



REPUBLIC OF KENYA



KENYA LAW
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**Osamba v Osamba (Environment and Land Appeal E3 of 2020)
[2023] KEELC 17345 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E3 OF 2020
SO OKONG'O, J
MAY 11, 2023**

BETWEEN

FLORENCE ANYANGO OSAMBA APPELLANT

AND

SAMUEL OKELO OSAMBA RESPONDENT

*(Being an Appeal from the Ruling of Hon. S. TEMU, PM delivered
on 1st October 2020 in Nyando PMC ELC No. 36 OF 2020)*

JUDGMENT

Background:

1. This appeal is challenging the ruling of Hon. S. Temu PM delivered on 1st October 2020 in Nyando PMELC No. 36 OF 2020 (hereinafter referred to as “the lower court”). In the lower court, the Appellant had sued the Respondent on 13th August 2020 seeking the following reliefs;
 - a. A declaration that Title No. S/Nyakach/Diang'a/1373(hereinafter referred to as “the suit property”) belonged to Joshua Okelo Osamba.
 - b. A declaration that the transfer of the suit property into the name of the Respondent was fraudulent and therefore illegal.
 - c. An order directing the Land Registrar Nyando to cancel the registration of the Respondent as the proprietor of the suit property and revert the property to the name of Joshua Okelo Osamba.
 - d. An order restraining the Respondent his agents, servants and/or nominees from in any manner whatsoever interfere with the suit property.
 - e. Costs of the suit.



- f. Any other or further relief the court may deem fit to grant.
2. In the lower court, the Appellant averred that she was the widow of Joshua Okelo Osamba (hereinafter referred to as “the deceased”) and the Respondent was her step son. The Appellant averred that the suit property was at all material times registered in the name of the deceased. The Appellant averred that in 1990, the Respondent asked the deceased to give him the title deed for the suit property so that he could facilitate the transfer of the same to the name of the deceased. The Appellant averred that at the time of that request, the suit property was registered in the name of the deceased’s elder brother, Joanes Ajwang who held the property which was ancestral land in trust for the rest of the family. The Appellant averred that the deceased released the said title deed for the suit property to the Respondent so that the Respondent could transfer the suit property into the deceased’s name.
 3. The Appellant averred that on 3rd June 1991, the Respondent had the suit property transferred to the name of the deceased and a title deed was issued in the name of the deceased. The Appellant averred that the Respondent did not hand over the new title deed in the name of the deceased to the deceased despite frequent demands by the deceased. The Appellant averred that without the deceased’s consent, the Respondent transferred the suit property to his name on 25th July 2012. The Appellant averred that the transfer of the suit property into the name of the Respondent was illegal, unjust and cruel in that; the same was undertaken without the deceased’s consent, the transfer was in respect of the entire family land and the deceased never executed the instrument of transfer in respect thereof in favour of the Respondent.
 4. The Appellant averred further that the said transfer was fraudulent and that the same violated the rights of the Appellant and other beneficiaries of the estate of the deceased. The Appellant pleaded several particulars of fraud against the Respondent including uttering false documents, collusion, misrepresentation and bad faith. The Appellant averred that it was only fair if the fraudulent transfer was cancelled and the suit property reverted to the name of the deceased.
 5. Together with the plaint, the Appellant filed an application by way of a Notice of Motion dated 13th August 2020 seeking a temporary injunction restraining the Respondent by himself, his servants and/or nominees from in any manner whatsoever interfering, trespassing, selling, dissipating, charging, transferring the suit property pending the hearing and determination of the lower court suit. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the Appellant in which the appellant to a large extent reiterated the contents of the plaint.
 6. Prior to the filing of the lower court suit, the Appellant had filed another suit at the Chief Magistrate’s Court at Kisumu against the Respondent on 11th May 2020 namely; Kisumu CMCC No. 172 of 2020, Florence Anyango Osamba v. Sam Okello Osamba (hereinafter referred to as “the Kisumu suit”). In the Kisumu suit, the Appellant averred that she was the widow of the deceased, Joshua Okelo Osamba who died on 27th March 2019 after a long illness. The Appellant averred that the Respondent was his stepson. The Appellant averred that even before the death of the deceased, the Respondent had often treated the Appellant and the deceased with cruelty. The Appellant averred that on 21st April 2019, a day after the burial of the deceased, the Respondent summoned the family to the grave site at Wahanda village in Nyakach Constituency and announced that he wanted the Appellant to leave her matrimonial house since his father had died and the house belonged to his late mother.
 7. The Appellant averred that the Respondent’s other siblings and villagers prevailed upon him to stop aggression as this amounted to disrespecting his deceased father. The Appellant averred that despite several pleas from the neighbours, the Respondent and his other siblings had on several occasions threatened to throw the Appellant out of her matrimonial home.



