



**Semo v Owidhi & another (Environment and Land Appeal  
E014 of 2022) [2023] KEELC 17042 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17042 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

**E ASATI, J**

**APRIL 27, 2023**

**BETWEEN**

**BAHATI MUSIRA SEMO ..... APPELLANT**

**AND**

**CONSOLATA AKINYI OWIDHI ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE ODUOR WAYOMBA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement dated 4th February  
2022 in Kisumu CMC E&L Case No. 472 of 2018)*

**JUDGMENT**

**Introduction**

1. Being dissatisfied by the judgement delivered on 4<sup>th</sup> February 2022 in Kisumu CMC E&L Case No. 472 of 2018 (the suit) the appellant vide the Memorandum of Appeal dated 15<sup>th</sup> March 2022 preferred the appeal herein seeking for orders that the appeal be allowed, the Respondent's case at the court below be dismissed and that the costs of the appeal and of the court below be awarded to the appellant. The grounds of appeal as contained in the Memorandum of appeal were that:-
  - a. The learned Magistrate erred in law and in fact by not finding that the suit was res judicata and she proceeded, in effect, to sit on appeal in a case heard and determined by the Winam court of concurrent jurisdiction.
  - b. The learned Magistrate erred in law and in fact by usurping the jurisdiction of the High court Probate and Administration Court that had heard Kisumu High Court Succession Cause No.57 of 2005, determined the same and distributed the estate vesting the suit properties in Appellant – a third party.



- c. The learned Magistrate erred in law and in fact by ignoring the fact that the estate of the deceased Livingstone Semo no longer exists the same having been distributed and the suit properties passed to innocent third party who had no notice of the alleged transaction between the deceased and the Respondents.
  - d. The learned Magistrate erred in law and in fact by failing to appreciate the serious discrepancies between the Respondent's evidence in Winam Civil Case No.123 of 2009 (George Oduor Wayomba -Vs- Bahati Musira Semo) and Civil Suit No.425 of 2008 (Consolata Akinyi Owidhi –Vs- Bahati Musira Semo) and in this case and the fact that the 2<sup>nd</sup> Respondent admitted that he never personally met or dealt with the deceased Livingstone Semo.
  - e. The learned Magistrate erred in law and in fact in ignoring glaring evidence of forgery, fraud and alternation of documents on the part of the Respondent and the fact that there was no consent of the Land Control Board to transfer any of the suit properties.
  - f. The learned Magistrate erred in law and fact in ignoring and failing to consider the numerous points of law raised in the defence and submissions on behalf of the Appellant.
  - g. The learned Magistrate erred in law and fact in failing to find that a perfectly similar case, same parties and same issue had been dismissed at Winam and that the Respondent's failure to adhere to the timeline set by Winam case were fatal to this case.
  - h. The Learned Magistrate erred in law and fact by failing to put due weight to the evidence of Counsel Miruka Owuor (now deceased) before the Winam Court.
  - i. The Learned Magistrate erred in law and fact by giving an extremely shallow judgement that ignored pertinent issues and the totality of the case.
  - j. The learned Magistrate erred in law and fact by twisting the facts and evidence to suit her bias against the Appellant in favour of the Respondent.
  - k. The learned Magistrate erred in law and fact in not determining that none of the Respondents had proven his/her case on a balance of probabilities.
2. The appellant was the 1<sup>st</sup> Defendant in the suit wherein he had been sued together with the Land Registrar Kisumu by the Respondents herein for orders that: -
    - a. A declaration that the Plaintiffs are the bona fide owners of land parcel numbers KISUMU/ KOGONY/4024 and 4025 respectively
    - b. An order compelling the Defendants either jointly or severally to transfer and register land parcel numbers KISUMU/ KOGONY/4024 and 4025 into the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's names respectively
    - c. Costs of the suit
    - d. Any other relief this honourable court may deem fit and just to grant
  3. The suit was heard by the trial court which delivered its judgement in favour of the Respondents granting the prayers in the plaint.
  4. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 22<sup>nd</sup> February 2023 while the Respondents filed written submissions on 21<sup>st</sup> February 2023.



