



Mutua & another (On their behalf and on behalf of 48 head-of-households and their families, residents of Kinanie, Bawazir Area, Athi River) v Mueni & 4 others; Cabinet Secretary, Ministry of Interior and Coordination of National Government (Interested Party) (Environment & Land Case E010 of 2022) [2023] KEELC 399 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E010 OF 2022**

**A NYUKURI, J
JANUARY 25, 2023**

BETWEEN

ELIZABETH MUTUA 1ST PLAINTIFF

EMILY MWIKALI 2ND PLAINTIFF

**ON THEIR BEHALF AND ON BEHALF OF 48 HEAD-OF-HOUSEHOLDS AND
THEIR FAMILIES, RESIDENTS OF KINANIE, BAWAZIR AREA, ATHI RIVER**

AND

MUSYOKA MUHABUB MUENI 1ST DEFENDANT

DANIEL MAINGI 2ND DEFENDANT

NZAU KOMU 3RD DEFENDANT

LAND REGISTRAR MACHAKOS COUNTY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

AND

**CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF
NATIONAL GOVERNMENT INTERESTED PARTY**

JUDGMENT

1. By a plaint dated 10th February 2022 and filed on 14th February 2022, the Plaintiffs in this case sought the following orders;



- (a) Compensation for illegal eviction and demolition of property for the Plaintiffs and the 50 home owners.
 - (b) Proper procedures to be followed for any eviction to be carried out (if any).
 - (c) Compensation for mental anguish caused by the Defendants.
 - (d) Resettlement of the Plaintiffs and the 50 home owners of the Bawazir area, Kinanie Location in Athi River.
 - (e) Costs of the suit and interests at court rates from the date of the judgment till payment in full.
 - (f) Any other relief that court deems fit to grant.
2. The Plaintiffs averred that at all material times, they were residing on “the suit property” for over 28 years where they have built their homes. Further that in the month of February 2022, the 1st and 2nd Defendants and their agents went to the Plaintiff’s premises with a bulldozer and issued threats of demolishing their houses and evicting their families.
 3. They asserted that 18 households gave into the eviction threats of the 1st Defendants and vacated the suit property and were each compensated Kshs. 2,000/-. They stated that they sought the assistance of the 3rd Defendant in vain as the latter gave them two days notice to vacate. That the 1st and 2nd Defendants began constructing a stone perimeter wall around the suit property so as to forcefully evict the Plaintiffs.
 4. The Plaintiff lamented that the 1st, 2nd and 3rd Defendant’s actions were in bad faith as the eviction was done without notice, warning, consultation, justification with no relocation option, thus violating the Plaintiff’s rights. It was their complaint that the 1st, 2nd and 3rd Defendants have never convened a forum to discuss the process of relocation, resettlement and compensation and that the Defendants did not put in place any special measures to protect the vulnerable in the premises. They averred that the plaintiffs’ children were faced with imminent danger of being stranded in the cold with no access to reasonable shelter, food and other basic amenities.
 5. It was pleaded by the Plaintiffs that the 1st to 3rd Defendants were in breach of Sections 152 B, 152 E and 152 G of the *Land Act* No. 6 of 2012. Further that the 4th Defendant failed to comply with Sections 7(a), 12, 12(e) and 14(1) & 5 of the *Land Act* by failing to provide notice to marginalized communities and groups living in the general vicinity of the public lands being proposed for allocation namely L.R. No. Mavoko Municipality No. 2966 which have since been subdivided. It was their view that failure to issue the required notices rendered the allocation of the land to the 1st and 2nd Defendants a nullity in law.
 6. Upon service, the 1st, 4th and 5th Defendants entered appearance and filed defence while the 2nd and 3rd Defendants neither entered appearance nor filed defence. They also did not participate in these proceedings.
 7. On 24th February 2022, the 1st Defendant filed their defence and counter claim dated 22nd February 2022. The 1st Defendant stated that the Plaintiffs together with others vacated the suit property but came back in 2018. He averred that the eviction of the Plaintiffs was preceded by sufficient notice as there were eviction orders issued in Machakos CMCC No. 184 of 2012 Abdulkarim Saleh Muhsin & Another vs. Margaret Nyokabi & Others sued for and on behalf of Bawazir Self Help Group.
 8. The 1st Defendant further asserted that the perimeter wall on the suit property was constructed many years ago but it was the Plaintiffs who demolished it necessitating the 1st Defendant to rebuild it. The



