



**Gogo & another v Mwasia & 6 others (Civil Appeal E110 of 2021)  
[2024] KECA 1827 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1827 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E110 OF 2021  
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**BINTOMARI JUMAA GOGO ..... 1<sup>ST</sup> APPELLANT**

**HAMISI AMRI MAZU (SUING AS PERSONAL REPRESENTATIVES OF THE  
ESTATE OF AMRI MCHORO MWAMURI (DECEASED) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MATANO MWASIA ..... 1<sup>ST</sup> RESPONDENT**

**IBRAHIM NJOROGE KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**BETINA MALTHER ..... 3<sup>RD</sup> RESPONDENT**

**SWAN ISLAND LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**MOSES KABERI KARIUKI ..... 5<sup>TH</sup> RESPONDENT**

**DICKSON OTIENO AKENO ..... 6<sup>TH</sup> RESPONDENT**

**CHRISTINE MUMBI MIANO ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Ruling and Orders of the Environment and Land Court of  
Kenya at Mombasa (C. K. Yano, J.) dated 16th July 2020 in E.L.C Case No. 120 of 2007 (O.S))*

**JUDGMENT**

1. The appellants, Bintomari Jumaa Gogo and Hamisi Amri Mazu, in their capacity as the personal representatives of the estate of Amri Mchoro Mwamuri (deceased), moved to this Court on appeal against the ruling of the Environment and Land Court at Mombasa (C.K. Yano, J.) dated 16<sup>th</sup> July 2020 in ELC Case No. 120 of 2007 (OS) in which the deceased had taken out an Originating Summons in the High Court at Mombasa dated 17<sup>th</sup> May 2007 against the 1<sup>st</sup> to 5<sup>th</sup> respondents herein praying for:



- a declaration that he was the proprietor of 1.76 hectares of land comprised of 5 parcels, namely Plot Nos. Kwale/Diani Complex/391, 393, 395, 397 and 399 (the suit properties), on the grounds that he had acquired them by adverse possession after allegedly residing thereon for over 73 years; orders that he was entitled to be registered as the owner of the said parcels of land, and to be issued with certificates of titles thereto; and costs of the suit.
2. The précis of the deceased's claim was that the 1<sup>st</sup> to 5<sup>th</sup> respondents were the respective registered owners of the 5 suit properties; that his grandparents and father had moved from Kilifi District and occupied the suit parcels in the 1920s; that his father and mother planted trees and crops on the suit property; that his father died in 1972 and was buried on the suit properties, which contain many graves of his family members who were born and resided thereon; that his parents' occupation of the suit parcels was peaceful and without anyone's permission; and that the parcels were government land until 1992 when demarcation and survey took place, whereupon the suit properties were allotted to non-residents; and that none of the plots was allotted to the deceased or to any of his relatives.
  3. The deceased further claimed that the parcels were fully developed and occupied by the deceased and members of his family, including his children and grandchildren; that the deceased and his relatives' occupation of the suit properties was continuous for 73 years, open, uninterrupted, adequate and adverse to the 1<sup>st</sup> to 5<sup>th</sup> respondents' title; that he had dispossessed the 1<sup>st</sup> to 5<sup>th</sup> respondents of their ownership by way of adverse possession, having allegedly occupied them for over the 12 year period contemplated in section 38 of the *Limitation of Actions Act*; that, although demarcation was undertaken in 1992, the 1<sup>st</sup> to 5<sup>th</sup> respondents had not bothered to evict him and his family members within a period of 12 years; that 15 years had elapsed since the demarcation and survey exercise took place; and that the deceased was entitled in law to be declared as the lawful owner of the suit properties.
  4. On their part, the 4<sup>th</sup> and 5<sup>th</sup> respondents entered appearance and filed their replying affidavits in opposition to the deceased's Originating Summons.
  5. The 1<sup>st</sup> to 3<sup>rd</sup> respondent's having failed to enter appearance, default judgment was entered against the 1<sup>st</sup> respondent on 4<sup>th</sup> September 2009 and against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 7<sup>th</sup> January 2010.
  6. Subsequently, the 1<sup>st</sup> respondent, Matano Mwasina, entered appearance and filed an application dated 15<sup>th</sup> November 2010 seeking orders to set aside the ex parte judgment entered against him, and to allow him to tender his defence unconditionally. His application was allowed by consent and an order recorded in that regard on 21<sup>st</sup> February 2011 directing him to file his defence and counterclaim within 14 days next following.
  7. In his defence and counterclaim dated 23<sup>rd</sup> February 2011, the 1<sup>st</sup> respondent denied all the averments made by the deceased in the Originating Summons and the supporting affidavit. He averred that his family were indigent residents of Diani who, along with many others, settled on and tilled the disputed land for years, and had many relatives buried thereon; that, in 1992, the Government declared the land a settlement scheme and had it subdivided with a view of settling the local community; that members of the community were allocated portions of the land at random, and not necessarily on the basis of the exact location of their previous occupation, and title documents issued accordingly; that all members of the local community accepted the respective portions of land allocated to them to foster peaceable co-existence; and that the deceased, who was allocated parcel No. 425, took up his portion, but that he was greedy and wanted more. In his counterclaim, the 1<sup>st</sup> respondent prayed for vacant possession of the parcel claimed by the deceased.
  8. The suit proceeded for hearing on 7<sup>th</sup> March 2012 when the deceased's witnesses testified and, thereafter, the deceased applied for a site visit by the court. Pending the site visit, the suit was transferred