### Issues for determination PARA 5.

5. The eleven (11) grounds of Appeal as contained in the Memorandum of appeal can be summed into 4 issues namely: -
  - a. Whether or not the trial court considered and determined points of law raised and particularly concerning whether or not the suit was res judicata (grounds 1, 6 and 7).
  - b. Whether or not the court ignored the succession proceedings that had already taken place and usurped the powers of the High Court in entertaining the suit (grounds 2 and 3)
  - c. Whether or not the trial court properly analysed and appreciated the evidence adduced (grounds 4, 5, 8, 10 and 11)
  - d. Whether or not the judgement delivered was too shallow or ignored pertinent issues raised and the totality of the case. (ground 9).
  - e. Who pays the costs of the appeal?

### Determination

6. This is a first appeal and as such the court has a duty to re-analyze and re-asses the evidence adduced in the lower court and be able to arrive at its own independent conclusion in the matter as held in the case of *Selle and another vs Associated Motor Boat Company Ltd and others* 1968 E.A 123.
7. Guided accordingly, I proceed to re-analyse the evidence as I discuss and determine the issues for determination. The first issue is whether or not the trial court considered and determined points of law raised and particularly whether or not the suit was res judicata (grounds 1, 6 and 7).

It was the case of the appellant that vide two former suits namely; WINAM PMCC NO. 425 OF 2008 CONSOLATA AKINYI OWIDH VS BAHATI MUSILA SEMO and WINAM PMCC NO 125 OF 2009 GEORGE ODUOR WAYOMBA VS BAHATI MUSIRA SEMO, the Respondents sued the appellant over the same subject matter, that the suits were fully heard and dismissed for want of jurisdiction.

The record shows that the issue of res judicata was pleaded in the 1<sup>st</sup> Defendant's (appellant's) Statement of Defence dated 20<sup>th</sup> February 2019 that

“This suit is res judicata and the 1<sup>st</sup> Defendant shall raise a preliminary objection in that regard.”

There was no evidence that any Notice of Preliminary Objection was subsequently filed or any preliminary objection taken in that regard. However, in his testimony the appellant testified as per his witness statement dated 9<sup>th</sup> October that he knew the two Plaintiffs because they had sued him in WINAM PMCC NO. 425 OF 2008 and WINAM PMCC NO 123 OF 2009 respectively. That the two cases concerned the same parties and issues as the issues in the suit. That the cases were fully heard, That the court considered the cases on merit and delivered judgement. That the court found that it had no jurisdiction because the issues therein had already been handled by the High Court in a Succession Cause. That the court then gave the Plaintiffs (Respondents herein) 3 months within which they were to move the appropriate court in default the two cases be marked as dismissed with costs.

8. There is no evidence that Reply to Defence was ever filed by the Respondents in response to the issue of re judicata raised in the defence.



9. In their testimony in court the Respondents adopted their joint witness statement dated 12/11/2018 and filed in court on 30/11/2018. There was no mention of the former suits in the witness statement. However, on cross examination the 1<sup>st</sup> Respondent conceded that he previously had a similar case. That it was case No WINAM PMCC NO. 425 OF 2008. That the prayers in the suit are the same as the Winam Case. That she had sued the appellant and that she was not aware that the case had been dismissed. That her Lawyer told her that the case had been transferred to the High court. The 2<sup>nd</sup> Respondent on his part conceded during cross examination that he filed a similar case in the Winam court vide Winam SRMCC NO 123 OF 2009. That his lawyer told him that the case was transferred to the trial court.
10. The record shows that the Respondents called a witness one Rose Apondi who testified as PW4. She testified that she was the Court Administrator Winam Law Courts. She produced court file in respect of case No. PMCC 123 OF 2009 as exhibit P. 15. She indicated that the parties in the suit were the 2<sup>nd</sup> Respondent and the appellant.
11. Although in the judgement, the court while summarizing the appellant's evidence mentioned that the appellant had testified about the two former cases, it did not make any findings on the same and particularly on whether the suit was res judicata the two former cases. The appellant in this appeal faults the court for not finding that the suit was res judicata.
12. The doctrine of res judicata is anchored in the provisions of Section 7 of the [Civil Procedure Act](#) which provides that: -
 