- 1st Defendant also stated that the eviction was proper and in compliance with the law as the Plaintiffs were severally given notice to vacate and also engaged in several meetings and asked to vacate peacefully.
9. It was the 1st Defendant's position that he had no obligation to relocate, resettle or compensate the Plaintiffs as the subject property is private property which the Plaintiffs have unlawfully trespassed on knowing that it was not public land. He stated that there was a previous suit between the parties and or persons representing them in Machakos CMCC No. 184 of 2012 Abdulkarim Saleh Muhsin & Another vs. Margaret Nyokabi & Others sued on behalf of Bawazir Self Help Group, which was settled by consent and the Plaintiffs agreed to demolish their structures and leave the suit property and in default eviction to issue and therefore that the suit herein offended the doctrine of res judicata.
 10. The 1st Defendant stated that Abdulkarim Saleh Muhsin & Abdulbasit Sale Muhsin t/a Regional Container Freight Services were and still are the lawful registered owners of LR No. 337/1884 Mavoko Municipality. He stated further that the Plaintiffs had trespassed on the suit property thereby committing acts of waste and damage thereon, which was in contempt of court orders. That they had unlawfully entered the suit property and constructed iron sheet shanties thereon.
 11. Th 1st Defendant counter claimed for the following orders;
 - (a) An order of eviction do issue against the Plaintiffs, their families or any person claiming under them to vacate land parcel otherwise known as L.R. No. 337/1887 within Mavoko Sub County.
 - (b) An order of permanent injunction do issue against the Plaintiffs, their families or any person claiming under them restraining them from entering, residing or in any way interfering with the use of land Parcel L.R. No. 337/1884 within Mavoko Sub County.
 - (c) Costs of the suit.
 12. On the 7th March 2022, the Plaintiffs filed a reply to the 1st Defendant's defence and a defence to his counterclaim. It was the Plaintiff's position that the parties in Machakos CMCC No. 184 of 2012 are not parties to this suit. They contended that the suit property was allocated to the Defendants after the Plaintiffs were already residents thereon and that the allocation was not in compliance with the law. They stated further that they had reasonable expectation of consideration, land allocation or resettlement before the land is allocated to private individuals. They averred that the title held by the 1st Defendant was a forgery and that the 1st Defendant was not the registered owner thereof. They stated that the counterclaim did not raise any reasonable cause of action against them.
 13. The 4th and 5th Defendants filed their statement of defence on 9th March 2022. They denied the Plaintiffs' claim and stated that they were strangers to the allegations in the plaint. They sought for the dismissal of the suit.

Plaintiffs' Case

14. PW1, Elizabeth Mutua, relied on her witness statement dated 10th February 2022 and adopted it as her evidence in chief. She testified that she was a resident of Bawazir Village in Athi River, where she lived with over 50 other families where they had built their homes and had been in occupation for many years.
15. She stated further that in the month of February 2022, the 1st, 2nd and 3rd Defendants came to their homes with a bull dozer and threatened to demolish the Plaintiffs' houses and evict them at night. That 18 families gave in and vacated the premises and were compensated. It was further her testimony that the agents of the 1st to 3rd Defendants came on 8th February 2022 and started constructing a perimeter



wall. That on 9th February 2022, the Plaintiffs did a physical count and established that 50 households were still intact. She complained that there have never been any meeting between the Plaintiffs and the Defendants to allow them air their grievances. She stated that no notice to vacate or court order has ever been issued to them and that the Defendants were in the process of evicting them, thus exposing them to risk of becoming homeless and destitute and lose of livelihoods.