to the Environment and Land Court at Mombasa and registered as ELC Case No. 120 of 2007 (OS). After numerous adjournments, the deceased abandoned his request for a site visit. It is noteworthy that, to-date, the ELC is yet to have the deceased's case closed and proceed to hear evidence from the respondents and render its judgment on the merits of the deceased's Summons.

9. Pending hearing and determination of the deceased's claims in respect of the five parcels, the 6<sup>th</sup> and 7<sup>th</sup> respondents, Dickson Otieno Akeno and Christine Mumbi Miano, filed an application dated 21<sup>st</sup> June 2019 seeking to be joined in the suit as interested parties. The application, which was unopposed, was allowed vide an order dated 22<sup>nd</sup> July 2019, following which the 6<sup>th</sup> and 7<sup>th</sup> respondents filed an application dated 18<sup>th</sup> September 2019 seeking orders that the deceased's suit in respect of land parcel No. Kwale/Diani Complex/391 be struck out on the grounds that they were the registered proprietors of land parcel No. Kwale/Diani Complex/391; that the deceased's claim of adverse possession as against the 1<sup>st</sup> respondent with regard to Kwale/Diani Complex/391 was no longer tenable and did not make sense as the 6<sup>th</sup> and 7<sup>th</sup> respondents were now the registered owners of the said parcel; that they were certain to be adversely affected by any order made in the suit as they had already obtained judgment against the deceased in Mombasa HCCC No. 115 of 2011; that the judgment in HCCC No. 115 of 2011 against the deceased ought to be taken into account to avoid absurdities; and that no prejudice would be suffered by the deceased and the other respondents if the orders sought were granted.
10. The 6<sup>th</sup> and 7<sup>th</sup> respondents annexed the judgment of the ELC (A. Omollo, J.) in HCCC No. 115 of 2011 dated 28<sup>th</sup> June 2018. The suit in HCCC No. 115 of 2011 was filed by the 6<sup>th</sup> and 7<sup>th</sup> respondents against the deceased seeking vacant possession of parcel No. Kwale/Diani Complex/391; and costs of the suit.
11. In the judgment dated 28<sup>th</sup> June 2018, the learned Judge found that parcel No. Kwale/Diani Complex/391 was initially registered in the name of the 1<sup>st</sup> respondent herein before being transferred to the 6<sup>th</sup> and 7<sup>th</sup> respondents and registered in their names; that the 6<sup>th</sup> and 7<sup>th</sup> respondents were innocent purchasers for value; that the deceased had not proved exclusive possession thereof; that there was evidence that only part of the deceased's house had encroached on the parcel, and that the deceased was therefore a trespasser; and that the 6<sup>th</sup> and 7<sup>th</sup> respondents had proved their case against the deceased on a balance of probabilities. Consequently, the ELC entered judgment in favour of the 6<sup>th</sup> and 7<sup>th</sup> respondents against the deceased and for vacant possession, costs of the suit and interest.
12. With regard to the deceased's claim for adverse possession in ELC Case No. 120 of 2007 (OS), the learned judge held as follows:
  10. The Defendant bases his claim in the suit property on adverse possession ....
  11. .... I have considered the facts presented herein by the Defendant and I find that the same do not contain the ingredients set out in the above case.  
  
