



**Odero v National Land Commission & 4 others (Environment & Land Petition
E005 of 2023) [2024] KEELC 7485 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E005 OF 2023**

CA OCHIENG, J

NOVEMBER 13, 2024

**IN THE MATTER OF ARTICLES 10, 19, 20, 21(1) AND 22(1),
23(1) AND (3) & 165(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 40 AS READ WITH 60(1) (B),
62(1) (C), 64 AND 260 AND 47 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 23 & 24 OF THE REGISTRATION OF TITLES ACT
(CHAPTER 281 OF THE LAWS OF KENYA) NOW REPEALED AND TRANSITIONED
AS SECTION 24, 25 AND 26 OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)**

AND

**IN THE MATTER OF THE PHYSICAL PLANNING ACT (CHAPTER 286 OF
THE LAWS OF KENYA) NOW REPEALED AND TRANSITIONED AS THE
PHYSICAL AND LAND USE PLANNING ACT (NO. 13 OF 2019 LAWS OF KENYA)**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL AND ILLEGAL
ALLOTMENT OF TITLE L.R NO. 1504/11 (I.R NO. 41771)**

BETWEEN

ENG JOSEPH ODERO PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

THE DIRECTOR OF SURVEY 3RD RESPONDENT



RULING

1. What is before Court for determination is the 5th Respondent's Notice of Motion Application dated the July 18, 2023 brought pursuant to Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules and Sections 7 and 3A of the Civil Procedure Act. The 5th Respondent seeks the following Orders:-
 1. That the Petition dated May 18, 2023 herein be struck out for being *res judicata*;
 2. That the Petition be struck out for being otherwise an abuse of the process of the Court;
 3. That the costs of this Application be borne by the Petitioner.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Joseph Karuoro Claudio, the 5th Respondent's Managing Director where he confirms that the 5th Respondent is the registered proprietor of LR No. 1504/11 (I.R.85400) hereinafter referred to as the 'suit land.' He contends that the ownership of the suit land which is an issue in this Petition was determined in Machakos ELC Case No. 166 of 2011, affirmed by the Court of Appeal in Nairobi Civil Appeal No. 70 of 2018 and Supreme Court Petition of Appeal No. E003 of 2023. He explains that in Mavoko Criminal Case No. 239 of 2019: *Republic vs Prasul Jayantilal Shah* (a Director of Megvel Cartons Limited), the Court found that the purported title documents held by the accused for Land Reference No. 25064 (I.R 85088) were forgeries. Further, the subordinate court convicted the accused Prasul Jayantilal Shah, of forcible detainer and conspiracy to defraud. He insists that the Petition herein is a flagrant attempt at evading the doctrine of *res judicata* by introducing alleged new causes of action so as to seek the same remedy before this court, because the issues in this Petition are founded upon the very same cause of action, to wit the ownership of the suit land. He avers that on May 30, 2023, after filing the instant Petition, the Advocates for Megvel Cartons Limited, who are the 1st Defendant in Machakos ELC Case No. 166 of 2011: *Diesel Care Limited v Megvel Cartons Limited & 2 Others*, wrote a letter to the Inspector General of Police and raised the same issues in the instant Petition and this clearly demonstrates that the Petition and Application herein is only meant to circumvent and evade the doctrine of *res judicata*.
3. Further, in the said letter, Megvel Cartons Limited claimed to be the registered owner of Land Reference No. 25064 (I.R. 85088), (formerly LR 1504/11(IR 49771) Athi River. He reiterates that the title documents allegedly in favour of Megvel Cartons Limited over Land Reference No. 25064(I.R 85088), were found to be forgeries, null and void by courts of competent jurisdiction and cannot confer rights to ownership of LR No. 1504/11, to the Petitioner or anyone else. He reaffirms that the Petition is therefore an abuse of the process of this court and ought to be struck out with costs.
4. The Petitioner opposed the instant Application by filing Grounds of Opposition dated the August 9, 2023 and insists that the Petition is not *res judicata* as the issues in the instant Petition were never directly and substantially in issue. He challenges the validity in law on the action of the Commissioner of Lands to allocate LR No. 1504/11 (IR No. 41771) to third parties, when the property had been surrendered for Change of User Only. He insists that the legal implication of the Commissioner of Lands expropriating his land was never dealt with. He contends that he has a right to the suit land having been the holder of the first title. Further, that there is an obligation of the court to interpret and facilitate enforcement of his Constitutional fundamental right not to be deprived of the property;



investigation and assessment of the value of the suit land forming the compensatory damages payable. He reaffirms that there was a breach of Article 47 (1) of the Constitution and Rules of Natural Justice and legal validity of Letter of Allotment Ref: 33745/XX11 dated September 1, 1999, issued by the Commissioner of Lands.

