



**Petro Oil Kenya Limited v Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others (Environment & Land Miscellaneous Case E017 of 2024) [2024] KEELC 7561 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7561 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E017 OF 2024  
FM NJOROGE, J  
NOVEMBER 14, 2024**

**BETWEEN**

**PETRO OIL KENYA LIMITED ..... APPLICANT**

**AND**

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED TRUSTEES & 58 OTHERS & 58 OTHERS & 58 OTHERS ..... RESPONDENT**

**RULING**

1. Petro Oil Kenya Limited filed a Notice of Motion dated 22<sup>nd</sup> March, 2024 and the Respondent's filed a Preliminary Objection dated 18<sup>th</sup> April, 2024.
2. In the Notice of Motion application filed by the applicant dated 22<sup>nd</sup> March, 2024, the applicant sought the following orders;
  1. ....Spent;
  2. The Respondents, their family members, tenants, agents, assigns or any person authorized by the Respondents be and are hereby ordered to vacate the properties known as Kilifi/ Madzimba/Mitangoni/835 and Kilifi/ Madzimba/ Mitangoni/ 841 within 30 days of this order in default of which the applicant be at liberty to evict them therefrom;
  3. The Kaloleni Sub-County Police Commander to provide security at all times that the order of this court is being enforced;
  4. Costs of this application be provided for.
3. The application was supported by the affidavit sworn by Benjamin Kingori sworn on even date. He deposed that the applicant is the registered proprietor of the properties known as Kilifi/ Madzimba/ Mitangoni/ 835 and Kilifi/ Madzimba/ Mitangoni/841 which jointly with other properties are sub-



divisions of the property known as Kilifi/ Mazimbani/ Mitangoni/ 160; that the Respondents and/or their family members are currently in occupation of the suit properties.

4. He outlined a number of cases where the mother title, Kilifi/Madzimba/Mitangoni/160 has been a subject of litigation, the matters that have been filed at the Mombasa High Court, the Kaloleni Senior Resident Magistrate's court and the Kaloleni Land Dispute Tribunal. In all these matters, the question of ownership of the said plot was settled against the Respondent herein. He also deposed that following the determination and settlement of the dispute over ownership of the suit properties, the Applicant served Notice of Eviction upon all the occupiers of the suit properties in accordance with Section 152E of the *Land Act*, 2012.
5. He stated that the notices were served in the Standard and Taifa Leo newspapers of 14<sup>th</sup> May, 2020. In addition to the newspaper notices, the applicant caused the Notice of Eviction to be pinned on strategic corners of the suit properties and also caused the Notice to be served upon the Deputy County Commissioner, Kaloleni Sub-County and the Sub-County Police Commander, Kaloleni.
6. He further deposed that upon service of the eviction notice, the Respondents filed Malindi ELC No. 63 of 2020: Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 Others v Petro Oil Kenya Limited & 6 Others. Owing to the fact that the question of ownership of the suit property had been determined, the applicant filed a Notice of Preliminary Objection dated 15<sup>th</sup> September, 2020 challenging the suit on ground that the same was res judicata and vide a ruling delivered on 30<sup>th</sup> July, 2021 the Court upheld the Preliminary Objection and struck out the suit. An appeal against that ruling Civil Appeal No E014 of 2023 filed by the present respondents was struck out.
7. He contended that the applicant did not come to court earlier for enforcement of the Notice of Eviction and since Malindi ELC 63 of 2020 which had challenged the eviction notices as well as the appeal emanating therefrom have been struck out, there is nothing standing on the way of enforcement of the Notice of Eviction and that this court ought to enforce the same by ordering the Respondents to vacate the suit properties in default of which they be lawfully and forcefully be evicted therefrom.
8. In Response to the said application, the Respondents filed a Replying affidavit sworn by Mohamed Menza Yama on the 13<sup>th</sup> day of May, 2024. He asserted that the Applicant's affidavit admits that there are several suits on the same subject matter which have been heard and determined by courts of competent jurisdiction. That they filed Malindi ELC No. 63 of 2020 over the same subject matter and where the applicant herein is a party which is pending and scheduled for mention on 21<sup>st</sup> May, 2024 and the issues by the applicant ought to have been raised in that suit.
9. According to him, there is no need in the applicant filing another suit seeking eviction orders when the same orders should be sought in matters which have been heard and determined and therefore any application ought to have been made in that matter. He further stated that the present suit is only meant to embarrass the court and waste its time.
10. In the Preliminary Objection filed by the Respondents dated 18<sup>th</sup> April, 2024, the Respondents set forth the following grounds of opposition;
  - a. That the Applicant's suit amounts to res-judicata as the issues raised herein have already been decided in several suits and as such, the suit is an abuse of the court process. The said matter are; Mombasa High Court Misc Civil Application No. 172 of 2009, Kaloleni Senior Resident Magistrate Civil Case No. 23 of 1998, Mombasa High Court Civil Appeal No. 45 of 1998, Mombasa High Court Civil Suit No. 326 of 2007, Kaloleni Land Dispute Tribunal Case No. 25 of 1998, Appeal to the Minister Lands Adjudications, Appeal No. 216 of 2017 and Kaloleni Land Dispute Case P. No. 160.



