



**Mastajabu (Suing as the Legal Administrator of the Estate of the Late Mastajabu Athumani Suleiman ) & another v Chief Land Registrar, Kwale & 3 others (Civil Appeal E083 of 2021) [2025] KECA 1319 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1319 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E083 OF 2021  
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**HASSAN MASTAJABU (SUING AS THE LEGAL ADMINISTRATOR  
OF THE ESTATE OF THE LATE MASTAJABU ATHUMANI  
SULEIMAN ) ..... 1<sup>ST</sup> APPELLANT**

**ALI ATHUMAN MADZENGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHIEF LAND REGISTRAR, KWALE ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMPANY ..... 2<sup>ND</sup> RESPONDENT**

**WILFRED JAMES KINANI KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**FAITH NJERI KAMAU ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 10th February 2021 in E.L.C No. 156 of 2018)*

**JUDGMENT**

1. Before us is an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 10<sup>th</sup> February 2021 in ELC No. 156 of 2018, dismissing the appellants' suit with costs to the respondents on the basis that it was res judicata.
2. The genesis of the impugned ruling is that, by a plaint dated 28<sup>th</sup> June 2018 and amended on 16<sup>th</sup> December 2019, the appellants, Hassan Mastajabu (suing as the legal administrator of the Estate of the late Mastajabu Athumani Suleiman) and Ali Athuman Madzenge, filed suit against the respondents (the Chief Land Registrar Kwale, the National Land Commission, Wilfred James Kinani Kamau and



Faith Njeri Kamau) seeking: a permanent injunction restraining the respondents from subdividing, selling, disposing of, transferring, constructing on, evicting, threatening and/or interfering in any other manner with the property known as Plot Number Kwale/Galu Kinondo/339 (the suit property); an order declaring the appellants as the legal/beneficial/registered owners of the suit property, and that they be issued with a title document without gazettelement; and costs of the suit and interest thereon at court rates.

3. The appellants' case was that they were the rightful owners of the suit property, having acquired it through what they termed as "ancestral rights"; that, on 5<sup>th</sup> January 2012, they sought the assistance of the Commissioner of Lands after assistance from both the Kwale Land Registrar and the Kwale Land Survey Officer was not forthcoming; that, on 11<sup>th</sup> November 2017, the 2<sup>nd</sup> respondent (the National Land Commission) made a decision in the appellants' favour, reaffirming their right of ownership, and directing the Chief Land Registrar to revoke the title held by one Mutuku Ngei, and to issue title to the appellants as the legal owners of the suit property; that, on 19<sup>th</sup> July 2019, the Chief Land Registrar wrote to the 1<sup>st</sup> respondent (Chief Land Registrar, Kwale) to implement the 2<sup>nd</sup> respondent's decision; that the 1<sup>st</sup> respondent declined to obey the recommendation of the Chief Land Registrar; and that the 3<sup>rd</sup> and 4<sup>th</sup> respondents (Wilfred James Kinani Kamau and Faith Njeri Kamau) were registered as owners of the suit property through illegal and fraudulent acquisition.
4. Contemporaneously with the plaint, the appellants filed a Notice of Motion dated 28<sup>th</sup> June 2018 seeking, inter alia: interim injunctive reliefs and orders mirroring the prayers sought in the plaint; orders that the suit property be registered in their names as proprietors thereof; and that they be issued with a title document without gazettelement.
5. In response to the appellants' Motion, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a Replying Affidavit sworn by the 3<sup>rd</sup> respondent on 20<sup>th</sup> July 2020 deposing that he was the registered owner of the suit property, having purchased the same for valuable consideration on 18<sup>th</sup> October 2007; that the purchase was undertaken after conducting due diligence and establishing that the suit property was free from encumbrances, and that the vendor, one Mutuku Ngei, was the duly registered owner thereof; that he therefore acquired a clean title, and had quiet possession of the suit property from the time of purchase until 28<sup>th</sup> May 2015 when he was summoned by the Kwale County Land Management Board (the Board) to appear before it on 2<sup>nd</sup> June 2015; and that, on the said date, he sent his legal representative who established that the complainants were the same people who had filed the present suit, and that their complaint was that the suit property belonged to the estate of their fore father, one Mwathuman Suleiman.
6. The 3<sup>rd</sup> respondent further deposed that his legal representative explained to the Board the 3<sup>rd</sup> respondent's rights of ownership, and that the only recourse the complainants had was to file suit against him; that the Kwale County Land Management Board refused to heed his legal representative's advice at the complainants' persistence, which prompted him and the 4<sup>th</sup> respondent to file Mombasa HC Constitutional Petition No. 35 of 2015 against the complainants, the County Government of Kwale, Kwale County Land Management Board and the 2<sup>nd</sup> respondent herein (the National Land Commission); and that, despite service of hearing notices on all parties by their advocate, the complainants and the other respondents, except for the Attorney General, failed to appear.
7. According to the 3<sup>rd</sup> respondent, the High Court delivered its judgment on 31<sup>st</sup> May 2016 and issued a declaration that the proceedings by the Kwale County Land Management Board were ultra vires the Board's power and that, therefore, they were unconstitutional; a declaration that Section 35 of the National Land Commission Act No. 5 of 2012 did not confer jurisdiction on the 2<sup>nd</sup> respondent or the Board to investigate title to private land; and an order of certiorari and prohibition against the National