5. He argues that ELC No. 166 of 2011 Diesel Care Limited v Megvel Cartons Limited & 2 others was between the 5th Respondent (Plaintiff), the Registrar of Titles (2nd Defendant), Commissioner of Lands (3rd Defendant) and Megvel Cartons Limited (1st Defendant). He insists that he was not a party to the said suit. Further, that Megvel Cartons Limited, that was holder of a title LR No. 25064 (I.R 85088) was not litigating through any person and certainly not through him, nor through the same title. He states that Megvel Cartons Limited was not seeking to uphold LR No. 1504/11 (I.R No. 41771) which is the suit title under the present Petition. Further, that his cause of action has not accrued and could only accrue after the decision of the Court invalidating LR No. 25064 (I.R 85088), in light of the provisions of Sections 26 and 80 of the Land Registration Act.
6. He reiterates that Megvel Cartons Limited was not litigating under the same title as himself and the issues raised in the Petition were never heard and determined. He reaffirms that the Petition is not an abuse of the court process and he stands to lose his property and stares at a liability of Kshs. 3 Billion. Further, that dismissing the Petition as proposed by the 5th Respondent shall be in contravention of Articles 10, 20, 25 (c) 47(1), 48, 50 (1) and 159 (1) of the Constitution including Rules 3, 4(1), 8 and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the supporting affidavit, Grounds of Opposition and rivaling submissions, the only issue for determination is whether this Petition should be struck out for being *res judicata*.
8. The 5th Respondent in his submissions relied on the averments contained in its Supporting Affidavit, highlighted the ingredients of *res judicata* and argued that this Petition is indeed *res judicata* as the issue in respect to the suit land had already been dealt with in ELC 166 of 2011. It also relied on various decisions to support its arguments.
9. The Petitioner in his submissions reiterated his averments as per the Grounds of Opposition, insisted that this suit is not *res judicata* as the issues herein were not directly and substantially in issue in a previous suit. He insisted that striking out the Petition would be draconian and he will be condemned unheard. He contended that the issues herein were not heard and determined by a court of competent jurisdiction. Further, that the parties in ELC 166 of 2011 were not the same as the parties herein nor were they litigating under the same title. He further submitted that the principle of *res judicata* cannot be used as a shield to illegal and unprocedural transactions. He insisted that there is a serious illegality and fraud in the purported divestiture of his property by the Respondents and insists vide a transfer registered on October 15, 1986 as IR 6458/16, he acquired LR No. 1504/11 (original number 1504/7/1) for valuable consideration. Further, that the Commissioner of Lands issued a Letter of Allotment Ref: 33745/XXII dated the September 1, 1999, founding the 5th Respondent's title, at a time when the property was private property. He further submitted that the present proceedings cannot hence be defeated by the doctrine of *res judicata*. To buttress his averments, he relied on several authorities.



10. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at Section 7 which stipulates 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 can 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.”

11. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

12. In Mulla, [Code of Civil Procedure](#), 18th Ed 2012 at page 293, it describes *res judicata* as follows:-

“The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

13. In Machakos ELC 166 of 2011 the Plaintiff (5th Respondent) through a Plaint dated the July 11, 2011 sought for the following Orders against the Defendants:-

- a. A permanent injunction to be issued, restraining the Defendants whether by themselves, their agents and servants and/or whomsoever is acting upon their instructions or on their behalf from entering upon or remaining thereon, selling, allocating or alienating or denying the Plaintiff access to it or in any way interfering with the Plaintiff's quiet and peaceful possession and ownership of the premises/ property more specifically known as LR No. 1504/11 (I.R. 85400) situated in Mavoko.
- b. Damages for trespass.
- c. General Damages.
- d. Costs of the suit and interest thereon.



