



**Ogola & another v Legio Maria of Africa Church Mission (Enviromental and Land Originating Summons E017 of 2022) [2023] KEELC 17521 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17521 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2022**

**AY KOROSS, J**

**MAY 18, 2023**

**BETWEEN**

**GEORGE ODHIAMBO OGOLA ..... 1<sup>ST</sup> PLAINTIFF**

**FREDRICK OOKO OTIENO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEGIO MARIA OF AFRICA CHURCH MISSION ..... DEFENDANT**

**RULING**

**Defendant's case**

1. In the defendant's notice of motion dated January 18, 2023 that was moved pursuant to the provisions of Sections 1A, 1B and 7 of the *Civil Procedure Act*, the defendant sought the following reliefs from this court: -
  - a. Spent.
  - b. The suit be struck out with costs for being res judicata and an abuse of court process.
  - c. Costs of the motion be borne by the plaintiffs.
2. The motion was premised on grounds enumerated on its face and on the affidavit in support which was sworn on January 18, 2023 by Cardinal Nahashon Ondieki Nyakondo who was the secretary general and archbishop of the defendant.
3. In summary, the suit had been determined on merit in Siaya ELC Case Number 1 of 2016 between Melkio Oduor Ogola and Angeline Apondi and Kisumu ELC Appeal Number 30 of 2018. In this appeal, the plaintiffs' suit in Siaya ELC Case Number 1 of 2016 was dismissed. Further, it was not tenable for the estate of Gilbert Ogola Odhiambo ('Gilbert') to have two concurrent succession causes with each having separate administrators.



### Plaintiffs' case

4. The motion was opposed by the plaintiffs' joint replying affidavit deponed on February 14, 2023. In brief, the suit property was occupied by Gilbert's descendants. The suit was not res judicata since the parties in both suits were not the same. Melkio Oduor Ogola and Angeline Apondi were the administrators of the estate of Gilbert but they (plaintiffs in instant suit) had approached this court as adverse possessors.

### Defendant's submissions

5. The defendant's counsel, Mr Onsongo, filed written submissions dated March 1, 2023. Counsel submitted the legal framework of res judicata was laid out in Section 7 of the *Civil Procedure Act*. The significance of the doctrine was to bring litigation to finality and prevent litigants from being harassed twice over the same account. To buttress his position, counsel relied on *Nicholas Njeru vs the Attorney General & 8 others Civil Appeal Number 110 of 2011 [2013] eKLR*.
6. Having laid the legal framework, counsel identified 4 issues for determination (a) what was the subject matter of the suit? (b) who were the plaintiffs and in what capacity were they litigating? (c) was land parcel no. Siaya/Ojuando 'A'/3409 ('suit property') the subject matter in previous proceedings and settled with finality? (d) were previous decisions made by a competent court?
7. On the 1<sup>st</sup> and 3<sup>rd</sup> issues, counsel submitted the suit property was the subject of previous proceedings to wit Siaya PM ELC No 1 of 2016 and Kisumu ELC Appeal No 30 of 2018.
8. On the 2<sup>nd</sup> issue, counsel submitted in the instant case, the plaintiffs were Gilbert's grandchildren and nephews of Melkio Oduor Ogola and Angeline Apondi (plaintiffs in the previous suits). In the previous suits and this suit, the parties' claims were derived from their relationship with Gilbert.
9. On the 4<sup>th</sup> issue, counsel submitted the previous suits were handled by a court of competent jurisdiction which had authority to hear and determine the suits that were before them.

### Plaintiffs' submissions

10. The plaintiffs' counsel, Miss Kokeyo, filed her written submissions dated March 20, 2023. Counsel identified two issues for determination (a) whether the suit was res judicata and (b) whether the plaintiffs had an arguable case.
11. On the 1<sup>st</sup> issue, counsel submitted the suit was not res judicata for several reasons. Firstly, the parties in the previous suits and this suit were different. Secondly, the previous suits were on cancellation of title to the suit property and for the suit property to revert to Gilbert's name while the instant suit was pegged on adverse possession. Counsel relied on *Gurbachan Singh Kalsi vs Yowani Ekori Civil Appeal Number 62 of 1958* which outlined the principles of adverse possession thus: -

'The court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.'
12. On the 2<sup>nd</sup> issue, counsel laid out the principles of adverse possession and argued the merits of the plaintiffs' case.