Land Commission, the Kwale County Land Management Board and the County Government of Kwale, quashing their decision and restraining them from investigating, challenging and/or in any manner whatsoever questioning the validity of the title to the suit property.

8. The 3<sup>rd</sup> respondent further deponed that the 2<sup>nd</sup> respondent's decision of 11<sup>th</sup> November 2017 was made after the High Court decision aforesaid; that the issues raised before the Board had been properly dealt with by the High Court and were therefore res judicata; that there was prior litigation relating to the issues herein, which had been determined in favour of Mutuku Ngei, the previous owner; that those decisions had been clearly annexed to HC Constitutional Petition No. 35 of 2015; and that the appellants had deliberately omitted these facts in order to mislead the court.
9. The previous court decisions referred to by the 3<sup>rd</sup> respondent were: (i) Mombasa PMCC No. 350 of 1990 – Athumani Suleiman Mwakisha v Luke Musomba Mutio; (ii) Mombasa High Court Civil Appeal No. 113 of 1994 – Athumani Suleiman Mwakisha v Luke Musomba Mutio; (iii) Mombasa High Court Misc. Civil Application No. 110 of 2005 – Republic v Land Registrar Kwale ex parte Mutuku Ngei v Mastajabu Athumani Suleiman; and (iv) Mombasa High Court Civil Case No. 52 of 2007 - Mutuku Ngei v Mastajabu Athumani Suleiman.
10. The 3<sup>rd</sup> respondent finally deponed that the court was being called upon to adjudicate over a matter or matters which had previously been determined by a court of concurrent jurisdiction; that the appellants had not preferred any appeal from those decisions; and that the court should strike off the appellants' suit for being res judicata.
11. In addition to their replying affidavit, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a Notice of Preliminary Objection dated 20<sup>th</sup> July 2020 on the ground that the appellants' suit was res judicata the decisions delivered in Mombasa High Court Constitutional Petition No. 35 of 2015, Mombasa HCCC No. 52 of 2007 and Mombasa High Court Civil Appeal No. 113 of 1994; and that, therefore, the same should be struck out with costs.
12. The preliminary objection was canvassed by way of written submissions filed by counsel for the appellant and counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr. Makuto, did not file any submissions, but indicated that he supported the preliminary objection, and urged that the suit be deemed as being res judicata and struck out.
13. In its judgment dated 10<sup>th</sup> February 2021, the ELC (Munyao Sila, J.) held that the appellant's suit was a re-litigation of the previous dispute that the successors in title to the parties herein had; that, while the parties were different, the issue as to who was entitled to ownership of the property was in issue in the previous suits; that the issue of ownership had been determined on merits; and that it was held in those suits that the predecessor in title to the 3<sup>rd</sup> and 4<sup>th</sup> respondents held a good title to the suit property as against the predecessors to the appellants. Accordingly, the ELC found that the appellants' suit was res judicata and dismissed it with costs to the respondents.
14. Aggrieved by the ruling of the ELC, the appellants filed the instant appeal on 7 grounds set out in their Memorandum of Appeal dated 3<sup>rd</sup> September 2021, namely:
  1. That the Learned Judge erred in law and fact in holding that the suit is res-judicata.
  2. That the Learned Judge erred in Law and fact in failing to consider that the suit was premised on the investigations and determination of the National Land Commission.



