



**A.A Bayusuf & Sons Ltd v Bahola & another (Civil Suit
47 of 2022) [2023] KEELC 784 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 47 OF 2022
MAO ODENY, J
FEBRUARY 17, 2023**

BETWEEN

A.A BAYUSUF & SONS LTD PLAINTIFF

AND

FREDRICK JOHN BAHOLA 1ST DEFENDANT

COUNTY GOVERNMENT OF TANA RIVER 2ND DEFENDANT

RULING

1. This ruling is in respect of a Preliminary Objection dated September 9, 2022 by the 1st defendant and a Notice of Motion dated August 17, 2022 by the plaintiff/applicant seeking the following orders; -
 - a. Spent
 - b. A temporary injunction be issued restraining the 1st respondent from entering, constructing, fencing by himself or through his agents on plot number TRCC/ HOL/C/470 under PDP/TRC/312/2004/91 measuring approximately 0.04 Ha pending the hearing and determination of this application *inter-partes*.
 - c. A temporary injunction be issued restraining the 1st respondent from entering, constructing, fencing by himself or through his agents on plot number TRCC/ HOL/C/470 under PDP/TRC/312/2004/91 measuring approximately 0.04 Ha pending the hearing and determination of this suit.
 - d. Costs be in the cause.
2. The 1st defendant filed a Notice of Preliminary Objection dated September 9, 2022 and raised the following grounds: -



- a. The instant suit is *res judicata* having been determined in ELC no 168 of 2012 as consolidated with ELC Petition no 18 of 2012 which involved same subject matter.
 - b. The court has no jurisdiction to determine this matter having been decided by a fellow judge of concurrent jurisdiction in Malindi ELC no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012
3. The 2nd defendant also filed a Preliminary Objection dated September 12, 2022 on grounds that; -
- a. The suit and the application as are *res judicata* in view of Malindi Environment and Land Court Petition no 25 of 2019 A.A Bayasuf & Sons Limited v County Government of Tana River & Another [2020] eKLR.
 - b. The suit as filed is sub judice in view Malindi Environment and Land Court Petition no 18 of 2012.
 - c. This court does not have jurisdiction to entertain this suit as it will be sitting on appeal against itself.
4. Counsel agreed to canvas the Preliminary Objection and the application vide written submissions which were duly filed.

1st defendant/respondent's submissions

5. Counsel for the 1st defendant submitted that the applicant was a party to Malindi ELC no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012 where the subject matter was the suit properties in the current suit and a decision was rendered.
6. Counsel gave a brief background to the case and submitted that Fredrick John Bahola the 1st respondent herein is a member of the family of Mkalindi Righo, the plaintiff in Malindi ELC Suit no 168 of 2012 and that the suit property together with PDP no TRD/312/2004/91 belongs to the petitioners in Malindi Petition no 18 of 2012 and the plaintiff in Malindi E & LC Suit no 168 of 2012 and their family to the exclusion of the defunct county council of Tana River and now the 1st respondent and the other respondents in Malindi ELC Suit no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012.
7. Mr Binyenya submitted that Justice J O Olola in his ruling of September 21, 2018 in Malindi E LC Civil Case no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012 allowed as prayed the petitioners Notice of Motion Application dated November 1, 2016 and dismissed the 1st and 3rd respondents application dated April 10, 2017.
8. Counsel submitted that the applicant is guilty of material non-disclosure as it has failed to inform the court that there is a judgment of this honourable court in Malindi ELC Civil Case no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012 where no appeal or review has been preferred against the judgment of April 15, 2016, further that the did not disclose that it had filed Malindi ELC Petition no 25 of 2019 which was dismissed vide a ruling dated November 5, 2020 by the Justice Olola.
9. Counsel further submitted that a judge cannot sit on an appeal of an order issued by a court of concurrent jurisdiction and relied on the cases of *Mashreq Bank P S C v Kuguru Food Complex Limited* [2018] eKLR and *John Nancy Mwangi t/a Worthblin Marketers v Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others* [2014] eKLR hence this court has no jurisdiction to hear and determine this case.



10. It was counsel's further submission that the applicant has not satisfied the conditions for grant of an injunction as set out in law and that the applicant has no genuine grievance in the form of a right which is being infringed on by the respondents as an allotment letter is not proof of title as it is only a step in the process of allocation of land and relied on the cases of *Giella V Cassman Brown and Company Ltd* [1973] EA 358, *Wreck Motors Enterprises v Commissioner of Lands & 3 Others* [1977] eKLR, [Joseph N K Arap Ngo'k v Moiyo Ole Keiwua & 4 Others](#) [1997] eKLR, [David Sironga Ole Tukai v Francis Arap Muge 7 2 Others](#) [2014] eKLR and [Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others](#) and urged the court to dismiss the application for injunction and uphold the preliminary objection.