- e. Any other relief that his Honourable Court may deem fit and just to grant in the interest of justice.
14. The 1st Defendant (Megvel Cartons Ltd) filed a Defence and Counterclaim dated the September 12, 2011 where it sought for the Plaintiff's suit to be dismissed and Judgement entered in its favour in the following terms:-
- a. A declaration that the Grant IR No. 85400 LR No. 1504/11 is null and void and of no effect.
 - b. That the 1st Defendant to the Counterclaim be restrained by an Order of this Court by itself, its servants, agents, employees from entering upon LR. No. 25064 selling, charging, allotting, interfering with the quiet possession or howsoever with the ownership of the Plaintiff/ Counterclaimant.
15. The Court after considering the testimonies of the witnesses including exhibits, delivered its Judgment on January 26, 2018 where it dismissed the 1st Defendant's (Megvel Cartons Ltd) Counter-claim and entered Judgement in favour of the Plaintiff (Diesel Care Limited) in the following terms:-
- a. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents and/or servants or whomsoever is acting on their instructions from remaining upon, selling, allocating or denying the Plaintiff access to or in any way interfering with the Plaintiff's quiet and peaceful possession and ownership of land known as LR No. 1504/11 (I.R. 85400) situated in Machakos County.
 - b. The Grant for land known as LR No. 25064 (85088) held by the 1st Defendant be and is hereby declared null and void.
 - c. The 1st Defendant to pay the costs of the suit and the Counter-claim.
16. The Petitioner in the instant Petition dated the May 13, 2023, has sought the following Orders against the Respondents:-
- a. An order directing the 1st and 2nd Respondents to preserve the records for LR No. 1504/11(IR 41771) and LR No. 25064 (I.R. No. 85088) pending the hearing and determination of the Petition herein.
 - b. A declaration be issued that the Petitioner having been the registered proprietor of the suit property LR 1504/11 (IR 41771) as holder of a 999 - year agricultural lease from October 15, 1986, the said property was alienated land, and was not available for allotment by the Commissioner of Lands to any other person.
 - c. A declaration be issued that the Petitioner having been the registered proprietor of the suit property LR 1504/11 (IR 41771) as holder of a 999 - year agricultural lease from October 15, 1986, the said property was and continued to be the property of the Petitioner and could only be disposed of by the Petitioner in exercise of statutory powers and rights of a proprietor, for the period of the lease.
 - d. A declaration be issued that the surrender by the Petitioner of the property LR 1504/11 (IR 41771) in exchange for a 99 - year industrial use resulting in LR No. 25064 (IR No. 85088) was strictly for purposes of a change of user, it was not a divestiture of proprietorship of LR No. 1504/11 (IR 41771) from the Petitioner and did not make the property LR No. 1504/11 (IR 41771) available for alienation to any other person.



- e. A declaration be issued that the alleged allotment of the suit property by the Commissioner of Lands to Maji Safi Agencies on September 1, 1999 vide a Letter of Allotment Ref: 33745/XXII dated September 1, 1999 was unconstitutional, unlawful, irregular, and illegal.
- f. A declaration be issued that the nullification of LR No. 25064(IR No. 85088) by the Court in Machakos Environment and Land Court Case No. 166 of 2011; *Diesel Care Limited v. Megvel Cartons Limited vs. Registrar of Titles & Commissioner of Lands*, for irregularities in the change of user and the processing of the particular title did not extinguish the Petitioner's right over the property registered as LR 1504/11 (IR 41771), the proprietorship of the land reverted to the position ante, to the proprietorship of the Petitioner in 999 years agricultural lease LR 1504/11 (IR 41771).
- g. An order directing the 2nd Respondent to amend the register by reinstating and noting the Petitioner as proprietor of all that property known as LR No. 1504/11 (IR No. 41771).
- h. A writ of *mandamus* directed at the 2nd Respondent to re-issue to the Petitioner a Title Deed for its grant that was surrendered to the Commissioner of Lands over LR No. 1504/11(IR No. 41771) for purposes of change of user.
- i. A writ of *certiorari*, to bring into the Court the title LR 1504/11(I.R 85400/1 held by the 5th Respondent and to quash it.
- j. An order directing the 2nd Respondent to rectify the register by cancelling the Certificate of Title of all that property known as LR 1504/11 (IR 85400/1) issued to the 5th Respondent.
- k. An order of permanent injunction against all the Respondents herein restraining them whether by themselves, their representatives, agents, nominees, heirs and assigns from trespassing, dealing in and/or interfering with the Petitioner's proprietorship over LR 1504 (IR 41711).
- l. Alternatively to (f), (g), (h) (i) and (j) above, the Honourable Court be pleased to hold and declare that the allocation of the Petitioner's property LR No. 1504/11 (IR 41771) to Maji Safi Agencies who subsequently sold it to the 5th Respondent herein and the issuance of Grant No. IR 85400 to the 5th Respondent amounted to compulsory expropriation of private land for which the Petitioner is entitled to due compensation for the current value of the land and the developments thereon and all attendant losses flowing therefrom.
- m. In addition to prayer (l) above, the Honourable Court be pleased to Order the 1st, 2nd 3rd, 4th and 5th Respondents jointly and severally to pay the Petitioner the current market value of the land and developments and all attendant losses flowing therefrom thereon as at the date of filing the Petition.
- n. Pending the payment in full of the compensation being the value of the suit property and the developments thereupon and all attendant losses flowing therefrom in terms of prayer (m) above, an Order do issue restraining the Respondents herein, whether by themselves, their servants, agents, workers, and employees, from entering upon, gaining possession, or evicting the Petitioner or interfering with the *status quo* of the suit property.
- o. An order for compensatory damages for violation of fundamental rights of the Petitioner to property and the inconvenience and prejudiced caused to the Petitioner.
- p. Interest on the awards in prayers (l) and (n) above at Court rates from the date of filing this Petition until payment in full.