I find that the Defendant has not proved possession.
13. There is evidence that part of his house has encroached on the suit property. He is therefore a trespasser. He is not in exclusive possession and/or occupation of the entire Plot Number Kwale/Diani Complex/391 and the road reserve. Judgement in HCCC No. 120 of 2007 has not been delivered. The Defendants claim for adverse possession has not crystallized."
14. In opposition to the 6<sup>th</sup> and 7<sup>th</sup> respondents' application to strike out the suit with respect to parcel No. Kwale/Diani Complex/391, the deceased filed a replying affidavit dated 29<sup>th</sup> October 2019. He deposed that, after the 6<sup>th</sup> and 7<sup>th</sup> respondents sued him in HCCC No. 115 of 2011, he filed a Statement



of Defence invoking the defence of adverse possession and clearly notifying the 6<sup>th</sup> and 7<sup>th</sup> respondents of the suit he had filed seeking adverse possession of Kwale/Diani Complex/391, being ELC Case No. 120 of 2007 (OS); that, notwithstanding the pendency of his suit, the 6<sup>th</sup> and 7<sup>th</sup> respondents decided to continue with the hearing of HCCC No. 115 of 2011 instead of applying to be joined as interested parties in ELC Case No. 120 of 2007 (OS), resulting in a judgment to the effect that they were innocent purchasers, but that the learned Judge declined to adjudicate on the issue of adverse possession, noting that the issue was being handled in ELC Case No. 120 of 2007 (OS) which judgment was yet to be delivered.

15. The deceased further deponed that the judgment in HCCC No. 115 of 2011 was to the effect that Plot No. Kwale/Diani Complex/391 was subject to litigation, and that the 6<sup>th</sup> and 7<sup>th</sup> respondents would be affected by the judgment in ELC Case No. 120 of 2007 (OS) if the deceased was declared to have dispossessed the owner(s) of the land; that, although the deceased had initiated an appeal against the judgment in HCCC No. 115 of 2011, the said judgment was of no consequence to the deceased's pending suit as the deceased had recourse against the vendors (the 1<sup>st</sup> respondent) under the doctrine of adverse possession; that whoever buys land without due diligence could equally be dispossessed of the land under the doctrine of adverse possession; that there were no absurdities in the deceased's suit as the learned Judge did not adjudicate the issue of adverse possession in HCCC No. 115 of 2011, but stated that the issue was under the domain of ELC Case No. 120 of 2007 (OS) which was yet to be determined; that there would have been an absurdity had the learned Judge delved into the issue of adverse possession, but that the learned Judge did not; and that the 6<sup>th</sup> and 7<sup>th</sup> respondents' application must fail as it would greatly prejudice the deceased, yet the 6<sup>th</sup> and 7<sup>th</sup> respondents had recourse against the purported vendors should the deceased be successful in his case.
16. In its ruling dated 16<sup>th</sup> July 2020, the ELC (C. K. Yano, J.) held that the suit as against the subject parcel of land Kwale/Diani Complex/391 was res judicata as the ELC in HCCC No. 115 of 2011 had already heard and determined the issue of adverse possession over the same suit property, and that the matter was concluded. The ELC therefore struck out the entire suit with costs to all of the respondents herein.
17. Dissatisfied, the appellants (suing as personal representatives of the estate of the deceased) filed this appeal against the impugned ruling. In their memorandum of appeal dated 24<sup>th</sup> November 2021, the appellants set out 7 grounds of appeal, namely:
  - “1. That the learned Judge erred in law and in fact by striking out the entire suit for being res judicata yet the Application for striking out was in respect of one of the suit properties, being Plot No. Kwale/Diani Complex/391, hereinafter referred to as the first suit land.
  2. That the learned Judge erred in law and in fact by not appreciating that the suit involved four parcels of land, hereinafter referred to as other suit properties, whose registered owners are different parties and consequently the parties herein as well as the subject matter in this suit are quite different from those in ELC No.115 of 2011 (Mombasa), which was in respect of the first suit property and the interested parties.
  3. That the learned Judge erred in law and in fact by making a finding that the 1<sup>st</sup> to 5<sup>th</sup> respondents were enjoined or added to the suit after the determination of ELC No. 115 of 2011 (Mombasa), yet the suit was filed against the 1<sup>st</sup> to 5<sup>th</sup> respondents in the year 2007 as opposed to ELC No. 115 of 2011 (Mombasa), which was filed in 2011.