16. PW1 further stated that she stays at Canaan Athi River where she began staying in 1998. That she sought for permission from the elders of the residents of Bawazir area who showed her where to construct her house, and having been shown, she put a house thereon and that no one has challenged her stay on the suit property. She asserted that in February 2022, a group of young men came on the suit property with the village elder Daniel Maingi who is the 2nd Defendant herein and threatened to evict him. That this prompted them to report to the police and later to the area chief who is the 3rd Defendant, who instead asked them to vacate the land. Her further evidence being that they never had a meeting with the proprietor of the land or government officials On how they were to vacate the suit property and that they were never issued with notice to vacate. She denied being aware of any decided cases in respect of the suit property or of any persons who represented the residents of Bawazir area. She also denied being a member of Bawazir Self Help Group. She produced photographs of alleged demolished homes, a perimeter wall and iron sheet structures as exhibits. She also produced a letter dated 8th February 2022, medical reports and charge sheets. All these were produced as P-Exhibits 1, 2, 3, 4, 5 (a), (b), (c), (d) and (e), 6 (a), (b), (c), (d) and 7.
17. On cross examination by counsel for the 1st Defendant, she stated that when she first went to the suit property, she found elders of Bawazir residents, who showed her where to construct her house. She denied knowing the Defendants in CMCC No. 184 of 2012. She stated further that she did not know if in 2016 the residents vacated the suit property. She admitted that the 2nd Defendant was their village manager. She denied that some of the parties' houses were put up by other persons.
18. PW1 further stated that her original home was in Kitui, Mwingi, where she was born and that she is married in Makueni where she has a home and land. She stated that she had put up two houses on the suit property, and that she resides in one and her daughter Mercy Mutua resides in another house, although Mercy was not on the list of the persons who authorized the Plaintiff to plead. She insisted that her claim was not for the land. She stated that she sought only to protect her rights as she lived in the land for many years.
19. According to her, before she entered the suit land, she did not know who was the owner of the land. She stated that no survey has been done on the land. She stated further that although there are 48 people on the land, there was no evidence of their presence on the land and that there was no evidence of the existence of those people, including identity cards. She conceded that although she referred to Erick Kyalo, Eunice Karimi, John Mutinda, Mutuku, Francis Matheka, Alex Mbithi Peter as having been on the land, their names were not on the list of those who authorized her to plead.
20. On being cross examined by counsel for the 4th and 5th Defendants, PW1 stated that she has never informed a government official of her stay in the suit property and that since 1998 she has never established the owner of the land.
21. On re-examination, she stated that the elders who showed her where to construct, were not parties to Machakos CMCC No. 184 of 2012. She stated that the government is aware of their occupation of the suit property as they receive government services like vaccination and identity cards. With this evidence the Plaintiffs closed their case.



Defendants' Case

22. DW1, Mahabub Muysoka, relied on his witness statement dated 22nd February 2022, which he adopted as his evidence in chief. He testified that he was an agent of Regional Container Freights Company for over twenty two years and that the said company were the bonafide registered owners of L.R. No. 337/1884 and have been in actual use of the land for over 10 years having purchased the same in 2009. That the company has put up a perimeter wall on the suit property.
23. He further testified that when they took over the suit property there were several people who had put up iron sheet structures on the property but more people came onto the land which prompted them to file Machakos CMCC No. 184 of 2012 Abdulkarim Saleh Muhsin & Another vs. Margaret Nyokabi & Others sued for and on behalf of Bawazir Self Help Group and that the matter was settled by a consent judgment on 21st May 2016. That the Defendants therein agreed to move out and in default they would be evicted. That all the occupants moved out but the Plaintiffs and others; not more than 25 people, forcefully re-entered the land in defiance of the court order.
24. It was DW1's testimony that the perimeter wall on the suit property has been there for many years and that the Plaintiffs destroyed part thereof which led to criminal charges against them for malicious destruction of property. He maintained that the Plaintiffs were aware of orders evicting them as he personally gave them the orders and had meetings with them but they refused to vacate. That she gave them a sum of Kshs. 5,000/- to cover their transport to leave the land. His position was that the Plaintiffs were not entitled to any compensation as some of them were landlords who had constructed structures on the land and let out to various tenants and therefore collecting rent. He stated that there were only six people on the land and that he counterclaimed for their eviction.
25. On cross examination by counsel for the Plaintiff, he stated that the land was transferred to the registered proprietor on 28th January 2009, as the same had earlier been registered in the name of Joseph Gesare, who sold to the current proprietor. He stated that in Machakos CMC 184 of 2012, they sued the leaders of the group of the residents. He further stated that from the Plaintiffs' photographs there was no evidence of a demolition. He stated that the eviction of the Plaintiff was on the strength of the eviction order. He stated that he used the village elder to talk to the Plaintiffs.
26. On re-examination, he stated that he served the eviction order on the residents, the chief and the OCS.
27. DW2, Daniel Mutinda Maingi, is the 2nd Defendant. He testified in support of the 1st Defendant's case. He adopted and relied on his witness statement dated 22nd February 2022 as his evidence in chief. He stated that he lives at Canaan Athi River and that he had been a village elder for 8 years and knows his residents. He stated that he was the village manager of Canaan Village where there is Bawazir area, and that he had been a resident since the year 2006.
28. DW2 further testified that the residents of Bawazir had illegally occupied several land parcels including land belonging to Apex Company, Engen Petrol Station and Regional Container Freight Services. He stated that he was aware that land Parcel Number 337/1884 belonged to Regional Container Freight Services who had constructed a perimeter wall before it was demolished by the Plaintiffs. That the Plaintiffs are aware that they are in occupation of private land.
29. The witness further stated that in the year 2017, he was served with an order from court which required everyone occupying the suit property to move out, whereof he summoned all the residents and served them with the order. That the residents agreed to vacate. That most of the residents moved out leaving three people namely one lady called Akata, Rosed Nduku and Rose Kamolo with their families. That