- b. In light of the above, the Honourable court lacks jurisdiction to hear and determine the applicant's application dated 22<sup>nd</sup> March, 2024.

## **Submissions.**

### **Applicant's Submissions.**

11. The Applicant through the firm of Oluga & Company Advocates filed submissions dated 11<sup>th</sup> June, 2024. Counsel identified the following issues for determination as follows: whether the Respondents' Preliminary Objection is merited and whether the court should allow the application by the applicant.
12. On the 1<sup>st</sup> issue for determination, he submitted that what was decided and settled in the past cases is ownership of the suit property whereby the title/ownership of the applicant and the applicant's predecessors in title including Said Zembe Badi had been affirmed and upheld by the adjudication tribunals and the courts. That the question of whether the Respondents should vacate the suit property has not been determined and that the current application does not ask the court to make a finding on ownership of the suit properties. He submitted that the continued occupation by the Respondents on the suit property without any right to do so is what has given rise to the present application.
13. He submitted that no court of law or tribunal has issued an eviction order against the Respondents, that there is no eviction order that has been issued in favour of the Applicant and as such, the issue of eviction cannot be res judicata. He also submitted that the illegal occupation of the suit property by the Respondents is a continuing injury to the applicant and the question of whether this court should issue the eviction order is therefore not res judicata.
14. He further submitted that the application by the applicant seeking their eviction pursuant to the provisions of the *Land Act* is properly before court.
15. On the 2<sup>nd</sup> issue for determination, counsel submitted that the Respondents have not denied being in occupation of the suit properties; that since it has been determined that the Respondents are not the owners of the suit properties, they have no right to occupy the same.
16. He submitted that the legal procedure provided for in the law for seeking an eviction order is provided for in Sections 152A, 152B, 152C and 152E of the *Land Act*, 2012; that after the ownership of the suit properties was settled in the various cases where it was determined that the Respondents are not the owners thereof, the applicant served Notice of Eviction to all the occupiers of the suit properties who include the Respondents herein in accordance with Section 152E of the *Land Act*, 2012.
17. It was his submission that the applicant could not execute the decisions made in the past cases because there was no eviction order issued since those cases only determined ownership of the suit properties and that other than Malindi ELC No. 63 of 2020 which was struck out, the applicant was not a party to any of the past cases and could therefore not execute any order made in those cases.
18. He also submitted that the only option available is to exercise its right under Section 152E and in order to determine whether to grant eviction orders against the Respondents, this court is called upon to consider whether the applicant has demonstrated that it is the owner of the subject property and whether notices were served in accordance with Section 152E (d) of the *Land Act*. He relied on the case of Margaret Karwirwa Mwongera v Francis Kofi (2019) eKLR.
19. He further submitted that the instant case warrants the court's intervention by granting the orders sought because ownership of the suit properties has been decided in favour of the applicant and against



the Respondents, the Respondent has exhibited title deeds in its name, the eviction notice was duly served upon the Respondents as required by the Land Act and the Respondents have no legal basis to continue being on the suit premises.