4. That the learned Judge erred in law and in fact by striking out the entire suit, yet there was no invitation from the 1<sup>st</sup> to 5<sup>th</sup> respondents to do as they were all aware that the suit had proceeded for hearing and the deceased Plaintiff was about to close his case.
  5. That the learned Judge erred in law and in fact by not appreciating the fact that there was a default judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and thus he did not have the powers to strike out claims in which default judgment had been made.
  6. That the learned Judge erred in law and in fact by not appreciating the findings in ELC No. 115 of 2011 (Mombasa), where no decision was made on the issue of adverse possession relating to the first suit land, yet the same was raised therein as a defence, leaving the said issue to be determined in the suit when she expressly stated that the defendant's claim for adverse possession therein had not crystallized and merely made an observation to the effect that the plaintiffs therein were innocent purchasers for value, a decision that prompted the filing of a notice of appeal on 29<sup>th</sup> June, 2018, which is pending hearing.
  7. That the learned Judge erred in law and in fact in allowing the 6<sup>th</sup> and 7<sup>th</sup> respondents' application for striking out, dated 18<sup>th</sup> September 2019, when the suit was struck out for being res judicata on the basis of the said application."
18. In support of the appeal, learned Counsel for the appellants, M/s. Kenga & Company, filed written submissions and a list of authorities dated 15<sup>th</sup> July 2024. Counsel cited the case of Juma & 10 others v Wali & 2 others [2024] KECA 577 (KLR) for the proposition that, unless the parties and the causes of action in an earlier suit are similar to those in a subsequent suit, the suit would not be res judicata.
  19. In reply, learned Counsel for the 1<sup>st</sup> respondent, M/s. G. A. Okumu & Co., filed written submissions, a summary & analysis of authorities dated 12<sup>th</sup> July 2024, citing the cases of Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, which set out the elements to be satisfied for the bar of res judicata to be effectively raised; Nadeem A. Kana v Lucy Wambui Mwangi [2021] eKLR for the proposition that a matter overtaken by events cannot be tenable anymore and that, if it proceeds to success, the victory would be pyrrhic; and Kasuve v Mwaani Investments Limited & 4 others (2004) KLR 184 for the proposition that, in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.
  20. Learned Counsel for the 6<sup>th</sup> and 7<sup>th</sup> respondents, M/s. F. M. Mwawasi & Co., filed written submissions, a summary and analysis of authorities dated 12<sup>th</sup> July 2024, citing the case of Kridha Limited v Peter Salai Kituri [2020] eKLR, which cited Black's Law Dictionary's definition of judicial discretion as being "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."
  21. In our considered view, the main issues for determination as discernible from the grounds of appeal and the rival submissions are: whether ELC Case No. 120 of 2007 (OS) was res judicata HCCC No. 115 of 2011 in respect of claims over the suit properties, namely Plot Nos. Kwale/Diani Complex/391, 393, 395, 397 and 399; in particular, whether ELC Case No. 120 of 2007 (OS) was res judicata HCCC