4. That the Learned Judge erred in law and in fact in failing to appreciate the fact that the National Land Commission is a constitutional body established to investigate into and rectify historical land injustices.
  5. That the Learned Judge erred in law and in fact in failing to appreciate provisions of Article 40(6) that the right to property does not extend to property that is unlawfully acquired.
  6. That the Learned Judge erred in law and in fact in failing to consider the submissions of the Appellant and to the extent that the new constitution and the National Land Commission was established to look into historical injustices and rectify the same hence formed to act retrospectively.
  7. That the Learned Judge erred in law and in fact in failing to appreciate that the Court has jurisdiction to independently investigate titles as provided in Article 162 (2) as envisaged in Section 13(2) (a), (d) and (e) of the *Environment and Land Court Act.*”
15. In their appeal, the appellants seek orders that the appeal be allowed and the impugned ruling set aside; that the suit be heard and determined on its merits; and that the respondents be ordered to pay costs in the appeal and in the ELC.
  16. In support of the appeal, learned counsel for the appellants, M/s. Marende Ncheza & Co., filed written submissions and a list of authorities dated 16<sup>th</sup> February 2024.
  17. Likewise, learned counsel for the 1<sup>st</sup> respondent, Mr. Emmanuel M. Makuto, Senior Litigation Counsel for the Attorney General, filed written submissions dated 16<sup>th</sup> February 2024.
  18. On their part, learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, M/s. Muniyithya, Mutugi, Umar & Muzna & Co., also filed written submissions and a list of authorities dated 28<sup>th</sup> February 2024.
  19. In our considered view, two main issues commend themselves for our determination, namely: whether the appellants’ suit was premised on a determination of the 2<sup>nd</sup> respondent exercise of its mandate to investigate and rectify historical land injustices; and whether the learned Judge erred in holding that the appellants’ suit was res judicata.
  20. On the 1<sup>st</sup> issue as to the 2<sup>nd</sup> respondent’s constitutional mandate to investigate and rectify historical injustices relating to land and whether the appellants’ suit was properly founded on the 2<sup>nd</sup> respondent’s contested decision, counsel for the appellants submitted: that the 2<sup>nd</sup> respondent did its own investigations into the complaint and found that, indeed, “the first allottee and registered owner acquired his title through fraudulent and unjust ways since he was a land officer who abused his powers to remove the deceased’s name and place his and later sold it to third parties”; that the appellants were well within their rights to bring the case before the Environment and Land Court with a view of seeking justice to the historical injustice they suffered; and that “this Court ought to find that it has the mandate to apply the new Constitution retrospectively to correct the wrongs that previously occurred when land matters were heard based on bad law that promoted fraud by not challenging first titles”.
  21. Notably, neither counsel for the 1<sup>st</sup> respondent nor for the 3<sup>rd</sup> and 4<sup>th</sup> respondents made submissions on this issue.



22. The 2<sup>nd</sup> respondent's impugned decision dated 11<sup>th</sup> November 2017 identifies the nature of the complaint which it sought to investigate in the following words:

“In exercise of the powers conferred by Article 68(c) (v) of the Constitution of Kenya and Section 14(4) (5) (6) (7) and (8) of the National Land Commission Act, 2012, the National Land Commission upon receipt of the complaint regarding the ownership of the above listed property undertook review of grants to establish the legality or otherwise of the property above.”

23. Article 68(c) and (v) of the Constitution provides:

68. Legislation on land Parliament shall—

... ..;

(c) enact legislation—

... ..;

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;...

24. Pursuant to the afore-mentioned constitutional edict, Parliament enacted the National Land Commission Act, 2011. Section 14 of the Act provides in part:

14. Review of grants and dispositions

1. Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality..... ..