- q. Any other additional appropriate relief that the Honourable Court shall deem fit to grant in vindication protection of the violation of the Petitioner's fundamental rights.
- r. Costs on indemnity basis.
17. I note in ELC 166 of 2011, the Petitioner herein recorded and filed a Witness Statement dated the September 12, 2011 and even testified as DW2. In his witness statement, he claimed to have been issued with a Certificate of Title as registered proprietor of LR No. 1504/11 (No. I.R 41771) dated 5th October, 1986. He confirmed that on 20th September, 2000, in consideration of change of user, he surrendered title No. LR 41771 and was issued with a new title Grant No. I.R 85088 LR No. 25064 for a term of 99 years, from June 1, 1999. He contended that in 2006, he wanted to sell the land to prospective buyers but was unable to search the title at the Lands Office as he was informed that the Deed file was lost/misplaced and he was required to execute a Deed of Indemnity. He admitted that he entered into a Sale Agreement with Prasul Jayantilal Shah for the sale of LR No. 25064. Further, that he executed a Transfer in favour of Jewels Holdings Ltd and handed over documents in his possession to the purchaser.
18. On *res judicata*, the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), had this to say:
- “Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”
Emphasis Mine
19. While in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR, the Supreme Court stated that:-
- ‘The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.’ Emphasis Mine.
20. Based on the facts before Court, while relying on the decisions cited as well as the legal provisions quoted, and applying them to the circumstances at hand, I find that the fulcrum of the dispute herein is similar to the one in ELC 166 of 2011. The Petitioner has disputed that he was not a party to ELC 166 of 2011 and no one was litigating on his behalf. However, I note from the Petition, he seeks to restore the *status quo ante*, before he sold the suit land to Megvel Cartons Limited, but I opine that since he already disposed of the said suit land to Megvel Cartons Limited, he cannot turn around to claim proprietary rights on it, so as to re litigate on its title, yet the purchaser had already done so, in



ELC 166 of 2011. I hence find that the parties in both ELC 166 of 2011 and the instant Petition were litigating under the same title.

21. Further, since the Judgment in ELC 166 of 2011 which dealt with the suit land herein, was affirmed by the Court of Appeal in Nairobi Civil Appeal No. 70 of 2018 and Supreme Court Petition of Appeal No. E003 of 2023, I find that competent courts heard the matter in issue. To my mind, I find that since the title documents allegedly held in favour of Megvel Cartons Limited over Land Reference No. 25064(I.R 85088) were declared null and void by courts of competent jurisdiction, I hold that the said title cannot now confer fresh rights to the Petitioner in respect to ownership of LR No. 1504/11 as he claims.
22. The Petitioner cannot purport to bring forth another suit on the issues that the party that purchased the suit land from him, litigated upon and now seeks to direct his wrath upon different parties including the 5th Respondent that had been declared as the proprietor of the said suit land. It is trite that litigation must come to an end and the Petitioner should not be allowed to bring forth another suit on the same title, whose validity had been dealt with.
23. It is against the foregoing that I find that the instant Petition is indeed *res judicata* and concur with Kuloba J (as he then was) that this is indeed a cosmetic facelift to give the suit a different face.
24. In the circumstances, I find the Notice of Motion Application dated the July 18, 2023 merited and will allow it.
25. I proceed to strike out the Petition dated the May 18, 2023 for being *res judicata* and award costs to the 5th Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Kirina holding brief for Mwambonu for 2nd, 3rd and 4th Respondents

Kibera for 5th Respondent

Ms. Ochola for Bwire for Petitioner/Respondent

Court Assistant – Simon/Ashley