- No. 115 of 2011 in respect of Plot No. Kwale/Diani Complex/391; whether the learned Judge erred in striking out in its entirety the deceased's suit for being res judicata with costs to all the respondents; and what orders ought we to make in determination of the appellants' appeal, including orders on costs.
22. On the closely intertwined 1<sup>st</sup> and 2<sup>nd</sup> issues as to whether ELC Case No. 120 of 2007 (OS) was res judicata HCCC No. 115 of 2011 in respect of all five parcels of land, namely Plot Nos. Kwale/Diani Complex/391, 393, 395, 397 and 399; and whether ELC Case No. 120 of 2007 (OS) was res judicata HCCC No. 115 of 2011 in respect of Plot No. Kwale/Diani Complex/391 only, we hasten to observe: that the impugned ruling dated 16<sup>th</sup> July 2020 striking out ELC Case No. 120 of 2007 (OS) as being res judicata was delivered before the deceased closed his case to pave way for hearing of the respective replies by the 4<sup>th</sup> and 5<sup>th</sup> respondents, who had opposed the deceased's Summons; that there was on record default judgment against the 1<sup>st</sup> to 3<sup>rd</sup> respondents, who had not filed any reply to the deceased's Summons; and that HCCC No. 115 of 2011 (between the 6<sup>th</sup> and 7<sup>th</sup> respondents against the deceased) only concerned Plot No. Kwale/Diani Complex/391 in respect of which they were adjudged bona fide purchasers from the 1<sup>st</sup> respondent for value and without notice of any defect of title.
  23. In addition to the foregoing, it is equally noteworthy that the default judgment against the 1<sup>st</sup> respondent was subsequently set aside vide the consent order dated 21<sup>st</sup> February 2011 by which he was allowed to file his defence and counterclaim dated 23<sup>rd</sup> February 2011.
  24. To our mind, and as the appellants rightly contend, the deceased's claim against the 1<sup>st</sup> respondent became res judicata on delivery of the judgment in the subsequent suit filed by the 6<sup>th</sup> and 7<sup>th</sup> respondents in HCCC No. 115 of 2011 claiming plot No. Kwale/Diani Complex/391, and which was determined in their favour. However, we take to mind the fact that this appeal does not relate to the judgment in HCCC No. 115 of 2011, which remains unchallenged in that regard.
  25. Clearly, the appellants only challenge vide the appeal before us relates to the learned Judge's decision to strike out in its entirety the deceased's suit in ELC Case No. 120 of 2007 (OS) as against the 2<sup>nd</sup> to 5<sup>th</sup> respondents in relation to the remaining four parcels of land.
  26. For the avoidance of doubt, the deceased's suit related to 5 parcels of land while the suit filed by the 6<sup>th</sup> and 7<sup>th</sup> respondents against the deceased in HCCC No. 115 of 2011 related to only one of those parcels of land to wit plot No. Kwale/Diani Complex/391. That explains why, in their application in ELC Case No. 120 of 2007 (OS), they sought to have the deceased's claim against them struck out on the grounds that it was res judicata HCCC No. 115 of 2007. It is noteworthy that the 6<sup>th</sup> and 7<sup>th</sup> respondents specifically made a prayer for the suit in respect of parcel No. Kwale/Diani Complex/391 to be struck out and not the claims in respect of the other parcels of land as they did not form part of the subject matter in HCCC No. 115 of 2011. In our considered view, therefore, the outcome in HCCC No. 115 of 2011 did not affect the appellants' claim regarding the other parcels, which were owned by the 2<sup>nd</sup> to 5<sup>th</sup> respondents respectively, which claims were yet to be determined on merits.
  27. In view of the foregoing, we form the view that the learned Judge erroneously concluded that the claims against the 2<sup>nd</sup> to 5<sup>th</sup> respondents were introduced into the suit through an amendment after the conclusion of the 6<sup>th</sup> and 7<sup>th</sup> respondents' suit when he made observations to the effect that new parties and causes of action were added to the suit to evade the application of the doctrine of res judicata.
  28. In principle, the doctrine of res judicata would not apply unless parties are the same and the subject matter is also the same. In HCCC No. 115 of 2011, the parties were the deceased and the 6<sup>th</sup> and 7<sup>th</sup> respondents; and plot No. Kwale/Diani Complex/391 the only subject matter of that suit.