Akata who was an old lady sought for more time to vacate, and she thereafter left. That Rose Nduku also left.

30. According to him, it was in the year 2018 when former residents started going back to the suit land constructed iron sheet structures thereon and let out to other people, that among such persons are one Casanova who has six houses and Ngoma who also has six houses. He maintained that in 2018, he held four meetings with the residents where he asked them to vacate. He also stated that in February 2022, the residents asked him to request the owner of the suit property to give them more time of one week as he had informed them that he intended to evict them. That they were given Kshs. 5,000/- to assist them move out but they did not comply. He added that they were not entitled to compensation or resettlement as they had put up structures on private land, in defiance of a court order.
31. On cross examination, he testified that although he held four meetings with the residents in 2018, he had no minutes for the same. He confirmed that he was not involved in CMCC No. 184 of 2012. He stated that he had no documents to show that the Defendants in that suit represented residents of Bawazir. That marked the close of that 1st Defendant's case.
32. The 2nd Defendant who was DW1 testified on his own behalf by restating his testimony in support of the 1st Defendant. He added that it is the Plaintiff's who organized the meetings with him and sought for more time to vacate. That marked the close of the 2nd Defendant's case.
33. The 3rd Defendant did not participate in the suit. The 4th and 5th Defendants stated that they were not calling any witnesses and closed their cases respectively without presenting any evidence.
34. Parties were granted 14 days each, to file and serve their submissions. On record are the Plaintiffs' submissions filed on 5th October 2022 and the 1st Defendant's submissions filed on 7th October 2022.

Plaintiffs' Submissions

35. Counsel for the Plaintiff submitted that the suit raised four issues namely;
 - (a) Whether the forceful eviction and demolition was in compliance with the law.
 - (b) Whether the allocation of the suit land by the 4th Defendant followed due process.
 - (c) Whether the court should grant the reliefs sought by the 1st Defendant.
 - (d) Whether the court should grant the reliefs sought by the Plaintiffs.
36. Counsel submitted that forced evictions are illegal and it is immaterial whether squatters have title to the property, whether the title holder is a private owner or whether the evictee is a trespasser who has no title. Counsel took the position that since the Plaintiffs had occupied the suit property for over 40 years, being a marginalized community, they had unregistered overriding interest in the land pursuant to Section 7 of the Limitation of Actions Act as read with Section 28 h & j of the Land Registration Act No. 3 of 2012.
37. Counsel pointed out that eviction calls for a very meticulous and rigorous procedure. Counsel relied on Sections 152 E and 152 F of the Land Act, which prescribed the process preceding eviction. Reliance was also placed on the case of Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Securities [2011] eKLR, for the proposition that forced evictions are unlawful. Counsel argued that no special measures were taken by the Defendants to protect the vulnerable especially women, children, the elderly and persons with disabilities. That the Defendants failed to take into account the dignity, right to life and security of the residents of Kinanie. Counsel



pleaded that if the court fails to intervene, the Plaintiffs will be rendered homeless and their children's right to education and security will be curtailed.

