

KENYA / JUDGMENT

Magarini Amani Community Self Help Group & 6 others v Water Resources Authority & 3 others [2025] KEHC 10349 (KLR)

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COURT

High Court

BEFORE

M Thande

CASE / FILE NUMBER

Constitutional Petition E024 of 2024

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Magarini Amani Community Self Help Group & 6 others v Water Resources Authority & 3 others
(Constitutional Petition E024 of 2024) [2025] KEHC 10349 (KLR) (11 July 2025) (Ruling)

Neutral citation:

[2025] KEHC 10349 (KLR)

Republic of Kenya

In the High Court at Malindi

Constitutional Petition E024 of 2024

M Thande, J

July 11, 2025

Between

Magarini Amani Community Self Help Group

1st Petitioner

Mmukado Farmers Community Based Organisation

2nd Petitioner

Patanani Self Help Group

3rd Petitioner

Ufanisi Progressive Group

4th Petitioner

Gongoni Mwangaza Self Help Group

5th Petitioner

Amani Kanagoni Self Help Group

6th Petitioner

Munyu Cooperative Savings and Credit Society Ltd

7th Petitioner

and

Water Resources Authority

1st Respondent

County Government of Kilifi

2nd Respondent

The Honourable Attorney General

3rd Respondent

National Assembly

4th Respondent

Ruling

1. The Petitioners herein filed a Petition dated 5. 12. 24 seeking a declaration that the imposition of water use charges by the 1st Respondent pursuant to Regulation 84 of the Water Resources Regulations, 2021 on salt harvesting companies (the companies) in Kilifi County is unconstitutional contrary to Articles 40, 43, 55, 62 as read with 64, 209(4) and the Fourth Schedule of the Constitution; Article 56 of UNCLOS as read with Article 2 (5) of the Constitution and Section 5 of the Maritime Zones Act. They also seek an order prohibiting the implementation or further imposition of the said water use charges by the 1st Respondent. Additionally, they seek an order for refund of any water use charges paid by the companies in Kilifi County to the 1st Respondent. The Petitioners also filed an application seeking interim relief, pending the hearing and determination of the Petition.
2. The Petitioners describe themselves as registered community-based organizations with membership from within Kilifi County and whose main economic activity is salt harvesting. They have brought the Petition on behalf of their members, and the general public. The Petitioner's case is that as a result of the imposition of the said water use charges, the companies' cost of business operations has risen. The Petitioners state that they account for 90% of direct and indirect employees of the companies and have been notified of looming

mass layoffs. This they state will lead to loss of their livelihoods and adverse effects on the economy of the county.

3. The Petitioners further contend that the 1st Respondent has imposed the water use charges under the misguided belief that the companies are harvesting salt from seawater. They claim that water from the sea naturally collects itself into the companies' private land and falls under the doctrine of capture. As such, the Petitioners claim, such water cannot be said to be a public resource falling under the mandate of the 1st Respondent for regulation purposes and over which charges can be imposed.
4. In opposition to the Petition and application, the 3rd Respondent filed a preliminary objection dated 26. 1.25 raising the following objections:1. That pursuant to Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011, this Honourable court is not vested with the requisite jurisdiction to hear and determine this Application and Petition.2. That Section 13 (2) (a) of the Environment and Land Court Act, endows the Environment and Land Court with the requisite jurisdiction to hear and determine issues and/or allegations that relate to mining, minerals and other natural resources such as in the instant Application and Petition.3. That by virtue of Article 165 (5) of the Constitution of Kenya, 2010, the High Court's jurisdiction is ousted in matters where the Environment and Land Court has jurisdiction.4. That this suit is res judicata and/or barred by collateral estoppel as the issues raised in the application and petition are directly related to the issues which were raised, heard and determined by the Court of Appeal in *Krystalline Salt Limited v Water Resources Management Authority* [2024] KECA 191 (KLR).5. That some of the issues determined in the above case which have been presented again to this Honourable court are;a)Whether the respondent was entitled to recover from the appellant any amount at all for use of sea water or whether sea water is res nullius.b)Whether under section 2 of the repealed Water Act, 2002, territorial sea water was included as "water resources".c)Whether the appellant used sea water to produce salt.d)Whether the parcels of land on which the appellant produces salt are private and thus excluded by section 3 of the Water Act, 2002 (Repealed) from the provisions of the said Act.6. That vide the Supreme Court Ruling in *Krystalline Salt Limited v Water Resources Management Authority* [2024] KESC 40 (KLR) delivered on 2nd August, 2024 the matter was marked as final and could be relitigated.7. That in accordance with Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their proxies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.8. That the initiation of proceedings in this Honourable Court for the purpose of mounting a collateral attack on a final decision adverse to the intending Petitioners reached by a Court of competent jurisdiction is an abuse of the Court process.9. That this suit has been brought to this court in a clever way by the present Petitioners in clear disregard of the above and is an abuse of the due process of the court.