2nd defendant/respondent's submissions

11. Counsel submitted that the plaintiff/applicant has no *locus standi* to institute this suit and cited the case of [Khelef Khalifa El- Busaidy -vs- Commissioner of Lands & 2 others](#) [2002] eKLR where the court held that a Plaintiff must have an interest in the subject matter before Court, which interest must be legal and above that of the general public.
12. Counsel also stated that an individual lacking in locus standi is an incompetent Plaintiff who cannot be heard and relied on the case of [Apex International & Anglo Leasing Finance Ltd vs Kenya Anti-Corruption Commission](#) [2012] eKLR where Emukule J (as he then was) quoted the case of *Goodwill and Trust Investment Ltd & Another vs Witt and Bush Limited* (Nigerian SC 266/2005), for an action to be competent and a court to have jurisdiction, proper parties must be identified, in the absence of which, an action must fail.
13. Ms Muyoka also cited the cases of [Patrick Kiseki Mutisya \(Suing as the Personal Representative of the Estate of Nzomo Mutisya \(Deceased\) vs K.B Shangani & Sons Limited & Others](#) [2012] eKLR where Asike-Makhandia, J (as he then was), upheld the dismissal of a suit on a Preliminary Objection on the ground that it was filed by incompetent parties citing with approval the case of *Macfoy vs United Africa Ltd* [1961] 3 ALL E R 1169 at page 1172.
14. It was counsel's further submission that this case is *res judicata* having been heard and determined by a competent court in Malindi ELC Civil Case no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012 and no appeal or review has been preferred against the judgment of April 15, 2016, and Malindi ELC Petition no 25 of 2019 which was dismissed vide a ruling dated November 5, 2020 by the Justice Olola.
15. Counsel therefore submitted that the applicant is not entitled to the orders of injunction which are equitable remedies. The applicant has not proved that he has a legal right and has not met the threshold for grant of injunctions.
16. Counsel submitted that the suit being a mere declaratory suit without a consequential relief for possession, is infructuous and therefore an injunction cannot issue as against the respondents and relied on the case of *Smt Kasnibai W/O Late Kannya Naika -vs- Smt Hemli Bai W/O Late Govinda Naika* (2012) eKLR and urged the court to dismiss the application and uphold the Preliminary Objection.

Plaintiff/respondent's submissions

17. Counsel for the plaintiff submitted that the previous suits were in relation to different subject matters which are not related to this suit and further stated that the declaration made in the consolidated suits at (b) was not specific as it merely pointed to an area near Laza Primary school and water supply measuring approximately 15 acres.



18. It was counsel's submission that the said judgement was not implemented and the respondents have not refuted the same by filing any survey map and Part Development Plan (PDP) to show that the suit property is the one comprised in the 15 acres that were granted by court.
19. It was counsel's submission that the Preliminary Objection does not meet the threshold as stipulated in *Mukisa Biscuits Manufacturers Co Ltd v West End Distributors Ltd* as the disputed facts in this suit can only be ascertained by evidence.
20. Counsel therefore urged the court to find that the applicant is entitled to orders of injunction as prayed and that the court should dismiss the Preliminary Objections filed by the respondents.

Analysis and determination

21. The issue for determination is whether this suit is *res judicata* and if the court finds in the affirmative then the application for injunction also fails hence the court will not deal with its merits.
22. This is a Preliminary Objection raised on a point of law on the grounds that this matter is *res judicata*. The doctrine of *res judicata* is anchored under section 7 of the [Civil Procedure Act](#) which stipulates as follows: -

“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.”

23. If the suit falls on all fours of section 7 of the [Civil Procedure Act](#) then the court can declare the same as *res judicata* and strike it out.
24. In the case of *North West Water Ltd V Binnie & Partners* [1990] 3 ALL E.R.547, where the court held:

“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”

25. It is not disputed that there were 3 previous suits which involved the same parties. What the plaintiff disputes is that it involved different parcels of land.
26. I have perused the judgment in Malindi E & LC Civil Case no 168 of 2012 as consolidated with Malindi Petition no 18 of 2012 which I reproduce for clarity where Justice Angote in his judgment of April 15, 2016 in held as hereunder: -
 - a. A declaration be and is hereby issued that the petitioners' and the plaintiff's rights, individually and in association with other members of the family/community to property as guaranteed in article 40, 50 & 63 of the [Constitution](#) of Kenya, 2010 and in section 75 of the former Constitution of Kenya was and infringed by the 4th respondents' action in allocating part of the petitioners land situated at Hola town to the 1st and 2nd respondents and in approving the 1st and 3rd respondents development plans thereon.