4. After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

5. Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

6. Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

7. No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

8. In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution....

25. In investigating and determining the complaint lodged by Mutuku Ngei (the vendor who sold the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> respondents) against the deceased, the 2<sup>nd</sup> respondent was purportedly exercising its mandate to review grants and dispositions, and not the mandate to investigate into and rectify historical land injustices which is provided for under section 15 of the National Land Commission Act. Contrary to the appellants' contention, the 2<sup>nd</sup> respondent did not make any determination pursuant to Article 67(3) of the Constitution that a historical land injustice had been committed.



26. It is not lost on us that section 15 of the *National Land Commission Act* (No. 5 of 2012) mandated the Commission to investigate and adjudicate claims arising from historical land injustices and recommend appropriate legislation to Parliament within two years of its appointment. To our mind, its role under section 15 of the Act was to address historical land injustices, namely claims arising from past events that led to unfair or inequitable land ownership or use as contemplated in Article 67(3) of the *Constitution* (see: *Gathoni Park Farm Limited v National Land Commission & 7 others* [2019] KEELC 228 (KLR)). However, it is instructive that this mandate relates to public land.
27. Even if it were to be argued that the 2<sup>nd</sup> respondent was acting pursuant to section 14(1) of the Act and subject to Article 68(c) and (v) of the *Constitution*, its mandate would have been limited to review “... grants or dispositions of public land to establish their propriety or legality.” It is indubitable that this mandate does not extend to transactions relating to private land. In any event, the disputed ownership of the suit property had been previously determined with finality in Mombasa High Court Constitutional Petition No. 35 of 2015, Mombasa HCCC No. 52 of 2007 and Mombasa High Court Civil Appeal No. 113 of 1994 against which decisions no appeal had been preferred.
28. The suit property, which was registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> respondents (and previously in the names of Luke Musomba Mutio and then Mutuku Ngei), comprised private land as defined in Article 64 of the *Constitution* as follows:
64. Private land
- Private land consists of —
- a. registered land held by any person under any freehold tenure;
  - b. land held by any person under leasehold tenure; and
  - c. any other land declared private land under an Act of Parliament.
29. In a Mombasa Petition between Wilfred James Kimani Kamau & another v National Land Commission & 3 others [2016] KEHC 5097 (KLR) where the 3<sup>rd</sup> and 4<sup>th</sup> respondents challenged the legality of the proceedings before the Kwale County Land Management Board and the 2<sup>nd</sup> respondent to investigate the title to the suit property, the High Court (M. J. A. Emukule, J.), declared, inter alia, that the Kwale County Land Management Board and the 2<sup>nd</sup> respondent has no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land under Article 67 of the *Constitution*, the *National Land Commission Act* and/or under any other law.
30. In its judgment dated 31<sup>st</sup> May 2016, the court held that:
- “ 15. Article 40 guarantees every person the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. The Petitioners are owners of private land as defined in Section 64 of the *Constitution*. the *Constitution* vests in the National Commission, the power to investigate title in relation to public land, and not private land. It was therefore a violation of the Petitioners rights to own property of any description in any part of Kenya for the First, Second and Third Respondent to purport to investigate the Petitioners’ title to the suit land. It was violation of the Petitioners constitutional rights aforesaid.

... ..



17. The purported investigation of the Petitioners' title by the First, Second and Third Respondents under a complaint by the Fifth, Sixth and Seventh Respondents, is a threat to the Petitioners' right to property as guaranteed by Article 40 of the *Constitution*."
31. No evidence was tabled to demonstrate that the judgment in Mombasa Petition No. 35 of 2015 has been appealed against and successfully set aside. Accordingly, the court's decision in that petition remains in force and cannot be reverted or interfered with by the 2<sup>nd</sup> respondent's subsequent decision relied on by the appellants.
32. In the same vein in *Kipsyenan Farmers Company v National Land Commissioner & another* [2019] KEELC 1307 (KLR) Munyao Sila, J.) held that:

" 19. I am at a loss as to where the National Land Commission got the idea that they have a mandate to investigate and make decisions in relation to privately owned land. When it comes to disputes over private land that is not the mandate of the National Land Commission. For example, if people holding land under private tenure, have a dispute as to whether such land has been subdivided properly, or who between two private individuals should have title to the land, or whether an individual's title to private land should be cancelled, that is a dispute that needs to go to the courts and not to the National Land Commission...That is a private dispute among members of a private company, holding private land for which the National Land Commission has absolutely no mandate. We have other institutions which can, and do, resolve such disputes. When faced with such disputes, the National Land Commission should not waste tax payers money in trying to resolve these, but should politely decline jurisdiction and advise the parties as much. What the parties do thereafter is really none of the business of the National Land Commission.

