



**Republic v District Land Registrar Kilifi Lands Office; Kombo & another (Exparte Applicants)  
(Judicial Review Application E6 of 2021) [2024] KEELC 1390 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1390 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
JUDICIAL REVIEW APPLICATION E6 OF 2021**

**EK MAKORI, J**

**MARCH 13, 2024**

**IN THE MATTER OF: AN APPLICATION BY ATHMAN RAMADHAN  
KOMBO AND ABUBAKAR MICHAEL KAZUNGU FOR THE ORDERS  
OF MANDAMUS DIRECTED AT THE DISTRICT LAND REGISTRAR**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT, CAP 300 LAWS OF KENYA**

**IN THE MATTER OF: THE REGISTRATION OF  
TITLES ACT, CAP 281 OF THE LAWS OF KENYA**

**AND**

**MALINDI JR NO. E6 OF 2021 RULING IN THE MATTER OF  
ORDER 53 RULE 1(1) OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DISTRICT LAND REGISTRAR KILIFI LANDS OFFICE ..... RESPONDENT**

**AND**

**ATHMAN RAMADHAN KOMBO ..... EXPARTE APPLICANT**

**ABUBAKAR MICHAEL KAZUNGU ..... EXPARTE APPLICANT**

**RULING**

1. By a Notice of Motion application dated the 30<sup>th</sup> November 2021 and filed in Court on 1<sup>st</sup> December 2021 pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules, Athman Ramadhan



Kombo and Aboubakar Michael Kazungu - the ex parte applicants seek the following reliefs from this Court:

- a. That the Court be pleased to grant the applicants an order of Mandamus compelling the respondent to comply with the National Land Commission determination and Gazette Notice forwarded vide the Commission's letter dated 22<sup>nd</sup> October 2019 to have the ex parte applicants registered as proprietors of all that land known as LR No. Kilifi/Jimba/341 measuring approximately 1.3 Ha.
  - b. That the respondent be condemned to pay the costs of this application.
2. The application is supported by the grounds as set on the body of the motion and the statutory statement by the ex-parte applicants dated 4<sup>th</sup> November 2021.
  3. The interested party opposed the motion via replying affidavit deposed by one Sophia Abdillahi Chacha, Shareholder and Director of the interested party herein, deposed on 11<sup>th</sup> October 2023 and at the same time a Preliminary Objection dated 12<sup>th</sup> October 2023, raising among others issues that the instant judicial review application is defeated by the operations of the doctrine of res judicata.
  4. The parties agreed to dispose of the main JR application by way of written submissions. At the same time, the ex-parte applicants were also to answer to the Preliminary Objection as raised.
  5. As can be discerned from the record, the interested party did file written submissions, and the ex-parte applicants did not. What I can garner from the record is that the 1<sup>st</sup> ex-parte applicant wrote to the Court vide a letter dated 13<sup>th</sup> July 2023 seeking to act in person. I cannot tell whether this is what led to the failure of the ex-parte applicants to file their responses and submissions on the issues raised by the interested party in the replying affidavit and Preliminary Objection.
  6. The ex parte applicants significantly state that on 15<sup>th</sup> February 2019, the National Land Commission vide Gazette Notice Vol. CXXI-No. 21 Number 1529 recommended that the title deed issued to one Joseph Mbitha on Plot No. 341 be revoked and the said parcel of land be allocated to Athman Ramadhan and Aboubakar Micheal Kazungu the ex-parte applicants herein.
  7. The ex-parte applicants on diverse dates between 2019 and 2021 sought the National Land Commission recommendations implemented by the respondents to no avail, hence the orders sought in the instant application.
  8. Initially the interested party was never served. ex-parte orders were issued in favour of the ex-parte applicants by this Court on 28<sup>th</sup> June 2022 (Odeny J.) because the respondents failed to attend Court to defend. The orders issued obliged the respondent through a writ of Mandamus to register the ex-parte applicants as the absolute owners of the suit property in compliance with the recommendations of the NLC.
  9. When the interested party came to learn of the orders in place, it applied to this Court for joinder and setting aside the same for material non-disclosure.
  10. On 18<sup>th</sup> May 2023, this Court set aside the said orders ex debito justitiae and directed for the joinder of the interested party herein and all the parties were to be heard on the merits the Court said:

“From the record, the orders subject to the review application were issued ex parte by this court and without the benefit of the materials and averments as we now have from the applicant. The orders were issued in default of attendance of those persons the ex parte applicant thought were relevant excluding the applicant herein.