5. The preliminary objection challenges the jurisdiction of this Court to entertain the Petition and Application herein. It is therefore imperative that the same is dispensed with first.
6. The 3rd Respondent in its submissions contends that by dint of Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, this Court lacks jurisdiction to entertain this Petition which relates to water charges. The 3rd Respondent argues that this matter falls within the jurisdiction of the Environment and Land Court (ELC).
7. The 4th Respondent filed submissions in support of the preliminary objection. The 4th Respondent similarly asserted that the matters raised in the Petition fall within the purview of the ELC and that this Court lacks jurisdiction.
8. For the Petitioners, it was submitted that what is sought in the Petition is a determination on violation of fundamental rights and freedoms under the Constitution, interpretation on the constitutionality of Regulation 84 of the Water Regulations, 2021 and the water charges imposed thereunder. The Petitioners argued that these issues fall within the jurisdiction of this Court, pursuant to the provisions of Article 165(3) of the Constitution.
9. This Court derives its jurisdiction principally from Article 165(3) of the Constitution which confers upon the Court unlimited original jurisdiction in criminal and civil matters. Relevant to the Petition herein are Clauses (3)(a), (b) and (d) which provide as follows: Subject to clause (5), the High Court shall have—(a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii)...
10. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the jurisdiction to hear any question respecting the interpretation of the Constitution, the determination of the question whether any law is inconsistent with or in contravention of this Constitution or whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
11. The Petitioners herein challenge the constitutionality of the impugned regulations. Under Article 165(3)(d)(i), this Court is clearly vested with the requisite jurisdiction to address the Petitioners' grievances on the alleged violations of the Constitution.
12. In *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR, Lenaola, Ngugi and Odunga, JJ. addressing the jurisdiction of this Court to determine the constitutionality of statute stated: It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by

Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3)(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.

13. In the cited case, the bench found that the High Court has the requisite jurisdiction to determine the question whether the County Governments (Amendment) Act, 2014 is unconstitutional. Prior to so finding, the bench cited itself in an earlier decision in Petition No. 413 of 2014 involving the same parties where it was stated: We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court.
14. Under Article 165(3)(a), (b) and (d) of the Constitution, this Court is vested with the requisite jurisdiction to address the Petitioners' grievances on the alleged violations of the Constitution. The said provisions clothe this Court with the unlimited jurisdiction to consider and determine the constitutionality of any legislation including subsidiary legislation. The Court thus has the jurisdiction to determine the constitutionality of the impugned Regulations, whether the same violate the rights of the Petitioners and whether the promulgation thereof was done in accordance with the Constitution and the law. The exercise of this jurisdiction is lawful notwithstanding that the impugned Regulations relate to a natural resource. The exercise by this Court of its jurisdiction in this matter does not in any way violate the provisions of Article 165(5)(b) of the Constitution and there is no encroachment on the jurisdiction of the ELC, as alleged by the Respondents. My view therefore is that for this Court to hold that the Petitioners, who consider that the impugned Regulations violate the Constitution ought not to have moved this Court as claimed by the Respondents, would be to abdicate its responsibility under the Constitution.
15. In light of the foregoing, this Court finds that it has the requisite jurisdiction to determine the Petition herein. Accordingly, this objection fails.
16. I now turn my mind to whether the objection raised by the Respondents that the matter is res judicata is merited.
17. The 3rd Respondent contends that the matter herein is res judicata, having been determined by the Court of Appeal in *Krystalline Salt Limited v Water Resources Management Authority* (Civil Appeal 252 of 2018) [2024] KECA 191 (KLR) (23 February 2024) (Judgment) (Krystalline

case). It was further submitted that the Petition is an attempt by the Petitioners to circumvent the finality of the said decision. It was asserted that the substance of the dispute remains the same and Petitioners seek to relitigate the matter which is prohibited under the doctrine of collateral estoppel.