20. I am not saying anything new here. It has been held in countless decisions that the National Land Commission needs to stick to its lane, which is dealing with public land. I need not revisit all such decisions, but will only point at one, that is, the case of *James Ngochi Ngugi vs National Land Commission & Another* (2017) eKLR, which case has been cited by Mr. Kipkoech in his submissions. The petitioner in the case had received a letter from the National Land Commission stating that it had received a complaint, from the interested party in the suit, to the effect that the land in dispute was allocated to the interested party. It thus invited the petitioner to attend to "resolve the dispute." What the court found is that the deceased, whose estate the petitioner represented, and interested party, held shares in a private company and the interested party complained that the deceased used her position as director to improperly. The court (Mativo J) had this to say on the matter:-

The complaint disclosed by the documents presented by the interested party in my view disclose a claim to the land and cast aspirations on the manner in which the deceased acquired title to the land which the interested party claims is her land. Such allegations can in my view form the basis of a claim in the Environment and Land Court. I reiterate that no material was been presented (sic) to this court to demonstrate that the land was



once public land and was converted into private land. Absence of such evidence in my view ousts the jurisdiction of the Respondent because the title held by the petitioner shows that the land in question is private land registered in the name of the deceased as the absolute lawful proprietor under the provisions of the Registered [Land Act](#) – Repealed.

The upshot is that I find and declare that the Respondent has no legal mandate to investigate the legality or propriety of title No....”

33. Likewise, in *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] KECA 432 (KLR), this Court held that:

Because of what we have stated above, we are therefore satisfied that the Commission has jurisdiction, granted expressly by the [Constitution](#) and the [National Land Commission Act](#), to review grants and dispositions of public land to establish their propriety or legality. That jurisdiction is specific to the Commission and cannot be usurped by any other institution or agency and if we may add, cannot be ousted on the bare argument that land which was previously public land, has since become private land.

... ..

It is our conclusion therefore that on the issue of jurisdiction, the Commission has jurisdiction, vested in it by the [Constitution](#) and the National [Land Act](#), to inquire into the process and legality of how public land ended up registered as private land, as was the case with the suit property.”

34. It was not demonstrated that the suit property was previously public land and, therefore, the 2<sup>nd</sup> respondent’s actions to investigate and make a determination on the legality of the title to the suit parcel were ultra vires, null and void. Consequently, the 2<sup>nd</sup> respondent’s decision dated 11<sup>th</sup> November 2017 could not properly form the basis of the appellants’ suit.
35. That being the case, the 2<sup>nd</sup> respondent had no power whatsoever to revisit the issue and pronounce itself thereon. We reach this conclusion on the persuasive authority of *Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others* [2017] KEHC 5972 (KLR) where the High Court correctly held that:

“Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute. Therefore, whereas I need not overemphasise that the National Land Commission has power under Section 14 of the [National Land Commission Act](#) derived from Article 68 of the [Constitution](#) to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute. It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court’s jurisdiction by taking upon itself the mandate of hearing and determining the dispute.” [Emphasis ours]



36. In the same vein, the Court of Appeal in *Dr Alfred Mutua v Ethic and Anti-Corruption Commission (EACC) & 3 Others* [2016] KECA 511 (KLR) citing the Nigerian Court of Appeal decision in *Olusi & another v Abanobi & Others* Suit No. CA/B/309/2008 stated:

“It is an affront to the rule of law to ... render nugatory an order of court whether real or anticipatory. Furthermore... parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

37. What this means is that the parties and their predecessors in title in the three cases that preceded the 2<sup>nd</sup> respondent’s intervention leading to the impugned decision, and who had submitted to the court’s jurisdiction to adjudicate on their dispute over the suit property, ought not to have created a situation whereby the decisions made by the court in the above-mentioned cases would have been in vain.

