by Section 38 of the Physical Planning Act Cap 286 Laws of Kenya.*

iv. *The Application and Petition as preferred violates mandatory provisions of law and laid down procedures and cannot sustain the prayers sought; and*

v. *The Application and Petition is an abuse of the Court Process.*

4. I have perused the Application and the Notice of Preliminary Objection. I have also gone through the oral submissions and the authorities placed before me by the Learned Advocates for the respective parties herein.

5. The doctrine of res judicata, being a fundamental principle of law goes to the jurisdiction of the Court and I must therefore deal with it forthwith. In Kenyan law, it is anchored at section 7 of the Civil Procedure Act in these terms:-

“7. Res Judicata

No Court shall try any suit or issue in which the matter directly and substantially 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.”

6. From the foregoing, the ingredients of res –judicata could be said to be the following. First, that the issue in dispute in the former suit between the parties must be directly or subsequently be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly that the former suit should have been between the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly, that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally. (See **Karia & Another –vs- the Attorney general and others (2005) 1 EA 83**.)

7. The essence of the doctrine is well captured in the ancient case of **Henderson –vs- Henderson (1843) 67 ER 313** where the Court observed thus:-

“where a given matter becomes the subject of litigation in and 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 the 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 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..”

8. As stated by the Court of Appeal in **John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR:-**

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgment by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

9. It is not in dispute that the Petitioner before me has previously filed the two cases cited in the Notice of Preliminary Objection against the Respondent herein. It is however the Petitioner’s case that the said cases were not heard and determined fully on their merit.

10. I have had occasion to look at the cases cited by the Respondent herein. In *Malindi ELC Case No. 95 of 2016; Shahzid Ahmed Yusuf –vs- The County Government of Kilifi*, the Petitioner herein filed an application dated 26th April 2016 seeking the following orders:-

a. That the Honourable Court does issue a temporary injunction restraining the Respondent by itself, employees and/or agents from arresting the Applicant by himself, his employees and/or agents as they undertake construction of Plot No. 5054/116/Kilifi Township situated at Kilifi town and further restraining the Respondent (from) undertaking any works whatsoever or interfering with any construction that will be ongoing on the above said parcel of land and from any other manner whatsoever and whoever from interfering or blocking the Applicant’s activities and operations thereon pending the hearing of this Application inter-partes.

b. That in the alternative and without prejudice to the foregoing, the Honourable Court does allow the Applicant to continue with his construction and at the same time issue Orders prohibiting any arrests on the person of the Applicant, his employees and/or agents as they continue with construction on plot number 5054/116/Kilifi Township situated at Kilifi town pending the hearing and determination of this application inter-partes.

11. The said application was heard by the Honourable Justice Angote who on 3rd February 2017, proceeded to dismiss the same with costs. At Paragraph 13 and 17 of the Learned Judge's Ruling, he observed as follows:-

"13. The approval letter by the Defendant was on condition that the purported development is approved by relevant government departments. The Plaintiff was also required to secure the Change of User.

14. The Plaintiff has exhibited the Application for Change of User for "proposed extension of user from Commercial (lodge and Hotel) to include residential use (bedsitter)". Indeed special condition No. 5 of the grant shows that "the land and buildings shall only be used for lodge and hotel only."

14. There is no evidence before me to show that the Change of User from "Lodge and hotel" to a hall and residential use" was ever obtained by the Plaintiff or his agent.

16. The evidence before this Court shows that by the time the Defendant issued its notice of 21st March 2016 to stop construction, the Plaintiff had not obtained the approval of the National Construction Authority to develop the suit property. The letter of approval by the National Construction Authority was granted on 5th April 2016, a month after the Defendant served the Plaintiff with a notice stopping him from proceeding with the alleged construction.

17. In the absence of the approval for Change of Use, and in view of the belated letter from the National Construction Authority, I find that the Plaintiff has not established a prima facie case with chances of success."

12. Arising from the foregoing, it is clear to me beyond per-adventure that the said suit related to the same Enforcement Notice being challenged herein and further that it was in relation to the same suit property. It would however appear that the Petitioner was not contended with the findings of the Learned Judge and he thereafter proceeded to file Malindi High Court, Constitutional Petition No. 2 of 2017 in which he filed an application dated 24th February 2017 seeking the following Orders:-

".....

3. That pending the hearing of this Petition, a Conservatory Order does issue to restrain the Respondent, by itself, its appointed agents and/or servants from proceeding with the demolition of the properties of the Petitioner that have been identified and marked for demolition on the portion of land known as Plot No. 5054/116/Kilifi township situate at Kilifi town and measuring approximately 0.1128 Ha.

13. The said application was heard before the Honourable Justice Weldon Korir who proceeded to strike out the entire Petition on 29th June 2017. In striking out the Petition, the Learned Judge observed at Paragraphs 31 to 33 of his Ruling as follows:-

31. The Respondent has attached a Ruling dated 3rd February, 2017 by Angote J in which he dismissed the Petitioner's application for injunction holding that:-

"In the absence of the approval for change of use, and in view of the belated letter from the National Construction Authority, I find that the plaintiffs has not established a prima facie case with chances of success."

32. The Petitioner's response to this particular issue is found in his submissions. His case is that Malindi ELC No. 95 of 2016 was withdrawn. Apart from the fact that the Petitioner did not file an affidavit to formally rebut the Respondent's allegation that the matter is res judicata, I find that the Petitioner does not deny the fact that a ruling on the question of injunction had been heard inter-

partes and a determination made before the withdrawal of the case.

33. The application for a Conservatory Order herein is nothing but a reincarnation of the application for injunction that was rejected by the Environment and Land Court. The instant application is therefore an abuse of the court process. The same is also res judicata as the litigation before the Environment and Land Court was before a competent Court and involved the same parties who were tussling over the same subject matter.”

14. It is instructive that exactly two weeks after the determination by the Learned Judge, that the Petitioner was guilty of abusing the Court Process and that his case was res judicata, he had the temerity to move to this Court and file the present Petition seeking virtually similar orders as the ones sought in the previous two cases. He avers at Paragraph D 1 of this Petition as follows:-

1. There is no other suit pending in Court or concluded between the Petitioner and the Respondent in this Court or in any other Court of competent jurisdiction over the issue raised in this case and the cause of action relates to the Petitioner and its members (sic).

15. I think there can be no greater abuse of the Court Process than the one exhibited by the Petitioner herein. Both the application and the Petition upon which it is hinged amount to nothing but an invitation to judicial anarchy. This Court shall not countenance the same.

16. Accordingly, I allow the Preliminary Objection filed by the Respondent herein and like my brother Weldon Korir J., I strike out both the Notice of Motion dated 14th July 2017 and the Petition. The same are res judicata and a gross abuse of the Court's Process.

17. The Respondent shall have the costs of both the Application and the Petition.

Dated, signed and delivered at Malindi this 20th day of September, 2017.

J. O. OLOLA

JUDGE