“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, has been heard and finally decided by such court.”
13. The Court of Appeal while discussing the doctrine of res judicata in the case of [Accredo AG & 3 Others vs Steffano Uccelli & Another](#) [2019] eKLR quoted the Supreme Court and stated that
 

“the test for determining the application of the doctrine of res judicata in any given case is spelt out under section 7 of the [Civil Procedure Act](#). In *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others*[2017]eKLR the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

  - i. The suit or issue was directly and substantially in issue in a 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.
14. It is not in dispute that there were two former suits between the parties herein over the same subject matter. What appears to be in dispute is the manner in which the suits were terminated. According



to the appellant, the suits were fully heard, all the parties and their witnesses testified and judgement delivered. That once the 3 months grace period given by the court to the Respondents to approach the appropriate forum elapsed without the Respondents taking the appropriate steps, the suits were dismissed with costs hence finally determined. The Respondents' position is that the former suits were not determined.

The totality of the Respondent's testimony in the suit was that although the suits were heard, the trial court at Winam did not determine the issues in controversy but dismissed the suit for want of jurisdiction. One of the ingredients of res judicata is that the issues in the former suit must have been heard and finally decided.

15. *The Tee Gee Electrical & Plastic Co .v. Kenya Industrial Estates Ltd* C.A Civil Appeal No 333 of 2001 [2005 2KLR 97] the Court held that res – judicata only applies where a matter has been heard and determined on the merits and not where the matter was disposed of by the Court due to want of jurisdiction. Similarly, in *Caneland Ltd & Others vs Delphis Bank Ltd* C.A. Civil Appeal No 20 Of 2000, the Court held that for res – judicata to apply, the issues must have been heard and decided on merits otherwise that plea cannot be sustained. In *Wensley Barasa vs Immaculate Awino Abongo & another* [2020] eKLR where it was held that a suit that has been dismissed or struck out for non-attendance of a party or for want of jurisdiction or on account of limitation can hardly be said to have been “heard and finally decided” which is a requirement of Section 7 of the *Civil Procedure Act*. In *Enock Kirao Mubhanji Vs Hamid Abdalla Mbarak* [2013] eKLR

“The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts. It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision...”

I find that the issues in the former suits were not determined.

16. The next issues is whether or not the court ignored the succession proceedings that had already taken place and usurped the powers of the High Court in entertaining the suit (grounds 2 and 3)

The appellant testified that upon the demise of one Livingstone Musira Semo, who was his brother, the appellant petitioned the High Court in Kisumu H.C Succession Cause No. 57 of 2005. That he faithfully administered the estate, fully distributed the assets and the same is now in the hands of 3<sup>rd</sup> parties. That in concluding the two former cases, the Winam court had observed that since the matter had been concluded in the High Court the only avenue open to the Plaintiff was to seek review of the High Court determination or move to the court of appeal.

17. The appellant's complaint in this appeal is that the trial court erred in law and in fact by usurping the jurisdiction of the High Court Probate and Administration Court. And secondly that the trial Magistrate erred in law and fact by ignoring the fact that the estate of the deceased Livingstone Semo no longer exists the same having been distributed.

I note that the appellant was sued in his capacity as the Administrator and personal representative of the deceased. From the evidence on record, the deceased was the registered owner of the original parcel. He was the seller of the suit land to the Respondents. I find no evidence that the suit lands have been transmitted to third parties. My finding is that the trial court did not usurp powers of the High Court. It was exercising the jurisdiction conferred upon it by law.



18. The third issue is whether or not the trial court properly analysed and appreciated the evidence adduced (grounds 4, 5, 8, 10 and 11).

The evidence adduced by the Respondents comprised of the testimonies of the two Respondents and 3 more witnesses.