38. In *Tom Mboya Odege v Edick Peter Omondi Anyanga & 2 Others* [2018] KECA 611 (KLR) where the Dispute Resolution Committee of the IEBC purported to hear and pronounce itself on a matter that had been determined before a superior court and to make findings that were at variance with those made by the superior court, this Court held that:

“7. ... We may quote the learned Judge verbatim in his summary:

In this case the parties herein had subjected themselves to the jurisdiction of the Superior Courts. Having done so they had no justification to resort to the jurisdiction of inferior tribunals such as the Respondent’s Dispute Resolution Committee in order to in effect undo the decision of a superior court and in effect render proceedings pending before a superior court superfluous. parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. A situation where parties take action that destroy the subject matter of pending proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order that may be made therein was frowned upon by the Nigerian Court of Appeal in *United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development* [CA/A/165/2005]’

...

26. the *Constitution* in Article 162 and the *Judicature Act*, sets out the hierarchy of Kenyan courts. The architecture of such hierarchy does not envisage an inferior tribunal exercising supervision over superior courts. The DRC, as an inferior tribunal cannot therefore entertain matters that have been canvassed and determined before superior courts, and purport to pronounce findings that directly contradict that of superior courts in the same subject matter.”

39. In view of the foregoing, we find that the appellants’ suit was not premised on a determination of the 2<sup>nd</sup> respondent exercise of its constitutional and statutory mandate to investigate and rectify historical land injustices, or to review Grants or dispositions of public land. We form this view cognisant of the indisputable fact that the suit property was private land, and that the dispute between the parties



simply concerned ownership and the question as to the sanctity and indefeasibility of the 3<sup>rd</sup> and 4<sup>th</sup> respondents' title thereto.

40. Accordingly, the 2<sup>nd</sup> respondent's decision dated 11<sup>th</sup> November 2017 purporting to reaffirm the appellants' alleged ancestral right of ownership and directing the Chief Land Registrar to revoke the title held by Mutuku Ngei, and to issue title to the appellants as the legal owners of the suit property was made in excess of jurisdiction. It went against the grain of both the Constitution and statute law.
41. Turning to the 2<sup>nd</sup> issue as to whether the learned Judge was at fault in concluding that the appellants' suit was res judicata, we begin by taking note of what he had to say:

“ 14. In this case, the 1<sup>st</sup> plaintiff has filed suit on behalf of the estate of Mastajabu Athumani Suleiman (deceased) claiming ancestral rights over this land together with the 2<sup>nd</sup> plaintiff. The 3<sup>rd</sup> and 4<sup>th</sup> defendants are the successors in title to Mutuku Ngei. It will be recalled that Mutuku Ngei had already sued Mastajabu Athumani Suleiman in Mombasa HCCC No. 52 of 2007. It will also be recalled that there was previous litigation, being the case Mombasa PMCC No. 350 of 1990 and Mombasa HCCA No. 113 of 1994 between the successor in title to Mutuku Ngei and the father of Mastajabu Athumani Suleiman. These cases have already been decided.

15. It is patently clear to me that this suit, however couched, is a re-litigation of the previous dispute that the successors in title to the parties herein had. The parties herein may be different but the issue of who is entitled to ownership of the land was the issue in the previous suits and this was settled. The parties herein litigate on the basis of the same cause of action that the parties under whom they claim had, and/or are litigating under the same title, thus subject to being captured by the res judicata rule. It has already been held in the previous cases that the predecessor in title to the 3<sup>rd</sup> and 4<sup>th</sup> defendants held a good title as against the predecessors of the plaintiffs. The plaintiffs cannot now re-open that dispute for it has already been decided. As I have said, however the pleadings are couched, there is nothing different being raised here which was not raised in the previous litigation and decided.

16. I find that this suit is res judicata and the only option that I have is to have the suit dismissed. It is hereby dismissed with costs to the defendants.”