The orders have a serious ramification to the extent that the Land Registrar Kilifi has been compelled by orders of Mandamus to register the ex parte applicants as the registered owners of the suit property to the detriment of the whole world including the applicant/interested party who claims to be the proper and rightful registered owner of the land in question.....

The orders will be set aside ex debito justitiae. It will be in the interest of justice and cannot be refused in view of the disclosure by the applicant. Equality of arms demands so, to place the two protagonists on equal pedestal. The pendulum has to swing back by recalling those orders.”

11. The interested party in a rejoinder and its submissions states that it is the registered owner of the suit property - Kilifi/Jimba/341 having purchased it from one Ali Mohammed Ali on 17<sup>th</sup> August 2006 as a bona fide purchaser for value. There has been litigation over the same subject matter in the past, well within the knowledge of the ex-parte applicants with the last one being Malindi ELC Judicial Review Application No. 1 of 2019, in which Olola J. dealt with the same issue in connection with the Gazette Notice Number 1529, Special Issue. CXXI - No. 21 by the National Land Commission – which is once again the subject of the instant judicial review application. The ex-parte applicant contends that the past cases fully and finally settled what the current JR seeks to readdress.
12. In that matter, Olola J. quashed the determination by the NLC concerning the current suit property and declared that the same was res judicata, the issues raised were fully and finally adjudicated by this Court (Angote J.) in Malindi Petition No. 11 of 2012 Denman Properties Ltd, Bond Street Properties Ltd, Holborn Properties Ltd, *Royal Tulia Estate Ltd v the AG & 6 Others and 36 Interested parties*
13. In Malindi ELC No.19 of 2020 – Athman Ramadhan Kombo & Aboubakar Michael Kazungu v Joseph Mbitha Kadenge, Ali Mohammed Ali (deceased), Denman Properties Limited, the AG and Kilifi County Land Registrar the ex parte applicants had filed a suit inter alia seeking to have any title issued concerning the suit property measuring 1.3 Ha. registered in the names of one Joseph Mbitha Kadenge, Ali Mohamed Ali(deceased), and the interested party be declared by this Court null and void by dint of the NLC recommendations aforesaid as contained in the same Gazette Notice aforesaid. The same was dismissed on 28<sup>th</sup> May 2021 by this Court – Olola J.
14. The same issue was initially addressed by this Court in Malindi HC Land Case No. 11 of 2013 *Athman Ramadhan Kombo v Denman Properties Ltd, Land Registrar, & the AG* which was determined in accordance with the judgment in Malindi Petition No. 11 of 2012 Denman Properties Ltd, Bond Street Properties Ltd, Holborn Properties Ltd, *Royal Tulia Estate Ltd v The Hon. The AG & 6 Others and 36 Interested parties*, the judgment of this Court – Angote J. dated 8<sup>th</sup> May 2015, which found in favour of 3<sup>rd</sup> defendant in the former suit.
15. The interested party has referred the Court to authorities on how to reckon a Preliminary Objection particularly that this Court immediately downs tools when it is found that it has no jurisdiction to proceed further. In this matter res judicata has been cited as extinguishing the jurisdiction of this Court not to make any other move forward.
16. The authorities cited by the applicant include, *Mashreq Bank P.S.C v Kuguru Food Complex Ltd* [2018] eKLR and *CCD v ENB, PKN, VD & BU* [2018] eKLR, with both cases emphasizing that the Court lacks jurisdiction on a matter that has already been addressed by a court of competent or coordinate jurisdiction.



17. On lack of power by the NLC to entertain matters already settled or within the armpit of the ELC, interested party cited the decisions in - *R v National Land Commission & Another Ex-parte Muktar Saman Olow* [2015] eKLR, *Robert Mutiso Lelli and Cabin Crew Investment Ltd v National Land Commission & 3 Others* [2017] eKLR and *R v National Land Commission ex-parte Holborn Properties Ltd (supra)*.
18. The interested party referred this Court to judicial authorities to guide itself on what the doctrine of res judicata entails, and in this regard, the decisions in *Lotta v Tanaki* [2003] 2 EA 556, and *Sceneries Ltd v National Land Commission* [2017]eKLR and make a finding that the issues raised in the instant application have already been fully and finally determined in the former suits as to deprive this Court the necessary power to proceed further but rather down tools by striking out the entire JR herein in limine
19. The issues that fall for the determination of this Court are whether a Preliminary Objection herein has been achieved, whether the current judicial review application falls afoul of the doctrine of res judicata, and if to the negative whether the same is sustainable. And who should bear the costs of the cause?
20. Relevant judicial precedents were cited on what a Preliminary Objection entails. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent management of time as a Court resource by summarily flagging out a frail and hopeless suit that if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not, but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969)* EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the



preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

21. In this matter the Preliminary Objection rests on the doctrine of re judicata which is based on the principles that if a suit has been heard and issues fully and finally settled, the reopening of another matter on the same issues is untenable because litigation has to come to an end in one way or another. It saves costs to parties and lessens the rigmaroles of seeking redress in our justice system. It abhors abuse of the Court process by decreeing that litigation replays over and over again on already litigated and settled issues and has to be halted by the Courts once raised and proven - see the case of *E.T v Attorney General & Another* [2001] eKLR:

“The rationale behind the said doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be reopened. The rule of res-judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.

52. The general principle of res-judicata is captured in section 7 of the *Civil Procedure Act* which provides that:-

7. 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.

53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of *Karia and Another v The Attorney General and Others* [2005] 1 EA 83, 89).”

22. It has been shown by the interested party in this cause that there has been active litigation on the same subject matter by the same parties or the persons they litigate under as enumerated in the submissions by the interested party. It is aptly captured by this Court (Olola J.) It is reported as *Athman Ramadhan Kombo & another v Joseph Mbitwa Kadenge & 4 others* [2021] eKLR:

“In the said Petition, the 3<sup>rd</sup> Defendant among others had sued five National Government entities including what was described as the Ministerial Task Force on Land issues in Coast Province. That Task Force had been set up by the Ministry of Lands and Settlement in order to resolve various complaints on what was said to be irregularities in the allocation and issuance of titles to the 3<sup>rd</sup> Defendant among other entities.

26. In a report dated June 2010, the Special Task Force concluded that a number of parcels of land within Kilifi/Jimba and Chembe Kibabamshe adjudication areas were irregularly acquired and it proceeded to give a schedule of those parcels in an annexure to the Report. The suit property herein was one of the



parcels of land indicated to have been so acquired and it was recommended that a new title be issued to the Plaintiffs herein.

27. Subsequently and by a Chamber Summons application dated 28<sup>th</sup> May 2013, the 1<sup>st</sup> Plaintiff sought inter alia leave to be enjoined as an Interested Party in the said Malindi ELC Petition No. 11 of 2012 and that the Grounds of Opposition he had filed to the Petition be deemed as his response. In addition, the 1<sup>st</sup> Plaintiff sought orders to the effect that Malindi ELC Case No. 11 of 2013 which he had filed against the 3<sup>rd</sup> Defendant and two others be stayed pending the hearing and determination of the Petition. The 1<sup>st</sup> Plaintiff equally sought orders to the effect that Judgment in Petition No. 11 of 2012 be applied to the extent that it concerned LR No. Kilifi/Jimba/341, (the suit property) to Malindi ELC Case No. 11 of 2013 filed by himself.
28. On 13<sup>th</sup> May 2013, the 1<sup>st</sup> Plaintiff's application was allowed by the consent of the parties and he was thereby enjoined as the 32<sup>nd</sup> Interested party in the Petition. Subsequently, on 21<sup>st</sup> June 2013, the 1<sup>st</sup> Plaintiff filed an Affidavit in Opposition to the Petition in which he deponed inter alia that: -
- i) The original proprietor of the suit property was one Zainab Musa Said who is step mother and that the said Zainab gave him the suit property in 1990 and since then he has been grazing domestic animals thereof under Giriama Customary Laws;
  - ii) The 3<sup>rd</sup> Defendant herein fraudulently and corruptly had the suit property registered in its name and that the 3<sup>rd</sup> Defendant has never occupied the suit property;
  - iii) When the area was declared an adjudication area, some unscrupulous people associated with fraudulent activities took advantage of the majority of the illiterate residents of the area such as his step mother Zainab and altered the adjudication records and thereafter became the registered owners of the land; and
  - iv) That the Court makes a comprehensive decision in Malindi Petition No. 11 of 2012 and that such decision be applied in Malindi ELC Case No. 11 of 2013.”
29. That Petition was subsequently heard and, in a Judgment, delivered herein by the Honourable Justice Angote on 8<sup>th</sup> May 2015 the Court determined inter alia as follows: -
- i) A declaration be and is hereby issued that the issuance of Certificates of Leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 and the letter by the Hon. Gideon Mung'aro dated the 20<sup>th</sup> day of August 2010 was in violation of Articles 3, 10, 27, 40 and 47 of *the Constitution* and Sections 10, 33 and 143 of the Registered *Land Act*, Cap 300 of the Laws of Kenya (Repealed) hence unconstitutional, null and void ab initio;



