



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omenya v Owaga & 3 others (Environment and Land Appeal  
29 of 2019) [2023] KEELC 17355 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17355 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 29 OF 2019**

**SO OKONG'O, J**

**MAY 11, 2023**

**BETWEEN**

**CARILUS JUMA OMENYA ..... APPELLANT**

**AND**

**FREDRICK OWAGA OWAGA ..... 1<sup>ST</sup> RESPONDENT**

**JAVAN OTIENO RAKWAR ..... 2<sup>ND</sup> RESPONDENT**

**SHEM ADODA OMOLLO ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR NYANDO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order made by Hon. P. Olengo  
SPM on 1st August 2019 in NYANDO SPMC ELC No. 109 OF 2018)*

**JUDGMENT**

1. This appeal is against the ruling and order of Hon. P. Olengo SPM made on 1<sup>st</sup> August 2019 in Nyando SPMCC ELC No. 109 of 2018 (hereinafter referred to as “the lower court suit”). The Appellant had sued the Respondents in the lower court suit seeking judgment for:
  - a. A permanent injunction against the Respondents, their agents, employees, servants or assigns and/or any person whatsoever acting on their behalf restraining them from trespassing onto, fencing off, offering for sale, advertising for sale, selling, taking possession of, leasing, transferring, registering or otherwise in any manner whatsoever interfering with the land parcel numbers KISUMU/ BORDER /4498, KISUMU/BORDER/4499 and KISUMU/ BORDER/4500.
  - b. An order for the cancellation of the titles for land parcel numbers KISUMU/ BORDER/4498, KISUMU/BORDER/4499, KISUMU/BORDER/4500 and the illegal



title being KISUMU/BORDER/40 and for the reversion of the same to the original parcel number KISUMU/BORDER/1498.

- c. An order directing the 4<sup>th</sup> Respondent to issue the Appellant with a single title including the illegally curved out portion.
  - d. Cost of the suit be borne by the Defendants.
2. The Appellant averred in the lower court that he was at all material times the registered proprietor of all that parcel of land known as No. KISUMU/BORDER/1498 measuring 4.0 Ha. (hereinafter referred to as Plot No. 1498). The Appellant averred that the size of Plot No. 1498 was reduced to 2.1 Ha. after Lukas Akoth Owaga, deceased represented herein by the 1<sup>st</sup> Respondent, Fredrick Owaga in collusion with the 4<sup>th</sup> Respondent caused a portion of Plot No. 1498 to be illegally curved out to create a new parcel of land known as KISUMU/BORDER/40 (hereinafter referred to as “Plot No. 40”) which was registered in the name of the deceased.
  3. The Appellant averred in the lower court that he never sold any portion of Plot No. 1498 to the deceased or anyone else and did not authorise the 1<sup>st</sup> and 4<sup>th</sup> Defendants to deal with the said parcel of land. The Appellant averred that upon being illegally registered as the owner of Plot No. 40 which was curved out of Plot No. 1498, the deceased illegally sub-divided Plot No. 40 into three portions namely; KISUMU/BORDER/4498, 4499 and 4500 (hereinafter referred to as “Plot Nos. 4498, 4499 and 4500”). The Appellant averred that the said actions of the deceased and the 1<sup>st</sup> Respondent bordered on fraud.
  4. Together with his plaint in the lower court, the Appellant filed an application by way of Notice of Motion dated 17<sup>th</sup> October 2018 seeking a temporary injunction restraining the Respondents from having any dealing whatsoever with Plot Nos. 4498, 4499 and 4500 pending the hearing and determination of the lower court suit. The Appellant’s application was brought on the same grounds that were set out in the Appellant’s plaint. The Appellant averred that after the deceased had illegally acquired Plot No. 40, he subdivided the same into three portions namely, Plot Nos. 4498, 4499 and 4500 of which he retained Plot No. 4498 in his name and transferred Plot Nos. 4499 and 4500 to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in a bid to defeat the Appellant’s rights in the said Plot No. 40. The Appellant averred that it was in the interest of justice that the injunction sought be granted by the lower court so as to safeguard the substratum of the lower court suit.
  5. The deceased who was the 1<sup>st</sup> Defendant in the lower court and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein opposed the Appellant’s application through a replying affidavit sworn by the deceased on 4<sup>th</sup> February 2019. The deceased averred that he was the registered proprietor of Plot No. 4498 while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the registered proprietors of Plot Nos. 4499 and 4500 respectively which he sold to them in 2013 at Kshs. 400,000/- each. The deceased averred that Plot Nos. 4498, 4499 and 4500 came about following the subdivision of Plot No. 40 that was registered in his name. The deceased averred that he purchased Plot No. 40 from the Appellant in 1975 at a consideration of Kshs. 1,400/-. The deceased averred that when he purchased the parcel of land that was subsequently registered as Plot No. 40 in 1975, the land in the area was still under adjudication. The deceased averred that his name was duly entered in the adjudication register and the land was registered in his name as a first registration.
  6. The deceased averred that in 2006, the Appellant entered into a portion of Plot No. 40 illegally and put up a temporary structure thereon. The deceased averred that after his pleas to the Appellant to vacate the said portion of Plot No. 40 that he had encroached on was not headed, he filed a suit against the Appellant in the High Court at Kisumu namely, Kisumu HCCC No. 92 of 2007, Lukas Akoth Owaga v. Karilus Juma Omenya. The deceased averred that in a ruling delivered on 23<sup>rd</sup> April 2009, the High