42. Faulting the learned Judge's decision, counsel for the appellants submitted: that the prayers sought in the suit filed before the Environment and Land Court vide the amended plaint dated 16<sup>th</sup> December 2019 were completely different from what was sought in the previous cases listed by the respondents; that, furthermore, the causes of action were also different; that, in the previous cases referred to, being HCCC No. 52 of 2007, High Court Civil Appeal No. 113 of 199 and PMCC No. 350 of 1990, “... the cause of action were mainly complaints by the appellant's father to Court claiming ownership and pointing out the unfair/corrupt and unjust way a land official replaced his name and acquired land fraudulently, but under the previous laws he was failed as the law did not question the first allottee/registered owner and on those grounds his claims failed”; that “... in the appellants' suit, the cause of action and entire suit is premised on the investigation of a historical injustice conducted by the 2<sup>nd</sup> respondent”; and that “... the appellants were seeking the enforcement and adoption of it by the Court”.



43. On their part, counsel for the 1<sup>st</sup> respondent submitted: that all the ingredients for the declaration that the suit is res judicata are present in the instant suit; that there are previous cases relating to the same cause of action, to wit, ownership of land parcel known as KWALE /GALU KINONDO /339; that the parties in this matter were either parties in the previous cases or successors in title to parties in the previous cases; that the said cases have also been heard and determined by courts of competent jurisdiction; that, in one case, High Court Constitutional Petition No. 35 of 2015 Dr. Wilfred James Kimani Kamau and Another vs. The National Land Commission, the High Court declared that the 2<sup>nd</sup> respondent lacked the jurisdiction to entertain a challenge to the title of the suit property; that the 2<sup>nd</sup> respondent proceeded and entertained a challenge to the title of the suit property contrary to the above court's decision; that the decision by the 2<sup>nd</sup> respondent is therefore null and void and not capable of enforcement; and that the doctrine of res judicata is to ensure that there is an end to litigation, otherwise parties will litigate ad infinitum.
44. Likewise, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted: that the prayers set out in the amended plaint clearly shows that the issue for determination before the ELC was ownership of Land Parcel Kwale/Galu Kinondo/339; that in HC Petition No. 35 of 2015, a key issue for determination was whether the 2<sup>nd</sup> respondent and/or the County Land Management Board has mandate to investigate, question or make recommendations on title to private land under Article 67 of the *Constitution*, the *National Land Commission Act* and/or under any other law whatsoever; that no appeal was filed against the court's decision; that "... the issues raised in ELC No. 156 of 2018 are the same issues raised in the other mentioned cases - PMCC NO. 350 OF 1990, High Court Civil Appeal No. 113 of 1994, High Court Civil Suit No. 52 of 2007 and HC Constitutional Petition No. 35 of 2015".
45. Counsel cited the case of John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR which set out the elements that must be demonstrated for the doctrine of res judicata to be invoked in a civil case, namely that there was a former judgment or order which was final; that the judgment or order was on merit; that the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and that there had to be between the first and the second action identical parties, subject matter and cause of action.
46. We take to mind the instructive provision of section 7 of the *Civil Procedure Act*, which reads:
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.
47. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR), the Court of Appeal held that:
- "... for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:
- 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 or the suit in which the issue is raised ....

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice ....

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

- 48. In this case, the 3<sup>rd</sup> and 4<sup>th</sup> respondents’ contention is that earlier suits involving the same parties and subject matter as the present case, and which had been heard and finally decided without an appeal or further appeal being proffered, rendered ELC No. 156 of 2018 *res judicata*. The veracity of this allegation is determinable by scrutiny of the pleadings and decisions in the earlier suits as annexed to HC Petition No. 35 of 2015.
- 49. In Mombasa PMCC No. 350 of 1990 - Athumani Suleiman Mwakisha v Luke Musomba Mutio, the deceased’s father filed suit seeking a declaration that he was the owner of the suit property, and that it be transferred to him. His claim was that he was the owner of the suit property; and that, around 1985, the defendant therein, Luke Musomba Mutio, fraudulently represented to the Land Adjudication Office that the deceased’s father had sold the suit property to him and caused his name to be registered as the owner thereof. In a judgment dated 17<sup>th</sup> June 1992, the learned Magistrate (J. K. Kanyi, CM) held that the defendant’s registration as the first proprietor was indefeasible, and the fact that the defendant stayed on the suit property for 16 years rendered the deceased’s father’s suit time barred. The deceased’s father’s suit was therefore dismissed with costs.
- 50. Aggrieved by the learned Magistrate’s decision, the deceased’s father filed an appeal in Mombasa High Court Civil Appeal No. 113 of 1994 - Athumani Suleiman Mwakisha v Luke Musomba Mutio, which was likewise dismissed. In its decision, the High Court held that the deceased’s father’s allegations were not enough to prove ownership of the suit property prior to the adjudication process; and that no evidence was adduced to show that the deceased’s father had established his claim to the adjudication officers, or that the defendant was unlawfully awarded the first registration. From the evidence on record, no further appeal was lodged by the deceased’s father from this decision.
- 51. In Mombasa High Court Misc. Civil Application No. 110 of 2005 - Republic v Land Registrar Kwale ex parte Mutuku Ngei v Mastajabu Athumani Suleiman, Mutuku Ngei (the person to whom Luke Musomba Mutio transferred the suit property to, and who eventually sold it to the 3<sup>rd</sup> and