### RESPONDENTS' SUBMISSION.

20. The Respondents through the firm of Ondabu & Co. Advocates filed submissions dated 18<sup>th</sup> September, 2024. Counsel submitted and directed the court's attention to Section 7 of the Civil Procedure Act, paragraph 7 of the Supporting Affidavit by the applicant submitting that there were similar matters on the same subject matter which were heard, determined and judgments delivered on the same. He also submitted that the doctrine of res judicata serves the purpose 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.
21. It was his submission that all the eight (8) cases captured at paragraph 4 of the Replying affidavit sworn by Mohamed Menza Yama for and on behalf of the Respondents, he stated that if indeed the applicant had judgments and the issue of ownership has been settled in those former suits, the only remedy or the applicant is to enforce the judgment and decrees in those specific cases and not filing a fresh suit.
22. He submitted that the instant suit seeks to take the Respondents through embarrassment, harassment and derail noting that the same issues have been interrogated and conclusively determined. He relied on the Indian Supreme Court case of Lal Chad v Radaha Kishan AIR 1977 SC 789 and that of Edwin Thuo v Attorney General & Another, Nairobi Petition No. 212 of 2012 (unreported).

### Analysis And Determination.

23. I have considered both the application dated 22<sup>nd</sup> March, 2024 and the Preliminary Objection by the Respondents dated 18<sup>th</sup> April, 2024.
24. In my view what this court is being called to determine whether this application is res judicata and whether an eviction order can issue as sought in Prayer 2 of the application dated 22<sup>nd</sup> March, 2024.
25. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”

The Black's law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

26. The Respondents in the Preliminary Objection raised on 18<sup>th</sup> April, 2024 contend that the Applicant's suit amounts to res-judicata as the issues raised herein have already been decided in several suits and as such, the suit is an abuse of the court process. The said matter are; Mombasa High Court Misc Civil Application No. 172 of 2009, Kaloleni Senior Resident Magistrate Civil Case No. 23 of 1998, Mombasa High Court Civil Appeal No. 45 of 1998, Mombasa High Court Civil Suit No. 326 of 2007,



Kaloleni Land Dispute Tribunal Case No. 25 of 1998, Appeal to the Minister Lands Adjudications, Appeal No. 216 of 2017 and Kaloleni Land Dispute Case P. No. 160. The applicant on the other hand asserts that the question of whether the Respondents should vacate the suit property has not been determined and that the current application does not ask the court to make a finding on ownership of the suit properties. He submitted that the continued occupation by the Respondents on the suit property without any right to do so is what has given rise to the present application.

27. In order therefore to decide whether a case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:

- (i) what issues were really determined in the previous case;
- (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- (iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

28. In *E.T vs Attorney General & Another* (2012) eKLR the court held that:

“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 Vs 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 vs 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....”

29. Rightly put by both parties, all the above matter sought to determine the issue of ownership of the suit property, an issue that this court has already determined. I have considered the application by the applicant and in my view, what this court is being called upon to determine is an issue that the other stated matters have not determined. The present application is simply aimed at obtaining execution that will enable the applicant enjoy to the full the fruits of its judgment. This kind of proceeding has not been undertaken prior to the present application. To this end, I am not persuaded that this matter is *res judicata*.

30. The 2<sup>nd</sup> issue for determination is whether an eviction order can issue as sought in the application dated 22<sup>nd</sup> March, 2024. The thrust of the applicant’s submissions was to the effect that the issue of ownership of the suit property being plot No. Kilifi/ Madzimba/ Mitangoni/ 835 and Kilifi/ Madzimba/ Mitangoni/841 was determined by the court in Malindi ELC No. 63 of 2020.

31. From a reading of Sections 152C, 152D and 152E of the *Land Act*, 2012 it is not clear how a party ought to approach the court for relief under Section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit? In my opinion, any eviction order has far-reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/ possession of for some time. Before such an order is given the court must be satisfied on its merits



which means any person who stands to be affected by any order the court may make is entitled to be heard. Section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. What is the situation where there is no dispute on ownership and the occupation is unlawful?

32. In the instant matter the Respondents do not hold title to the suit property. The applicant has indicated that it is the registered owner of the suit properties and that the Eviction notice was duly served upon the Respondents as required by Section 152E of the Land Act. In the circumstances, this court is of the opinion that the applicant having satisfied the requirements under Section 152A, 152B, 152C and 15 E of the Land Act, the application dated 22<sup>nd</sup> March, 2024 is merited and it is hereby allowed as prayed in prayers nos 2 and 3 thereof. The respondents shall bear the costs of the application.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