Court (Mwera J.) struck out the Appellant's defence and entered judgment for the deceased against the Appellant for an injunction restraining the Appellant from trespassing on Plot No. 40 and an order for the eviction of the Appellant from the said property. The deceased averred that the Appellant refused to vacate the said property voluntarily and was forcefully evicted by auctioneers on 5<sup>th</sup> October 2009. The deceased averred that the Appellant did not appeal against the said decision by Mwera J. The deceased averred that the Appellant's suit in the lower court was res judicata. The Appellant averred that he would raise the issue of res judicata as a preliminary objection against the Appellant's suit.

7. The Appellant's application in the lower court was heard by way of written submissions. In a ruling delivered by the lower court on 1<sup>st</sup> August 2019, the court agreed with the deceased that the dispute between the deceased and the Appellant over the ownership of Plot No. 40 was fully and finally determined in Kisumu HCCC No. 92 of 2007, *Lukas Akoth Owaga v. Karilus Juma Omenya* (hereinafter referred to as "the High Court suit"). The lower court found that the Appellant's suit in the lower court offended the provisions of section 7 of the *Civil Procedure Act*. The court held that the suit was res judicata and that it lacked jurisdiction to hear and determine it. The lower court struck out the suit with costs.
8. It is the said decision that is the subject of this appeal. In his Memorandum of Appeal dated 23<sup>rd</sup> August 2019, the Appellant has challenged the said ruling by the lower court on the following grounds;
  1. That the learned magistrate erred in fact and in law in concluding that the suit before him was res judicata.
  2. That the learned magistrate erred in fact and in law in striking out the suit for being res judicata.
  3. That the learned magistrate erred in fact and in law in finding that he lacked jurisdiction to entertain the suit.
  4. That the learned magistrate erred in law and in fact in finding that the matters that were in issue in KISUMU HCCC NO. 92 OF 2007 and NYANDO ELC NO. 109 OF 2018 were the same.
  5. That the learned magistrate erred in fact and in law in failing to consider the pleadings filed and the evidence presented to him in its entirety.
9. The Appellant urged this court to set aside the said ruling and order by the lower court and in its place make an order dismissing the Preliminary Objection that was raised by the deceased in the lower court with costs. The Appellant also sought the costs of the appeal.
10. The deceased, LUCAS AKOTH OWAGA passed way while the appeal was pending and was substituted in the appeal by his legal representative, FREDRICK OWAGA OWAGA on 26<sup>th</sup> September 2022. The appeal was argued by way of written submissions. The Appellant filed his submissions on 23<sup>rd</sup> November 2022 while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their submissions on 2<sup>nd</sup> February 2023.

#### **The Appellant's submissions:**

11. In his submissions dated 22<sup>nd</sup> November 2022, the Appellant submitted that the issues that the Appellant had raised for determination in the lower court case were different from the issues that had been raised and determined in the High Court suit. The Appellant argued that the High Court suit dealt with the issue of trespass while the lower court case concerned illegal and unlawful creation of Plot No. 40 from the Appellant's land, Plot No. 1498. The Appellant submitted further that the High Court suit was determined summarily through the striking out of his defence and as such the suit was not heard on merit. The Appellant submitted further that the issue of ownership of Plot No. 40 was



not determined in the High Court suit. The Appellant submitted that due to the foregoing, the lower court erred in its finding that the lower court suit was res judicata and in striking out the same for want of jurisdiction. The Appellant cited *Kenya Anti-Corruption Commission v. Willesden Investment Limited & 7 Others* [2019] eKLR in support of his submissions.

#### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions:**

12. In their submissions dated 31<sup>st</sup> January 2023, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (hereinafter referred to only as “the Respondents”) submitted that the lower court suit was bad for being res judicata and was properly struck out by the lower court. The Respondents submitted that a reading of the plaint that was filed by the Appellant in the lower court leaves no doubt that the ownership of Plot No. 40 was at the center of the dispute between the parties in that case. The Respondents submitted that it was Plot No. 40 that gave rise to Plot Nos. 4498, 4499 and 4500. The Respondents submitted that in the High Court suit, the court determined on 23<sup>rd</sup> April 2009 that Plot No. 40 belonged to the deceased. The Respondents submitted that the issue of the ownership of Plot No. 40 could not be litigated again by the Appellant in the lower court the same having been determined in the High Court suit as aforesaid. The Respondents submitted that having come to the conclusion that the lower court suit was res judicata, the lower court needed not go any further than that. The suit was for striking out. The Respondents urged this court to find that the lower court reached the correct decision on the matter that was before it. In support of their submissions, the Respondents cited *Charo Thali Ngala v. Republic & 4 Others* [2018] eKLR and *Kenya Commercial Bank Limited v. Muiri Coffee Estate Ltd. & Another* [2016] eKLR.

#### **Analysis and Determination:**

13. I have considered the ruling of the lower court the subject of this appeal and the grounds of appeal put forward against the same by the Appellant. I have also considered the submissions by the advocates for the parties and the various authorities relied on in support thereof. The only issue arising for determination in this appeal is whether the lower court erred in its finding that the lower court suit was res judicata. From my analysis of the proceedings of the lower court, I am of the view that the lower court suit was an abuse of the process of the court. The Appellant who filed that suit was well aware that he had been sued by the deceased in the High Court suit in 2004 over the ownership of Plot No. 40. In that suit, the deceased had accused the Appellant of trespass on Plot No. 40. The High Court agreed with the deceased that the Appellant was a trespasser on Plot No. 40 and not only restrained the Appellant from continuing to trespass on the property but also ordered that he be evicted therefrom. I do not quite understand the Appellant’s advocate’s argument that what was in issue in the High Court suit was trespass and not the ownership of Plot No. 40. The High Court could not hold that the Appellant was a trespasser on Plot No. 40 without determining the issue of ownership of Plot No. 40. The High Court found that the deceased was the owner of Plot No. 40 and that the defence that had been put forward by the Appellant against the deceased’s claim over the property was a sham. The issue of ownership of Plot No. 40 was therefore fully and finally determined in the High Court suit and as such, it was against the doctrine of res judicata for the Appellant to try to re-litigate the issue in the lower court. I wonder how the Appellant would have expected the lower court to find that Plot No. 40 was acquired by the deceased illegally and unlawfully after the High Court had found that the deceased was the lawful owner of the property and that the Appellant was a trespasser thereon.
14. I also find no merit in the argument put forward by the Appellant that the High Court suit was not heard on merit. From the decree of the High Court that was produced before the lower court, the High Court suit was determined through an application by the deceased to strike out the Appellant’s defence before that court and for judgment to be entered for the deceased as he had prayed in his



amended plaint. The High Court allowed the application as prayed. That determination brought the High Court suit to an end. It resulted in a decree and not an order. There was nothing left to be heard in the High Court. It was a merit determination of the dispute. A conclusive finding was made that Plot No. 40 belonged to the deceased and that the Appellant had no lawful cause for entering the same. The issue of ownership of the suit property was therefore heard and finally decided by the High Court although summarily. A summary judgment has the same effect as a judgment entered after a plenary hearing for the purposes of the doctrine of res judicata. A summary judgment is final and conclusive and the same is only subject to an appeal. In *E.T v. Attorney General & Another* [2012] eKLR the court stated that:

The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....’”

#### **Conclusion:**

15. For the foregoing reasons, I am not persuaded that the lower court fell into any error in its findings and conclusions reached in the ruling made on 1<sup>st</sup> August 2019. The Appellant’s appeal fails on all the grounds set out in his memorandum of appeal. Consequently, the appeal filed herein on 23<sup>rd</sup> August 2019 is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**DELIVERED AND DATED AT KISUMU ON THIS 11<sup>TH</sup> DAY OF MAY 2023**

**S. OKONG’O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform **in the presence of:**

Mr. Abande for the Appellant

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

N/A for the 4<sup>th</sup> Respondent

Ms. J.Omondi-Court Assistant

