



**Kebabe v Onyiego (Enviromental and Land Originating Summons
E002 of 2023) [2025] KEELC 2947 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

M SILA, J

MARCH 25, 2025

BETWEEN

SAMWEL OBEGI KEBABE PLAINTIFF

AND

JOSEPH OMONDO ONYIEGO DEFENDANT

RULING

(Application to dismiss suit on the claim that it is time barred and is res judicata; suit being one of adverse possession wherein the plaintiff claims to have purchased the land in 1980; suit filed in 2023; contention of the defendant that the suit is therefore time barred as contracts have a limitation period of 6 years; contention of the defendant baseless since the case is not one to enforce the contract of sale but is for adverse possession; mention of contract of sale meant to provide a time when possession started; on question whether the case is res judicata, the defendant providing evidence of a previous suit filed in the Magistrates' Court where jurisdiction was contested; no evidence of what happened to it; cannot on that basis be alleged that there has been a previous suit touching on the same issues which was heard and determined; application dismissed)

1. The application before me is that dated 24 May 2024 filed by the defendant. It seeks the following substantive orders which are prayers (2) and (3) thereof:
 - i. That this honourable court be pleased to strike out the suit for offending the provisions of Section 7 of the *Civil Procedure Act* as the subject matter in this suit is equally the subject matter in Kisii Law Courts, Magistrates' Case No. 994 of 2004 Joseph Omondi Onyiego vs Samuel Obegi Kebabe.
 - ii. That this Honourable Court be pleased to find that it lacks the jurisdiction to entertain this matter by virtue of Section 4 (1) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, since



the plaintiff's suit is premised on an alleged sale of the suit properties in the year 1980, therefore the suit is statute barred by reason of having been instituted outside the period of limitation.

2. To put matters into context, this suit was commenced by the plaintiff/respondent through an Originating Summons filed on 29 September 2023. In the Originating Summons, the plaintiff seeks orders that he has acquired title through adverse possession to the land parcels West Kitutu/Bomatara/2606, 2607 and 2608 registered in the name of the defendant/applicant. He averred that these parcels of land arose from subdivision of the land parcel West Kitutu/Bomatara/1532 which he had bought for value from the defendant's grandmother in 1980, and since the purchase, he has been in peaceful, open possession. He elaborated that the defendant's grandmother owned the land parcel No. 520. She then subdivided it into the parcels No. 1531 and 1532. She however died before transferring the parcel No. 1532 to the plaintiff. It is averred that the defendant filed succession and got himself registered as proprietor of the said land parcel No. 1532. He subsequently subdivided it into the parcels No. 2606, 2607 and 2608. It is these parcels of land that the plaintiff now claims title to, through adverse possession.
3. To oppose the suit, the applicant filed a replying affidavit. In it he deposed inter alia that it is not true that the respondent has been in possession since 1980. He contended that it was in 2004 that the respondent trespassed into the suit properties and he sued him in the suit Kisii CMCC No. 970 of 2006. He claims that interim orders of injunction were issued and the case is still ongoing.
4. In the supporting affidavit to this application, the applicant has more or less reiterated the foregoing and he has annexed some documents related to the case Kisii CMCC No. 970 of 2006.
5. To oppose the motion, the respondent filed a replying affidavit wherein he averred that this suit is not res judicata as there is no previous suit that has been heard and determined. He deposes that the suit Kisii CMCC No. 970 of 2006 was never heard, as during that time it was only the High Court that had jurisdiction to entertain land matters. He believes that this court is properly seized of jurisdiction. He reiterates that he has been in occupation of the suit land for over 43 years.
6. The application was argued through written submissions and I have taken note of the submissions filed by Mr. Obonyo, learned counsel for the applicant, and Mr. Nyariki, learned counsel for the respondent.
7. The applicant has raised two issues. First, there is the contention that the suit offends Section 7 of the *Civil Procedure Act*, and there is the second contention that the court lacks jurisdiction as the plaintiff's claim would be time barred.
8. I will start with the second issue, i.e that the claim is time barred, as it is the easiest to deal with. It is raised that because the respondent claims to have purchased the suit land in 1980 then his claim is time barred by dint of Section 4 (1) of the *Limitation of Actions Act*. The said Section 4 (1) of the *Limitation of Actions Act* provides as follows :
 - 4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
 - a. Actions founded on contract;
 - b. Actions to enforce a recognizance;
 - c. Actions to enforce an award;
 - d. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;



- e. Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
9. Well, clearly the applicant has misconstrued the action of the applicant. The applicant is not trying to enforce any sale agreement entered into in the year 1980. What the applicant is saying is that he purchased the suit properties in 1980, and arising out of that purchase, he took possession which he has continued to maintain. He is only mentioning the alleged purchase to demonstrate when and how he came to be in possession of the land. There is certainly no prayer for specific performance of any contract of land purchase entered into in 1980. The claim remains one for adverse possession not a claim for enforcement of any purchase of land contract. It cannot therefore be argued that Section 4 (1) of the Limitation of Actions Act is applicable; it clearly is not. There is therefore no substance in the second limb of this application.
10. Let me now turn to the first limb, i.e that the case offends Section 7 of the Civil Procedure Act. Section 7 provides as follows :
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.
- Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
- Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
- Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
- Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested
11. Now, if the applicant wishes to rely on Section 7, above, which he surely does, he must demonstrate that there is a previous suit that has been heard and determined wherein the issues raised in this case have been ventilated. I have gone through the annexures to the supporting affidavit. I have seen the plaint in the said case Kisii CMCC No. 994 of 2004. The applicant in this application was the plaintiff and the respondent was the defendant. I see that he sued seeking to have the respondent restrained by



way of a permanent injunction from the land parcels West Kitutu/Bomatara/ 2606, 2607, and 2608, which are the suit properties herein. The respondent filed a preliminary objection that the court did not have jurisdiction to hear the case. He also filed a defence wherein he stated that he is entitled to 2 ¼ acres of the suit land that he has occupied since 1969. There is annexed a consent transferring the suit to the High Court for hearing, filed on 9 September 2004, but I have also seen that there was filed Kisii High Court Miscellaneous Application No. 42 of 2005 seeking orders for the High Court to transfer the case from the Magistrates' Court to the High Court for determination. Nothing was annexed to demonstrate that the said case was ever transferred to the High Court or its status. There is certainly nothing to show that the case was heard and determined so as to offend Section 7 of the [Civil Procedure Act](#).

12. From the foregoing, I am not persuaded as to the merits of this application and it is dismissed with costs. The matter to proceed for hearing on merits.
13. It is so ordered.

DATED AND DELIVERED THIS 25 DAY OF MARCH 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Ms. Hadija h/b for Mr. Obonyo for the defendant/applicant

Mr. Aminga h/b for Mr. Nyariki for the plaintiff/respondent

Court Assistant – Michael Oyuko