38. It was also submitted for the Plaintiffs that forcible, violent and brutal eviction through demolition of the Plaintiffs' homes without according their children alternative shelter or accommodation and leaving them exposed to the elements of nature is a violation of the rights of the children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed in Articles 21 (3) 53 (1) (b) (c) (d) and 2 of the Constitution. Counsel referred to the case of *Satrose Ayuma & 11 Others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* for the proposition that as evictions are traumatic and cause physical and emotional stress, whenever they are done, the evictees right to adequate housing and dignity must be respected. Counsel also relied on the case of *Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 Others ex parte Francis N. Kiboro & 198 Others* [2015] eKLR, where the court laid down procedures for eviction.
39. While submitting that the allocation of the suit land by the 4th Defendant did not follow due process, counsel argued that Section 14 of the Land Act No. 6 of 2012 provides for the process of allocation. Counsel submitted that the allocation was done in 2009 to one Josephine Gesare Atandi and argued that Sections 14 and 30 of the repealed Registered Land Act (Cap 300) and the Registration of Titles Act provided that an overriding interest may subsist over land even though the same is not noted on the register, which includes rights of persons in possession of the land.
40. Counsel argued that as the Plaintiffs had occupied the land for over 12 years as at the time of registration of the land in 2009, they had accrued the right of adverse possession and hence had an overriding interest in the land at the point of first registration, hence subsequent proprietorship of the land was subject to the overriding interest. Counsel placed reliance on the case of *Grace Mwakiria Mugambi v Philip Kimani* [2018] eKLR, *Muthee Kathurima vs. Commissioner of Lands & Another* [2015] eKLR and *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Another* [2014] eKLR, for the proposition that the rights of a person having possession of the land are equitable rights which attach to the land and are not affected by change of proprietorship.
41. On whether the 1st Defendant had proved the counterclaim, counsel submitted that the 1st Defendant did not avail any evidence to show that the Defendants in *Machakos CMCC No. 184 of 2012*, represented the Plaintiffs herein. Counsel contended that the 1st Defendant had failed to make full disclosure, and was not entitled to injunction.
42. Counsel maintained that forced eviction without provision of alternative land or accommodation is a violation of the fundamental rights to human dignity, security of persons, right to life, accessible and adequate housing, and other rights.

1st Defendant's Submissions

43. Counsel for the 1st Defendant submitted that the suit raised five issues namely;
 - (a) Whether this matter offends the doctrine of res judicata.
 - (b) Whether the Plaintiffs have legally been settling on Land Parcel L.R. No. 337/1884 within Mavoko Sub County.
 - (c) Whether the Plaintiffs deserve any form of compensation or resettlement from the 1st Defendant.
 - (d) Whether the eviction was lawful.



- (e) Whether the 1st Defendant's counterclaim is merited.
44. Counsel submitted that this matter offends the doctrine of res judicata. Counsel argued that in Machakos CMCC No. 184 of 2012, the suit was settled by consent. Reliance was placed on the case of Abdullahi Mohammed Sheikh v Gulf Africa Bank Ltd [2018] eKLR, where the court restated the elements for res judicata as stated in Section 7 of the *Civil Procedure Act*.
45. On whether the elements of res judicata were proved, counsel argued that in both this case and in Machakos CMCC NO. 184 of 2012, the orders sought were for eviction and injunction against residents of Bawazir area, and that in this suit it is curious that the Plaintiffs were focusing on compensation and resettlement. It was pointed out for the 1st Defendant that although the Plaintiff had referred to L.R. No. 2966 and the Defendants referred to L.R. No. 337/1884, it was not in dispute that the parties were referring to the land at Bawazir area. Counsel contended that the Plaintiffs were also curiously not challenging the ownership of the suit property because they were aware that the issue was already settled.
46. Counsel referred to the case of Theresa Costabir vs Alka Roshanlal Sharma & Another [2015] eKLR for the proposition that res judicata is in respect of not only issues raised in the previous suit, but in respect of issues that could have been raised but were not raised. Counsel maintained that the parties in the previous suit were substantially the same as the parties herein and the issue of illegal occupation of the subject land, was determined and an order to vacate voluntarily in default eviction to issue, was made on 24th May 2016.
47. Counsel pointed out that PW1 stated in evidence that before her entry on the land, she sought authority of the elders, of the residents of Bawazir area. Counsel argued that although it appears that the Plaintiffs and the Defendants are different, there was a clear game being played by the Plaintiffs to bypass the res judicata doctrine as the Plaintiffs were trying to hide their identity. Counsel argued that the Plaintiffs are residents of Bawazir. That they earlier sued through different people and now they are suing through other representatives, but they are the same persons against whom the decree was made.
48. Counsel also argued that the court that heard the previous suit had jurisdiction to determine the matter and both suits are primary suits. Besides, it was argued for the 1st Defendant that the determination in CMCC No. 184 of 2017 was a final determination as shown by D Exhibit 2.
49. On whether the Plaintiffs have legally been settled on L.R No. 337/1884, counsel submitted that it was not in contention that the said parcel was registered in the names of Abdulkarim Saleh Muhsin & Abdulbasit Saleh Muhsin t/a Regional Container Freight Services and that at the hearing, the Plaintiffs did not challenge the procedure in which the registered proprietor acquired the said parcel of land. Counsel argued that the suit property was private land as defined in Article 64 of *the Constitution*.
50. It was further submitted on behalf of the 1st Defendant that the certificate of lease produced as D. Exhibit 2 showed that the lease was from 1st July 1998, while the deed plan was prepared on 1st February 1994. Counsel pointed out that the Plaintiffs' allegation that she entered the suit property in 1998 was based on the date of the lease and no evidence was given as to when the other Plaintiffs entered the land. Counsel argued that no evidence was given to show that there was any illegality in the survey or subsequent allocation. Counsel relied on Sections 107, 108 and 109 of the *Evidence Act* for the proposition that the who alleges must prove.
51. Counsel argued that the identity of the Plaintiffs was in contention as the Plaintiffs testimony showed that there was no nexus between the persons said to have been injured while on the suit property and the persons who authorised her to plead in the suit. Counsel also argued that the framing of the plaint