18. On its part, the 4th Respondent submitted that the Petition is res judicata on the basis that in the Krystalline case, issues very similar to those raised in the present Petition, namely levies related to use of sea water, were settled.
19. On the objection that the Petition is res judicata, the Petitioners submitted that the Krystalline case and the present case are very different and that the parties are also different. The Petitioners thus argued that the doctrine of res judicata is not applicable.
20. In the cited Krystalline case, Krystalline Salt Limited filed suit against Water Resources Management Authority (WRMA) challenging the charges levied by WRMA for the its use of sea water for commercial salt production at Gongoni and Marereni areas near Malindi. The trial court held that WRMA was legally mandated to charge Krystalline for the use of sea water that it abstracts for salt extraction with effect from 1. 10. 17 when the water use charges were gazetted. Being aggrieved by the decision, Krystalline appealed to the Court of Appeal. In its decision, the Court of Appeal dismissed the appeal and upheld the decision of the trial court and stated in part: We must therefore uphold the learned judge's finding that the respondent had power and authority to regulate the use of the sea water that the appellant uses for salt extraction since the water is a water resource under the Act.
21. The key issue in question in the Krystalline case was the charges imposed by WRMA which is the 1st Respondent herein, for use of seawater for salt extraction. In the present case, the Petitioners claim that the issue is different as seawater is not used in salt extraction but rather, that upon collecting on the companies' private farms, seawater evaporates leaving behind salt deposits. It is these deposits that are refined into consumable salt.
22. In the Krystalline case a somewhat similar issue was raised and the Court of Appeal stated: The appellant's arguments are totally misplaced. First, we have established that the appellant was using territorial sea water, which is a water resource that was subject to regulations under the Water Act, 2002. Secondly, the trial court's visit to the two private properties revealed that the sea water was not naturally flowing into the two parcels of land, the water was actually being pumped into dams that the appellant had dug on its private lands. This ground of appeal must be rejected.
23. The Petitioners contend that the companies do not use seawater but at the same time state that seawater collects on private farms and leaves salt behind upon evaporation. The Petitioners appear to argue that because seawater collects in the companies' private farms, it is not seawater the use of which is subject to levy by the 1st Respondent. This is a rather hollow argument as Section 2 of the Water Act defines a water resource as: "water resource" means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and

includes sea water and transboundary waters within the territorial jurisdiction of Kenya;

24. From the above definition, it is clear that the seawater from which the companies extract salt is a water resource, notwithstanding that it collects, as the Petitioners claim, on the companies' private land.
25. A similar argument was made in the Krystalline case. This is how the Court of Appeal addressed it:⁴⁰ Moving on to the fourth issue, there is no dispute that the parcels of land on which the appellant produces salt are private property. The appellant's contention was that section 75 of the repealed Constitution protected the appellant's rights thereto, that under section 23(1) of the Registration of Titles Act the issuance of certificates of title to the appellant's parcels of land was conclusive proof that the appellant was the absolute and indefeasible owner thereof; that everything that occurred naturally thereon belonged to the appellant, and therefore section 3 of the repealed Water Act, 2002 excluded the water bodies on the private properties.⁴¹ The appellant's arguments are totally misplaced. First, we have established that the appellant was using territorial sea water, which is a water resource that was subject to regulations under the Water Act, 2002. Secondly, the trial court's visit to the two private properties revealed that the sea water was not naturally flowing into the two parcels of land, the water was actually being pumped into dams that the appellant had dug on its private lands. This ground of appeal must be rejected.
26. It bears repeating that the seawater from which the companies extract salt, is a water resource by definition, notwithstanding that it collects on the companies' private land. As stated by the Court of Appeal in the cited case, the Petitioners' argument is totally misplaced.
27. The doctrine of res judicata is set out in Section 7 of the Civil Procedure Act which provides: 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.
28. The rationale for this doctrine of res judicata was discussed in the case of Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others (Motion 42 & 43 of 2014 (Consolidated)) [2016] KESC 6 (KLR) (19 May 2016) (Ruling) where the Supreme Court of stated as follows:⁵⁴ The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