- b. A declaration be and is hereby issued that all the parcels of land measuring 15 acres or thereabouts situated at Hola town in Tana River county near Hola water supply site and Laza Primary School belongs to the petitioners and the plaintiff and their family to the exclusion of the 1st, 2nd and 3rd respondents.
 - c. A prerogative order of *certiorari* be and is hereby issued quashing the allocation by the 4th respondent to the 1st respondent of the portion of land measuring 0.72 hectares or thereabouts within the 15 acres parcel of land situated at Hola town in Tana River county forming part of the petitioners' and the plaintiff's land.
 - d. A prerogative order of *certiorari* be and is hereby issued quashing the allocation by the 4th respondent to the 2nd respondent of the portion of land measuring 150 feet by 100 feet or thereabouts within 15 acres parcel of land situated at Hola Town in Tana River county forming part of the petitioners' and the plaintiff's land.
 - e. An order of vacant possession of the said portion of land and the eviction therefrom of the 1st and 3rd respondents is hereby allowed.
 - f. The 1st, 2nd, 3rd and 4th respondents to pay the costs of the petition, and the 1st, 2nd, and 3rd defendants to pay the costs of the suit in ELC Case no 168 of 2012.
27. I have also perused the ruling dated November 5, 2020 by Justice Olola in Malindi ELC Petition no 25 of 2019 whereby the court dismissed the applicant's petition and application dated August 15, 2019. The applicant had sought the following orders in its Notice of Motion application dated August 15, 2019:
- a. That an order of temporary injunction be issued against the respondents, their servants, agents, employees, tenants and or any other person (s) acting on their behalf, prohibiting them from dealing, leasing, fencing, surveying, selling, developing, trespassing, on the applicant/petitioner's land known as plot no TRCC/HO/C/470 (PDP NO TRD/312/2004/91) situated in Hola town pending the hearing and determination of this petition.
 - b. That the officer commanding police station Hola to ensure compliance of the court orders.
 - c. That costs be in the cause.
28. It is unfortunate that the applicant has been litigating on the same subject matter in the same court without finality. The judgment in both petitions no 18 of 2012 and 25 of 2019 and ELC no 168 of 2012 had the same outcome of which the applicant was aggrieved, then he should have filed an application for review or filed an appeal in the Court of Appeal.
29. Courts do not have the luxury, time and resources to hear matters that are purely an abuse of court process. Where a party is aggrieved with the outcome of his/her case, then there are procedures for review of appeal. That is why there are hierarchy of courts for redress.
30. It is also absurd and with due respect to counsel for the plaintiff to argue that the judgement in the cases mentioned above had not been implemented as the subject area was not specific. This confirms that the matter is *res judicata*. If clarity is required in a judgment, do you file another case or follow up with the judgment that has already been rendered?
31. This is also a case of non-disclosure of material facts and if the court was to deal with the application for injunction, the Applicant would have suffered the fate of not disclosing that the subject matter had been litigated by the same parties by a court of competent jurisdiction.



32. The issue of non-disclosure of material facts was discussed in the case of *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* Civil Appeal no 210 of 1997 where the Court of Appeal stated as follows: -

“It is perfectly well-settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.

It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...

In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to consider the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...In the instant case the so-called material facts repeatedly alleged



to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of *ex parte* proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

33. What was the applicant hiding by not disclosing that there are previous suits that have been filed in respect of the same subject matter and has been determined? Injunctions are equitable remedies where an applicant must come to court with clean hands hence a party must disclose every relevant fact in the case in order to benefit from the remedy.
34. The Preliminary Objections filed by the respondents are on a point of law on *res judicata* and *locus standi* which touches on the jurisdiction of the court to hear and determine a matter. I will not deal with the issue of locus standi as the Applicant had no business filing this suit in the first place as it had already been determined with finality by a competent court of concurrent jurisdiction.
35. The test in determining whether a matter is *res judicata* are as was held in the case of *Bernard Mugo Ndegwa vs James Nderitu Githae and 2 Others* (2010) eKLR, as follows:
 - 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.
36. Having found that this suit is similar to both Petitions nos 18 of 2012 and 25 of 2019 and ELC No 168 of 2012 which were determined by this court, it follows that this suit is *res judicata* and the same is struck out with costs to the respondents. The Preliminary Objections are hereby upheld.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF FEBRUARY 2023.

M A ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