The 1<sup>st</sup> Respondent testified that he had a land transaction with Livingstone Musira Semo deceased namely that on 5<sup>th</sup> December, 2002 he bought a piece of land measuring 0.18 hectares of the land originally known as KISUMU/KOGONY/1608 at a cost of Kshs.160,000/-. That he conducted search and verified that the land was registered in the name of the said Livingstone Musira at the time of purchase. He produced a certificate of official search, land sale agreement, receipt for survey fees, mutation forms, consent of the Land Control Board to sub-divide the land, copy of duly signed transfer form, consent of the Land Control board to transfer, receipts for payment for the consent and certificate of official search for KISUMU/KOGONY/4024. He testified that after purchase of the land, the deceased surrendered vacant possession of the land to the Respondents, that they took possession and begun to construct and occupy. That as at the time of the deceased's death the entire process of sale and transfer was complete save for registration of the title transfer forms and issuance of title.

He testified that he bought the land with the second Respondent. That subsequently, the seller sub-divided the original parcel into 3 pieces thus creating the parcel for the 1<sup>st</sup> Respondent being KISUMU/KOGONY/4024, the parcel for the 2<sup>nd</sup> Respondent being KISUMU/KOGONY/4025 and the parcel to remain for the seller being KISUMU/KOGONY/4023.

19. The 2<sup>nd</sup> Respondent supported the evidence of the 1<sup>st</sup> Respondent and added that after purchasing the land, transfer was done. That it was the 1<sup>st</sup> Respondent who was handling the matter. That the seller put them in occupation of the suit lands.
20. PW3 was the Land Registrar, Kisumu. He confirmed that parcel No.KISUMU/KOGONY/1618 was the parent title for Kogony/4023, 4024 and 4025. He also confirmed the mutation, application for consent to sub-divide the land dated 27/3/2003. That there was a transfer form in respect of Kogony/4024 in favour of the 1<sup>st</sup> Respondent and a transfer form for Kogony 4025 in favour of the 2<sup>nd</sup> Respondent and a Land Control Board consent to transfer dated 29/5/2003.

That on the face of the transfers, it did not show whether the transfers were registered. That transfer confers ownership to the beneficiary.

My finding is that the evidence adduced was in support of the Respondents' case. It showed that the deceased had completed the sale transactions, save for registration of the transfers. The Deceased had signed the transfer forms for transfer of the suit lands in favour of the Respondents. The Appellant was under an obligation as the Administrator to cater for the interests of the Respondents in the administration of the state of the deceased.

21. The appellant's complaint in this appeal on the issue of the evidence adduced before the trial court is that firstly, the trial court failed to appreciate the serious discrepancies in the Respondent' evidence in the former suits and in present suit. There on record to show that the Respondent's testimony in the former suits was placed before court in the current suit. No material discrepancies were pointed out. Secondly, the appellant complains that the trial court ignored glaring evidence of forgery fraud, alterations of documents on the part of the Respondents. A look at the Statement of defence filed by the appellant in the suit shows that there was no pleading on fraud, forgeries or alteration of documents. The same applies to the appellant's testimony in the lower court. The appellant further complained that the trial court twisted the facts and evidence to suit her bias against the appellant in favour of the Respondents. This claim was not substantiated either in the grounds of appeal or in the



submissions. It was not proved. |She also complains that the trial court failed to determine that none of the Respondents had proved their case. On the basis of the evidence adduced in court as summarized herein above I find that the evidence adduced supported the findings and decision of the trial court.

22. The next issue for determination is whether or not the judgement delivered was too shallow or ignored pertinent issues raised and the totality of the case. (ground 9). The judgement contains a summary of the evidence, the points for determination, the decision thereon and the reasons thereof. I find that the judgement complies with the provisions of order 21 *Civil Procedure Rules*.

In summary this court has determined that the suit was not res judicata as the former suits were not finally decided on merit and the trial court of the former suits had no jurisdiction, secondly that the trial court did not usurp the powers of the High court and that the evidence produced supported the findings and decision of the trial court, I find that the grounds of appeal have not been proved. I find no reason to interfere with the judgment.

23. As to who pays the costs of the appeal, under section 27 of the *Civil Procedure Act*, costs follow the event

24. I find that the appeal is unmerited. The appeal is dismissed. Costs to the Respondents.

Orders accordingly.

**RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI**

**JUDGE.**

**In the presence of:**

**Maureen - Court Assistant.**

Amendi for the Appellant.

No appearance for the Respondents.