## Analysis and determination

13. Having read and considered the pleadings and written submissions, I shall be guided by the well cited provisions of law and precedents. The single issue for determination is whether the instant suit was res judicata. However, before I proceed, I observed parties waded into addressing the merits of the main suit.
14. Sections 1A and 1B of the [Civil Procedure Act](#) and Section 3(1) of the [Environment and Land Court Act](#) bid this court to facilitate the overriding objective of the [Civil Procedure Act](#) and the Environment Land Court Act by enabling just, expeditious, proportionate and affordable resolution of civil disputes.
15. The doctrine of res judicata is provided for under Section 7 of the [Civil Procedure Act](#) in the following terms: -

‘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.’
16. The essence of the doctrine is to bring litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits that have already been determined by a competent court.
17. It stops wastage of time and resources caused by an endless round of litigation at the behest of litigants hoping, by a multiplicity of suits, to obtain at last, outcomes favourable to themselves. The intent of the doctrine was aptly summarized by the Supreme Court of Kenya decision of [John Florence Maritime Services Limited & another vs Cabinet Secretary, Transport and Infrastructure & 3 others \[2021\] eKLR](#) as follows: -

‘It is primarily founded on the following three maxims:

  - (1) Nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
  - (2) Interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
  - (3) Res judicata pro veritate occipitur: a judicial decision must be accepted as correct.’
18. For res judicata to suffice, this court is called upon to juxtapose the facts of the previous suits and instant suit on the four corners set out in Section 7 of the [Civil Procedure Act](#) and establish if the latter suit was res judicata.
19. Firstly, the matter directly and substantially in issue in the former and subsequent suits must be the same and under the same title.
20. In the previous case, the plaintiffs had contended the suit property was fraudulently and illegally transferred to the defendant’s name. The defendant was in illegal occupation. The claim was on ownership of land. They sought for a transfer of the suit property to their patriarch; Gilbert.



21. In the instant suit, the plaintiffs have claimed to be adverse possessors. They alleged the defendant illegally and fraudulently subdivided the mother parcel no. Ojuando 'A' 69 to create the suit property. They sought for a transfer of the suit property to their names.
22. Section 7 of the *Civil Procedure Act* was expounded by giving 6 elucidations that govern the doctrine of res judicata and one such description is explanation no 4 which states as follows:

‘Any matter which might and ought to have been made a ground of defence and attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.’
23. Although the plaintiffs in the instant suit were claiming to be adverse possessors, the issues in the two suits were centered on the suit property; its illegal acquisition by the defendant and ownership. In both, the title was the same; the occupiers and owners of the suit property.
24. In the previous suit, the plaintiffs averred the defendant was in illegal occupation and they (plaintiffs) were the legitimate owners. In the instant claim, the plaintiffs have claimed ownership by occupation.
25. Although the respective claims were different, an application of explanation no. 4 shows that parties were required to bring forward their entire case in previous proceedings. An entertainment of filing of pleadings by instalments is an abuse of the court process. I agree with the defence counsel and find the issues in this case and previous case were similar. See Gurbachan Singh Kalsi vs Yowani Ekori (Supra).
26. Secondly and thirdly, the former suit must have been between the same parties or parties under whom they claim and are claiming under the same title. In both cases the defendant is the same. Albeit the plaintiffs are different, they are all claiming through their patriarch Gilbert. Melkio Oduor Ogola who was a plaintiff in the previous case was issued with limited grant on Gilbert’s estate on January 14, 2016. His co-plaintiff was his sister.
27. In the instant case, the plaintiffs were issued limited grant on Gilbert’s estate on August 30, 2022. I have restrained myself from making a finding on the legality of the two grants since it has to be addressed by a court of competent jurisdiction.
28. It is not lost to this court the plaintiffs in this case have by craft conjured new parties for purposes of circumventing res judicata. By explanation 6 of Section 7 of the Civil Procedure Rules, this cannot pass the test. The plaintiffs in both suits derived their respective claims through Gilbert.
29. It is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since parties cannot escape the said doctrine by simply undertaking a superficial enhancement of their pleadings.
30. Lastly, the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit. The previous suit was the subject of an appeal in Kisumu ELC Appeal Number 30 of 2018. In it, this court found the suit property was not illegally and fraudulently acquired by the defendant and held the plaintiffs’ claim was time barred. The jurisdiction of the court was never challenged and it finally determined the issues in dispute with finality.
31. Ultimately, I agree with the defendants counsel. I find the instant suit was res judicata and an abuse of court process. It is trite law costs follow the event. I hereby issue the following disposal orders: -
  - a. The plaintiffs’ suit is hereby struck out with costs to the defendant.
32. Orders accordingly.



**DELIVERED AND DATED AT SIAYA THIS 18<sup>TH</sup> DAY OF MAY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**18/05/2023**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Miss Kokeyo for the plaintiff

Mr. Onsongo for defendant

Court assistant: Ishmael Orwa