29. On their part, learned counsel for the 1<sup>st</sup> respondent submitted that the learned Judge was not at fault with regard to plot No. Kwale/Diani Complex/391 in respect of which the issue of adverse possession was heard and determined in favour of the 6<sup>th</sup> and 7<sup>th</sup> respondents in HCCC No. 115 of 2011; that the learned Judge in HCCC No. 115 of 2011 found that the deceased had not proved exclusive possession so as to impute adverse possession; that the judgment in HCCC No. 115 of 2011 remains unchallenged and has not been overturned; and that the position that the deceased' claim against the 1<sup>st</sup> respondent or the 6<sup>th</sup> and 7<sup>th</sup> respondent remains the same.
30. Counsel further submitted that the parties in HCCC No. 115 of 2011 are the 6<sup>th</sup> and 7<sup>th</sup> respondents and the appellants, while the subject matter is plot No. Kwale/Diani Complex/391; and that, in the circumstances, the court in ELC Case No. 120 of 2007 (OS) was estopped from entertaining the same issue of adverse possession, which was conclusively determined in HCCC No. 115 of 2011.
31. According to counsel, there was no such finding by the court that the 1<sup>st</sup> to 5<sup>th</sup> respondents were joined or added to the suit after determination of HCCC No. 115 of 2011; that, nevertheless, the appellants' claim of adverse possession has been overtaken by events after the determination of HCCC No. 115 of 2011 in respect of Kwale/Diani Complex/391; and that, accordingly, there is no reasonable cause of action against the 1<sup>st</sup> respondent as he is no longer the registered proprietor of Kwale/Diani Complex/391.
32. In further reply to the appellants' submissions, learned Counsel for the 6<sup>th</sup> and 7<sup>th</sup> respondents submitted that their application was merited, and that the learned Judge correctly ruled as he did with reasons for his decision; that the appellants' appeal is without merit; and that it ought to be dismissed with costs.
33. We hasten to observe that, in their written submissions, learned counsel for the appellants expressly conceded that the deceased's claim in respect to parcel No. Kwale/Diani Complex/391 and against the 1<sup>st</sup> respondent or the 6<sup>th</sup> and 7<sup>th</sup> respondents was res judicata in consequence of the judgment of the ELC (A. Omollo, J.) dated 28<sup>th</sup> June 2018 delivered in HCCC No. 115 of 2011 and which, as already observed, holds and remains unchallenged. We reach this conclusion taking to mind the fact that in HCCC No. 115 of 2011, the 6<sup>th</sup> and 7<sup>th</sup> respondents had sued the deceased over Kwale/Diani Complex/391 for vacant possession and secured judgment in their favour; that, in ELC Case No. 120 of 2007 (OS), the deceased sued the 1<sup>st</sup> respondent who sold Kwale/Diani Complex/391 to the 6<sup>th</sup> and 7<sup>th</sup> respondents; that, in their application aforesaid, the 6<sup>th</sup> and 7<sup>th</sup> respondents sought to have the suit with respect to Kwale/Diani Complex/391 declared as being res judicata; that ELC Case No. 120 of 2007 (OS) involved the same property to which the 6<sup>th</sup> and 7<sup>th</sup> respondents claim under the 1<sup>st</sup> respondent's title; and that the determination in HCCC No. 115 of 2011 in favour of the 6<sup>th</sup> and 7<sup>th</sup> respondents closed the door to the deceased's suit against the 1<sup>st</sup> respondent, who no longer had title to Plot No. 391.
34. In conclusion, ELC Case No. 120 of 2007 (OS) was, in our considered view, res judicata HCCC No. 115 of 2011 in respect of Plot No. Kwale/Diani Complex/391 only; and that the deceased's claims against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in ELC Case No. 120 of 2007 (OS) in relation to Plot Nos. Kwale/Diani Complex/393, 395, 397 and 399 were by no means res judicata and ought to have been determined in their merits.
35. Turning to the 3<sup>rd</sup> issue as to whether the learned Judge erred in striking out in its entirety the deceased's suit for being res judicata with costs to all of the respondents, we agree with the submissions of counsel for the appellants that he ought not to have done so, and for good reason.



36. In the impugned ruling, the learned Judge held as follows:

“8. The doctrine of res judicata as stated has been explained in a plethora of decided cases ....