- clearly showed that the Plaintiffs were aware of Machakos CMCC 184 of 2012 together with orders therein and chose to defy the orders hence their occupation of the suit property was unlawful. Counsel relied on Section 3(1) of the Trespass Act Cap 294 to argue that any person entering another's land without the owners' consent is guilty of an offence.
52. On whether the eviction was lawful, counsel submitted that the Plaintiffs were aware of the judgment in Machakos CMCC No. 184 of 2012 as the same was served on them by DW1 and DW2; and that is why they do not seek to continue using the land, rather they seek to move out under certain conditions. Counsel argued that failure to disclose the date in February 2022 when the Plaintiffs were asked to vacate the suit property was an act of dishonesty.
 53. Counsel also contended that the suit property being private land, Sections 7, 12 and 14 of the Land Act do not apply. Counsel argued that having been served with an order to vacate, the Plaintiffs chose to defiantly remain on the land which necessitated the eviction.
 54. On whether the Plaintiffs deserve compensation, counsel contended that the Plaintiffs claim to compensation was based on an illegality, that of trespass, and that acts of trespass should not form the basis of ordering an innocent land owner to compensate and resettle a trespasser to move out as that would be unjust enrichment and a violation of the owners' proprietary rights. Reliance was placed on the case of *Macfoy vs. United Africa Co. Ltd* [1961] TALL ER 1169 for the proposition that a void act is a nullity in law.
 55. Counsel relied on Article 40 of the Constitution to argue that condemning the 1st Defendant to compensate or resettle the Plaintiffs would amount to limiting the owners' rights to freely enjoy his property as it is already settled that a registered owner of land is under no obligation to settle evictees. Reliance was placed on the case of *Moi Education Centre Co. Ltd v William Musembi & 16 Others* [2017] eKLR, for the proposition that a private owner of property has no positive obligation under Article 21 of the Constitution to provide alternative housing to evictees.
 56. Counsel argued that the purpose of compensation was not to enrich the claimant but put him back to the position he was before the act complained about. That hence, the Plaintiffs were under duty to provide evidence to substantiate the claim for loss suffered, which evidence was not availed in this case. Counsel observed that the prayer sought by the Plaintiff for compensation for illegal eviction and demolition of property was a special damage which ought to be proved. Counsel relied on the cases of *Simon Ndung'u Mungai & Pastor Vincent Mungai t/a Overcomers Christina Centre & Likelink Communications vs Municipal Council of Kiambu*, Civil Appeal No. 23 of 2012 [2019] eKLR and *Karanja Muchiri v Proctor and Allan (EA) Limited*, Civil Case 48 of 2004 [2009] eKLR. Counsel argued that the Plaintiffs did not specifically plead or provide evidence for loss and that the photographs produced in evidence still showed that the iron sheet shanties were still intact.

Analysis and Determination

57. I have carefully considered pleadings, evidence and submissions filed in this matter. The issues that arise for determination are as follows;
 - (a) Whether this suit is res judicata.
 - (b) Whether the Plaintiff is entitled to the prayers sought.
 - (c) Whether the 1st Defendant's counterclaim is merited.
58. The doctrine of res judicata ousts a court's jurisdiction to try a suit or issue which had been conclusively determined in a previous suit by a competent court, involving the same parties or parties litigating



under the same title. The doctrine of res judicata is anchored on Section 7 of the [Civil Procedure Act](#) which provides as follows:-

“No court shall try any suit or issue in which the matter 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 heard and finally decided by such court.”