29. The doctrine seeks to protect parties from the filing of multiplicity of suits hoping for a favourable outcome. It is trite that litigation must come to an end and the doctrine of res judicata safeguards against endless litigation, wastage of judicial and parties' time and resources and brings closure and respite to parties engaged in litigation. Further, a party should not be vexed twice over the same matter.
30. For a party to succeed in an objection on ground of res judicata, such party must demonstrate each of the elements in Section 7 of the Civil Procedure Act. This requirement was set out by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, as follows: 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: i. The suit or issue was directly and substantially in issue in the former suit. ii. That former suit was between the same parties or parties under whom they or any of them claim. iii. Those parties were litigating under the same title. iv. The issue was heard and finally determined in the former suit. v. 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.
31. While the parties in the Krystalline case (supra) are different from those in the instant Petition save for the 1st Respondent, the Court notes that the issues in both cases are similar, namely the challenge to the imposition of water use charges by the 1st Respondent. This issue was heard and conclusively determined by the Court of Appeal.
32. In that case, the 1st Respondent had claimed in the trial court that Krystalline, traps seawater into shallow ponds where the sun evaporates most of the water. The concentrated brine precipitates the salt, which is then gathered by mechanical harvesting machines. In opposition to the claim, Krystalline had argued that the 1st Respondent has no power to develop principles, guidelines or procedures for the use of sea water; or to monitor and/or assess the use of sea water; or to receive or determine any application for use of sea water; or to regulate the use of sea water. Further, that neither the Water Act, 2002 nor the 2007 Rules, or even the Legal Notice No. 171 of 28th September 2007 govern the abstraction and/or use of sea water, and therefore it was not under any legal obligation to either apply for a permit or even make any payment to the respondent for the use of sea water as alleged by the 1st Respondent. In its judgment, the trial court held that the 1st Respondent was legally mandated to charge the appellant for the use of sea water that it abstracts for salt extraction.
33. In the instant Petition, the Petitioners have challenged the imposition of water use charges on the companies for use of sea water for salt extraction. This is the very same matter that was in issue in the Krystalline case (supra). In its decision, the Court of Appeal stated: We entertain no doubt that the water that the appellant uses for its salt production is part of Kenya's territorial waters (sea), and is not res nullius. It is res publicae, and thus its usage is subject to control by the country's laws. The respondent was therefore entitled, under the repealed Water Act, 2002 and the Water Act, 2016, to develop principles, guidelines and procedures to govern, inter alia, usage of the said water.

34. The doctrine of collateral or issue estoppel as pleaded by the Respondents is a legal principle that bars an individual from contesting an issue that has been resolved in an earlier case. This prohibits parties from continually raising the same issue in separate lawsuits, regardless of whether the overarching causes of action are different. Essentially, issue estoppel promotes fairness and efficiency within the legal system by stopping parties from re-examining issues that have already been ruled upon, which could otherwise result in conflicting judgments and squandered resources.
35. In the case of *Fatuma A. Chamkono & 40 Others v District Commissioner, Msambweni District & Another* [2013] eKLR, Tuiyott, J. (as he then was) had this to say on collateral estoppel: Collateral estoppel or Issue Estoppel as it is sometimes known, arises where an issue which has been decided in a particular case and is treated as decided is raised in a subsequent litigation that involves the same issue. The elements of collateral estoppel are:-
a) There has been prior litigation in which issues identical to the subsequent litigation has been brought before the Court.
b) The issue has been actually litigated in the prior proceedings and the party against whom the Estoppel is being asserted has had a full and fair opportunity to litigate the issue in that litigation.
c) The issue must have been decided and rendered as a necessary party of the Court's final determination.
36. After carefully considering the matter herein, it is evident that there has been previous litigation in courts of competent jurisdiction with identical issues, to wit the Krystalline case.
37. In the *Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited* case (supra), Supreme Court went on to state:⁵⁶ The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293): "The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."
38. By dint of the doctrine of collateral or issue estoppel, the issue of levying water use charges by the 1st Respondent for salt extraction from seawater cannot be reopened, having been determined with finality in the Krystalline case by a court of competent jurisdiction. Reopening the matter after a conclusive judgment militates against public policy. Such attempt at relitigating the matter is an abuse of the court process which this Court will not countenance.
39. In the end and in view of the foregoing, the Court finds the objection that the matter is *res judicata* is merited and the same is upheld with the result that the Petition dated 5. 12. 24 is struck out. The Respondents shall have costs.

DATED SIGNED AND DELIVERED IN MALINDI ON 11TH DAY OF JULY 2025.M.
THANDEJUDGE

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