10. .... The question therefore is whether the applicants in the application herein have satisfied the conditions for the principle of res judicata in view of the fact of this case ....

12. In this case, the plaintiff is basing his claim over the suit property on adverse possession. There is no doubt that the court that formerly heard and determined the issue of adverse possession in ELC Case No. 115 of 2011 was competent to try the suit. The court in the former suit entered judgment in favour of the applicants herein. Applying the stated law to the facts before one, it is clear that the plaintiff seeks to open issues that have been raised and determined in ELC Case No. 115 of 2011. Even the issue regarding adverse possession was fully canvassed and determined. There is no dispute that the parties are the same in all these, proceedings save that the defendants herein have been added in the suit herein. The subject matter in both suits is the property known as Kwale/Diani Complex/391. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in subsequent suit. In my view, the existence of an appeal over the judgment in the previous suit does not in itself render the principle of res judicata inapplicable. What is clear to me is that the plaintiff is trying to litigate a concluded matter. By virtue of Section 7 of the Civil Procedure Act, this suit is barred by the doctrine of res judicata.

12. In the result I find and hold that the notice of motion dated 18<sup>th</sup> September 2019 has merit and the same is hereby allowed. The suit is res judicata.

Accordingly, the plaintiff's suit is struck out with costs to the interested parties and the defendants.”

37. Section 7 of the Civil Procedure Act sets out the doctrine of res judicata thus:

7. Res judicata

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.

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.

38. This Court in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are 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 issue was competent to try the subsequent suit or the suit in which the issue is raised.”
39. The deceased’s claim with respect to parcel No. Kwale/Diani Complex/391 and against the 1<sup>st</sup> respondent or the 6<sup>th</sup> and 7<sup>th</sup> respondents (claiming under the 1<sup>st</sup> respondent) was heard and conclusively determined in HCCC No. 115 of 2011. However, the deceased’s claims over parcel Nos. Kwale/Diani Complex/393, 395, 397 and 399 were not the subject of HCCC No. 115 of 2011. The 2<sup>nd</sup> to 5<sup>th</sup> respondents were not parties in HCC No. 115 of 2011. Moreover, the deceased’s claim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents with respect to parcel Nos. Kwale/Diani Complex/393 and 395 had already been determined before HCCC No. 115 of 2011 was instituted when the High Court entered judgment in default against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 7<sup>th</sup> January 2010 in ELC Case No. 120 of 2007 (OS).
40. In view of the foregoing, we find that the learned Judge was at fault in striking out the deceased’s suit in its entirety on the grounds that it was res judicata as judgment had already been entered against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents before the existence of the 6<sup>th</sup> and 7<sup>th</sup> respondents’ suit; and because the judgment in the 6<sup>th</sup> and 7<sup>th</sup> respondents’ suit did not finally determine the deceased’s adverse possession claims in ELC Case No. 120 of 2007 (OS) against the 4<sup>th</sup> and 5<sup>th</sup> respondents with respect to parcel Nos. Kwale/Diani Complex/397 and 399.
41. Having carefully considered the record as put to us, the impugned ruling, the rival submissions, the cited authorities and the law, we find that the appeal herein succeeds in part and, accordingly, hereby order and direct as follows:
- a. That the ruling and orders of the ELC (C. K. Yano, J.) dated 16<sup>th</sup> July 2020 in ELC Case No. 120 of 2007 (OS) be and are hereby set aside in so far only as they relate to the appellants’ suit as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents;
  - b. That the deceased’s suit as against the 4<sup>th</sup> and 5<sup>th</sup> respondents be and is hereby reinstated for hearing and determination on its merits;
  - c. That the ruling and orders of the ELC (C. K. Yano, J.) dated 16<sup>th</sup> July 2020 in ELC Case No. 120 of 2007 (OS) declaring the deceased’s suit as against the 6<sup>th</sup> and 7<sup>th</sup> respondent’s res judicata Mombasa HCCC No. 115 of 2011 in so far as it relates to parcel No. Kwale/Diani Complex/391 be and is hereby upheld; and
  - d. That parties do bear their respective costs of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NG'ENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