59. The basis for the res judicata doctrine is that there must be an end to litigation and therefore no one should be endlessly dragged in court over an issue that has already been determined with finality by a court of competent jurisdiction. To succeed in the defence of res judicata, an applicant must prove that the issues in the previous suit are directly or substantially the same, the parties are the same and the issues were determined conclusively by a court of competent jurisdiction. In the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR the Court of Appeal set out the elements of res judicata and held as follows:-

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they 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 issues was competent to try the subsequent suit or the suit in which the issue is raised.”
60. In the instant suit, the 1st Defendant argued that the issues raised by the Plaintiffs in this suit are the same issues determined in Machakos CMCC No. 184 of 2012. I note that in that suit, Abdulkarim Sale Muhsin, Abdulbasit Sale Muhsin t/a Regional Container Freight Services sued Margaret Nyakabi, Makau Mutiso and Raphael Kioko who were the Chairperson, Secretary and Treasurer of Bawazir Self-help Group representing residents of Bawazir area. On 17th May 2016, the parties entered into a written consent which was adopted by the court as the court’s judgment on 21st May, 2016. In the consent judgment a permanent injunction was issued restraining the defendants from interfering with L.R. No. 337/1884 within Mavoko Municipality. The defendants were also ordered to demolish all the illegal structures thereon and in default an eviction order to issue.
63. Although the plaintiffs in the instant suit did not disclose the registration number of the suit property, they referred to the parcel land at Bawazir area. The 1st defendant has identified the suit property as being L.R. No. 337/1884 which is at Bawazir area and which was the subject matter of Machakos CMCC No. 184 of 2012 involving Bawazir Self Help Group L.R. No. 337/1884 measuring 2 Ha; and it is in respect of this land that the court in Machakos ELC NO. 184 of 2012, restrained the Defendants therein, their agents or servants or any other person acting under their authority from trespassing and ordered them to vacate in May 2016. It is therefore clear that the subject matter in the former suit and the current suit is the same.



64. Were the parties in the former suit and the current suit the same? I note that in the former suit, the Plaintiffs were Abdulkarim Saleh Muhsin, Abdulbasit Sale Muhsin t/a Regional Container Freight Services, while the defendants were Bawazir Self Help Group. The Plaintiff's in the current suit have argued that the parties in the two suits are different. I note that the Plaintiffs in this suit are Elizabeth Mutua and Emily Mwikali on behalf of 48 adults and their families of Kinanie, Bawazir area, Athi River. On the other hand, the 1st Defendant is Musyoka Muhabub Mueni the agent of Regional Container Freight Services who are the registered proprietor of the suit property. The 2nd Defendant is a village elder of Bawazir area while the 3rd Defendant is the area chief of the same area. The other Defendants are the Land Registrar Machakos County, the Hon. Attorney General and the Cabinet Secretary Ministry of Interior and Coordination of National Government. It was the Plaintiffs' arguments that the parties in the two suits are difference. On the other hand, the 1st Defendant avers that the framing of the plaint demonstrated that the Plaintiffs were party to and were aware of the determination in Machakos CMCC 184 of 2012; that is why they did not challenge the ownership of the suit property, but rather chose to challenge the eviction and seek compensation and resettlement.
65. PW1, testified that when she went to the suit property in 1998, she found elders on the property who authorized her entry thereon and showed her where to put up her house. This clearly shows that there were leadership structures within the residents of Bawazir area and there were persons who the residents entrusted with the responsibility of running the affairs of the area, in so far as their occupation of Bawazir area was concerned. Considering the court orders issued in Machakos CMCC No. 184 of 2012, I note that the orders did not just bind the leadership of Bawazir Self Help group, but also persons whose occupation of the suit property had been authorized by the leadership of the area. Those orders were in regard to the persons who were on the property upto 21st May 2016.
66. As the Plaintiffs herein testified that they entered the suit property in 1998 with the authority of the elders of Bawazir area, it is my finding that they were persons who were bound by the orders of 21st May, 2016 in Machakos CMCC No. 184 of 2012, although their names do not appear in CMCC No. 184 of 2012.
67. In her evidence, PW1 stated that the 2nd Defendant was the area village elder and that the 3rd Defendant was the area chief. It is not lost on this court that the Plaintiffs who disputed the 1st Defendant's counterclaim on account of him not being the registered proprietor of the suit property, alleged that the 1st and 2nd defendants were unlawfully allocated the suit property. It is therefore ironical that the plaintiffs faulted the allocation of the suit property, yet they did not consider it necessary to sue the registered proprietor thereof. This only points to the inescapable conclusion that the Plaintiffs were substituting the parties for the sake of circumventing the doctrine of res judicata. It is therefore my finding that the Plaintiffs sued the 1st and 2nd Defendants in the place of the registered proprietor and added more defendants as well as an interested party, knowing too well that the former were persons who had no enforceable interest in the suit property. This was not by default but by design to evade the defence of res judicata.
68. It is trite law that substitution or addition of parties to those in a former suit, is not a bar to the defence of res judicata. In the case of *Omondi v National Bank of Kenya Limited & Others* [2001] E.A. 177, the Court of Appeal held that parties cannot evade the doctrine of res judicata by merely adding or substituting parties or causes of action in a subsequent suit. It is my finding therefore that the act of substituting the registered proprietor's name with his agent, the village elder and the area chief, cannot assist the plaintiffs to circumvent the doctrine of res judicata.



