



**Kombe & 78 others v Matunda Services Limited & 3 others (Petition 22 of 2023) [2024] KEELC 7016 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7016 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
PETITION 22 OF 2023  
EK MAKORI, J  
OCTOBER 24, 2024**

**BETWEEN**

**FREDRICK KITHI KOMBE & 78 OTHERS ..... PETITIONER**

**AND**

**MATUNDA SERVICES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY KENYA ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Preliminary Objection dated 22<sup>nd</sup> day of April 2024 significantly raises the issue that the current petition is *res judicata* the decision in Malindi Civil Suit No. 83 of 2011- *Matunda Service Ltd v Fredrick Kithi & 16 others* - Meoli J. dated 18<sup>th</sup> February 2014.
2. Parties were directed to file written submissions. They complied.
3. From the materials and submissions placed before me, the dominant issue I frame for determination in the Objection raised is whether the issues raised in the petition run afoul of the doctrine of *res judicata* and who should bear costs.
4. Parties cited relevant judicial precedents 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 crucial role of the Court in managing time and resources, as it summarily flags 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 the works of 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 Jobo & Another v Suleiman Said Shabbal & 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.”

5. The parties also cited various judicial precedents and provisions of the law on what constitutes *res judicata* and its rationale. I will revert to the same below.
6. The doctrine of *res judicata* is based on the principles that if a suit has been heard and issues have been tried thoroughly and finally settled, the reopening of another suit 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 replayed over and over again on already litigated and settled issues has to be halted by the Courts once raised and proven - see [E.T v Attorney General & Another](#) [2001] eKLR:

“The rationale behind the doctrine of *res judicata* and issue estoppel is that if the controversy in issue is finally settled, 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).”
7. The Petitioners claim that they have been residing on Plot No. 295 Malindi for a very long time and have developed the parcel by cultivating, building, and investing their entire livelihood as their source of income for daily living. They plead historical injustice as having been meted out to them by ignoring their presence on the suit property when the Government was doing the allocation.
8. The Petitioners question how the 1<sup>st</sup> Respondent was registered as the owner of the suit property. Hence, the orders sought in the petition.
9. The Petitioners further contend that the former suit was filed in the wrong form – the High Court rather than the ELC.
10. In the Preliminary Objection, the 1<sup>st</sup> Respondent contends that the same issues raised in the petition were addressed in Malindi Civil Suit No. 83 of 2011—*Matunda Service Ltd v Fredrick Kitihĩ & 16 others*. Consequently, the current petition is a replica of the former suit.
11. In the former suit, the Plaintiffs' claim was dismissed, and the Court issued the following reliefs in favour of the 1<sup>st</sup> Respondent:
- a. A permanent injunction is hereby issued restraining the defendants, their servants, agents, family members, and any other person deriving interest from them from trespassing and entering into the Plaintiff's Plot No. 295 Malindi, and from cutting down mango trees, burning charcoal, cultivating and planting crops, putting up structures and living on this land;
  - b. A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants, or employees from entering upon, remaining thereon, removing from, wasting, subdividing, digging on, excavating, fencing, erecting, or building any construction whatsoever or otherwise dealing with the suit property all that property Plot No. 295, Malindi;
  - c. A permanent mandatory injunction is hereby issued compelling the Defendants by themselves, their agents, servants, or employees to vacate the suit property and demolish any structure put on by the Defendants, which order, be enforced by the officer commanding Malindi Police Station;
  - d. That the Plaintiffs' counterclaim has failed and is hereby dismissed accordingly;
  - e. That an order is hereby issued for the Plaintiff, its agents and servants or agents to demolish and remove any illegal structure unlawfully built by the Defendants, its agents, and servants on the suit property Plot No. 295 Malindi; and
  - f. Parties to bear their own costs.



12. In the current petition, the prayers sought by the Petitioners are as follows:
  - a. A declaration that registering and transferring the suit property to the 1<sup>st</sup> owner and subsequent to the 1<sup>st</sup> Respondent was unlawful and unconstitutional.
  - b. A declaration that the 1<sup>st</sup> Respondent's acts of evicting and interfering with the Petitioners' quiet possession and occupation of the suit property violate their constitutional rights to residence.
  - c. An order of mandamus be issued compelling the commissioner of land to conduct proper investigations on the Petitioners' long-stay, possession, and occupation of the suit property, to have the title herein cancelled, and to have all the petitioners settled thereon.
  - d. An order of permanent injunction restraining the 1<sup>st</sup> Respondent through its agents, servants, legal representatives, or anyone claiming interest through the 1<sup>st</sup> Respondent from demolishing, constructing, developing, evicting the Petitioners and dealing with the suit property being plot No. 234 Mambui in any manner whatsoever.
  - e. A declaration that the Petitioners are constitutionally entitled to remain in the suit property unless an alternative settlement is put in place.
  - f. The costs of this petition.
  - g. Interest on six above at Court rates.
13. Significantly, the petition seeks to cancel the title in possession of the 1<sup>st</sup> Respondent.
14. In the former suit, the issues raised in this petition were addressed by Meoli J. as follows:

“The Defendants’ evidence of their alleged exclusive possession in my view rather sketchy. It is not clear which Defendant occupied which portion of the suit land, for what use, and in what period....

The Defendants’ counterclaim has failed and is dismissed accordingly. On their part, the Plaintiffs have proved their case on a balance of probabilities as to the become entitled to the prayers in their Plaint. These prayers on the face of it seem repetitive and could have been framed better.... Be that as it may, they generally capture the remedies available to the Plaintiffs, and I grant them as pleaded.”
15. An examination of the decree from the previous case and the arguments presented in the current petition indicates that the Petitioners are pursuing the same objective in both instances. The primary distinction I can identify is the framing of the petition, which claims infringements of constitutional rights and raises issues of historical wrongs. The duration of the petitioners' occupancy of the disputed property was addressed in the earlier case.
16. What is raised here consistently involves the same parties and issues; it has been revealed that there is currently an ongoing appeal in the Superior Court related to the conclusions of the previous suit. Going back will lead to an undesired outcome of convoluted, conflict in suits, and warring outcomes—a recipe for chaos.
17. The Preliminary Objection succeeds to the extent that the petition is struck out with costs. It represents an abuse of the Court process and offends the doctrine of res judicata.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the presence of:-

Ms. Metto, for 1<sup>st</sup> Respondent

Mr. Mbura for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Happy: Court Assistant

In the absence of:-

Mr. Otara, for the Petitioners