- ii) A declaration be and is hereby issued that the 1<sup>st</sup> Petitioner (the 3<sup>rd</sup> Defendant herein) is the legal proprietor of Parcels of Land known as Kilifi/Jimba/342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344,
  - iii) ....
  - iv) ....
  - v) .....
  - vi) An order of certiorari be and is hereby issued to bring to this Honourable Court for purposes of being quashed, Leases, Certificates of Lease that were issued in respect of the above suit properties;
  - vii) An order of Permanent Injunction be and is hereby issued to prohibit the Respondents by themselves, servants, agents, or whosoever authorized on their behalf from giving effect or implementing or in any manner whatsoever the report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 or in any other manner interfering with the Petitioners possession and ownership of their respective suit properties; and
  - viii) An order of mandamus be and is hereby issued compelling the 4<sup>th</sup> Respondent to restore the register in respect of the above mentioned parcels of land and issue to the Petitioners with Certificates of Search on payment of the requisite fees.”
30. Arising from the foregoing, it was evident to me that the subject matter in the said Malindi Petition No. 11 f 2012 and the subject matter in the present suit is the same. Other than the 2<sup>nd</sup> Plaintiff who is said to have authorized the 1<sup>st</sup> Plaintiff to appear, plead and act on his behalf in this matter, both the 1<sup>st</sup> Plaintiff and the 3<sup>rd</sup> Defendant were parties in the previous litigation whose outcome was equally applied to Malindi ELC Case No. 11 of 2013. It is also clear to me that the issues in regard to the ownership of the subject parcel of land were clearly determined in favour of the 3<sup>rd</sup> Defendant.
31. It was not in dispute that no appeal or review has been preferred against the decision in both Malindi Petition No. 11 of 2012 and ELC Case No. 11 of 2013. Applying the law to the facts before me it was evident that despite the fact that the 2<sup>nd</sup> Plaintiff was not a party to the two former suits, he was privy thereto and their suit as filed herein is clearly barred under the doctrine of res judicata. As Mativo J stated in *Sceneries Ltd v National Land Commission* (2017) eKLR: -

“On the issue of res judicata, as Somervell L.J., stated in *Greenhalgh -vs- Mallard (1943) 2 ALL ER 234*) it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of



the process of the court to allow a new proceeding to be started in respect of them. Clearly, the issues now raised by the Applicant touch on the same land, hence the first Interested Party was not only under a duty to disclose the details of previous litigation, but to provide evidence of the determination or status of each case for the Respondent to satisfy itself that the issues before it were not res judicata. A decision arrived at in a matter that has been decided before by a competent Court is open to legal challenge and is obviously tainted with illegality and or abuse of the Court process.”

37. In the premises, I am satisfied that there is merit in the 3<sup>rd</sup> Defendant’s Notice of Preliminary Objection dated 27<sup>th</sup> July 2020. The Plaintiffs’ suit as filed is hopelessly misconceived and devoid of merit. Both the suit and the Motion are dismissed with costs to the 3<sup>rd</sup> Defendant.

23. I need not belabour to prod into the other former matters as cited by the interested party that there has been litigation in the past over the same subject matter, involving the same parties or those they litigate under, it has been a circuitous and a whirlwind of litigation and rematch over the same issue and subject matter – over and over again ad infinitum ad nauseam - litigation must come to an end. That is why the Preliminary Objection dated 12<sup>th</sup> October 2023 is hereby sustained and the Notice of Motion dated 30<sup>th</sup> November 2021 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13<sup>TH</sup> DAY OF MARCH 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Adede for the Applicants

Mr. Kazungu for the Respondents

Court Assistant: Happy