69. On whether the issues in the former suit were the same as those in the current suit, I note that the issue of ownership and legality of occupation by the residents on the suit property was determined in Machakos CMCC No. 184 of 2012. In the current suit the plaintiffs are only interested in compensation and resettlement. They do not in any way challenge the fact that they should vacate the suit property. They are only arguing that they ought to be given a proper notice and that the procedures for eviction ought to be followed so that they are compensated and given alternative homes. I also note from the framing of the plaint that the plaintiffs did not state the registration number of the suit property, only referring to the same as “the suit property” and the “premises of the Plaintiff” as demonstrated in paragraph 7, 8 and 9 of the Plaint. Even as they complained that no notice was given by the land Registrar for allocation of Parcel L.R. No. 2966, they only alleged that the notice was not given to persons in the general vicinity of that parcel. Clearly the Plaintiffs were evasive as to exactly where they were occupying.
70. Looking at the current suit vis a vis the previous suit, it is clear that the Plaintiffs have merely expanded the scope of the issues in the former suit by attempting to frame different issues and bring in a new cause of action. It is my view that introducing a new cause of action or expanding the issues, when the party had an opportunity to include the new issues or cause of action in the former suit, cannot shield such party from the consequences of res judicata. A party ought to seize the trial opportunity availed to them under the law, by bringing forward their case in its entirety in all its facets, flavours colours and splendour; with every possible and conceivable argument and evidence, so that the same is heard at once. Litigation on an issue or subject matter cannot be done in piecemeal. It must be done at once, otherwise there would be no end to litigation, and that would make nonsense of notion of the certainty and expediency of justice.
71. I am in agreement with the reasoning in the case of *E.T. v Attorney General* [2012] eKLR, where the Court stated as follows:-
- “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 *Njangu vs Wambugu & 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.”
72. In the instant suit, the Plaintiffs have stated that they only need the court to address the issue of compensation and resettlement. Essentially, they do not wish to continue in the occupation of the suit property, neither are they interested in the same. It is my view that they ought to have raised the questions of compensation and resettlement in Machakos CMCC No. 184 of 2012 and not filed a fresh suit.
73. The decision in Machakos CMCC No. 184 of 2012 was a conclusive determination of the rights of the registered proprietor of L.R. No. 337/1884 and the illegal occupants of the said property. The court was competent to determine the issue by virtue of Section 9 of the *Magistrates’ Courts Act* 2015, that confers jurisdiction on the Magistrate’s Court to hear and determine claims relating to land use,



title, tenure as well as public, private and community land and any enforceable interests inland, among other matters.

74. For the above reasons, it is my findings that the Plaintiffs' suit is res judicata.
75. On whether the 1st defendant is entitled to the counterclaim seeking orders of eviction, I note that from the exhibit produced by the 1st Defendant, namely the certificate of title, the 1st Defendant is not the registered proprietor of the suit property. Therefore, he has no right over the suit property, capable of being protected under the law. Besides, orders of eviction in favour of the registered proprietor as against the residents of Bawazir area who entered the property before 2016, including the Plaintiffs were issued in Machakos CMCC No. 184 of 2012. In the premises, the counterclaim is also res judicata.
76. For the reasons stated above, I find and hold that the Plaintiffs' suit and the 1st Defendant's counterclaim are both res judicata and both claims are hereby dismissed. Each party shall bear its own costs.
77. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Munyaka for the 1st Defendant

No appearance for Plaintiff

No appearance for other Defendants

Josephine – Court Assistant