- 4<sup>th</sup> respondent) filed an application for judicial review against the deceased. All we have on record regarding this case is the replying affidavit sworn by the deceased, who deponed that Luke Musomba Mutio transferred the suit property to Mutuku Ngei in order to destroy traces of his unlawful acts.
52. In Mombasa High Court Civil Case No. 52 of 2007 - Mutuku Ngei v Mastajabu Athumani Suleiman, Mutuku Ngei filed suit against the deceased claiming that he purchased the suit property from Luke Musomba Mutio in 1978 and a title deed issued to him; and that, on 22<sup>nd</sup> October 2004, the deceased colluded with the Ministry of Lands officials, and a new title was issued in favour of the deceased. Mutuku Ngei sought recovery of the suit property by cancellation of the title deed issued in the name of the deceased. In a ruling dated 26<sup>th</sup> July 2007, the High Court (Sergon, J.) allowed an application to strike out the deceased's defence and counterclaim. The court held that the deceased's defence and counterclaim, which heavily relied on the allegation that Mutuku Ngei colluded with Luke Musomba to fraudulently acquire the suit property from the deceased's father, was a sham, frivolous and scandalous as the issue had been heard and determined in Mombasa PMCC No. 350 of 1990 and the subsequent appeal in Mombasa High Court Civil Appeal No. 113 of 1994, and that it could not be re-agitated by the deceased.
53. In the appellants' case, which commenced as ELC No. 156 of 2018, the parties thereto are the successors in title to the same parties as those in PMCC No. 350 of 1990, that is, the legal administrators to the Estate of the son of Athumani Suleiman Mwakisha and the persons who bought the suit property from the vendor who in turn bought the suit property from the first registered owner Luke Musomba Mutio. The subject matter is the same in all the cases, namely ownership of Plot Number Kwale/Galu Kinondo/339.
54. In view of the foregoing, we find that this issue has been heard and determined on merit, including on appeal to this Court. Accordingly, the learned Judge cannot be faulted for finding that the suit was res judicata.
55. We hasten to add that the attempt by the appellants to add the 2<sup>nd</sup> respondent as a party and to use its decision of 11<sup>th</sup> November 2017 as a basis for their suit on previously litigated and determined issue cannot stand. The 2<sup>nd</sup> respondent's decision was null and void as it was rendered after the judgment of the High Court in HC Petition No. 35 of 2015 dated 31<sup>st</sup> May 2016, correctly declaring that the 2<sup>nd</sup> respondent and/or the County Land Management Board "has no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever."
56. It is noteworthy that the appellants made a futile attempt to base their claim on an unlawful determination by the 2<sup>nd</sup> respondent, which they incorrectly interpreted as a finding of the Commission of a historical land injustice. However, the amended plaint did not allude to a historical land injustice, but instead sought more or less the same remedies as did the deceased and his father in the previous suits.



57. Addressing itself to the manner of pleadings and the doctrine of res judicata, the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) observed as follows:

“59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney- General & another*, [2012] eKLR, thus:

The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction’. In the case of *Omondi v National Bank of Kenya Limited and others* (2001) EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case, the court quoted Kuloba J, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....”

58. Having considered the record as put to us, the grounds on which the appeal was founded, the rival submissions of respective counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed. Consequently, the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 10<sup>th</sup> February 2021 is hereby upheld.

59. The costs of the appeal shall be borne by the appellants.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY 2025.**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