8. The Appellant averred that on 29th April 2020, the Respondent in the company of his two uncles stormed the Appellant's homestead and demanded that she vacates her matrimonial house since it belonged to the Respondent's late mother, Patricia Osamba who died in 1999 before the Appellant was married by the deceased. The Appellant averred that when she resisted and informed them that she will not vacate her matrimonial home where the deceased left her, the Respondent and his uncles shouted at her and threatened to beat her up. The Appellant averred that on 30th April 2020, the Respondent once again came to her homestead and asked the Appellant to vacate the same. The Appellant averred that the Respondent continued to go to her homestead from time to time to threaten her with eviction from her matrimonial home and this forced her to be locking herself inside the house. The Appellant averred that the said actions of the Respondent were uncouth and illegal. The Appellant averred that the said actions required the intervention of the court.
9. The Appellant sought the following reliefs against the Respondent in the Kisumu suit;
 - a. A permanent injunction to restrain the Respondent, his servants, agents, nominees and/or any such persons from in any manner whatsoever trespassing and/or evicting the Plaintiff from her matrimonial house in her home at Wahanda Village in Nyakach Constituency Kisumu County.
 - b. An order directing the Officer Commanding Pap Onditi Police Station to ensure compliance with the orders in (a) above and peace and tranquility in the Appellant's home.
 - c. Costs of the suit.
 - d. Any other or further orders as the court may deem fit to grant.
10. Together with the plaint filed in the Kisumu suit, the Appellant had also filed an application by way of Notice of Motion dated 11th May 2020 seeking the following orders;
 1. A temporary injunction restraining the Respondent by himself or through his servants, agents, nominees and/or any such persons from trespassing, evicting, harassing and/or in any manner whatsoever interfering with the Appellant's peaceful stay in her home and house at Wahanda Village in Nyakach Constituency, Kisumu County pending the hearing and determination of the suit.
 2. The Officer Commanding Pap Onditi Police Station be ordered to provide security to ensure peace and tranquility at the Appellant's homestead.
 3. The costs of the application.
11. The application in the Kisumu suit was brought on several grounds set out on the face thereof and on the affidavit of the Appellant sworn on 11th May 2020. On 11th June 2020 the court after hearing the application in the Kisumu suit made the following orders;
 1. That the Appellant herein do continue staying in her house and home in Wahanda Village in Nyakach Constituency, Kisumu County without any harassment or threat of eviction from the Respondent or any other person until a succession cause filed by the family was finalised.
 2. That the Respondent to have access to his father's home in Wahanda Village in Nyakach Constituency, Kisumu County until the succession cause filed by the family was finalised.
 3. That the Respondent to restrain himself from causing any harassment to the Appellant,
 4. That both parties to embrace Court Annexed Mediation Process.



5. The Officer Commanding Pap Onditi Police Station to ensure that peace prevailed in the home.
6. Costs be in the cause.
12. In response to the Appellant's application in the lower court, the Respondent filed a Notice of Preliminary Objection dated 24th August 2020 that was worded as follows:

“Take Notice that the Respondent herein Samuel Okelo Osamba shall raise a preliminary point of law that the application dated 13th August 2020 is Res judicata as the same had already been determined in Kisumu CMCC NO. 172 OF 2020.”
13. The Respondent also filed a statement of defence in the lower court on 1st September 2020. The Respondent averred that he was the absolute owner of the suit property and that the suit property was consciously and deliberately transferred to him by his late father Joshua Osamba Okelo (the deceased). The Respondent averred that the Appellant was only interested in inheriting the Respondent's deceased mother's house for purposes of disposing of the same to third parties. The Respondent averred that the suit property was procedurally transferred to him by the deceased during his lifetime and as such the same could not form part of the deceased's estate. The Respondent averred that the Appellant had filed a similar suit in Kisumu namely, Kisumu CMCC NO.172 OF 2020 (the Kisumu suit) against the Respondent in which the Chief Magistrate had directed the parties to pursue the succession cause. The Respondent averred that the Appellant had refused to be a party to the said succession cause. The Respondent averred that the lower court suit did not disclose any cause of action and that the same was frivolous, vexatious and an abuse of the court process.
14. When the Appellant's application in the lower court came up for hearing, the parties agreed to argue the Respondent's preliminary objection first. The said preliminary objection was argued by way of written submissions. The Respondent submitted that the Appellant's application was the same as the application that the Appellant had filed in the Kisumu suit and in which the Kisumu court had given final orders on 11th June 2020. The Respondent submitted that the orders sought in the lower court were the same as those that the Appellant had sought in the Kisumu suit and that there was a danger of the lower court giving orders that would conflict with the orders that had been issued in the Kisumu suit. The Respondent argued that the subject matter of the two suits was the same and urged the court to dismiss the application with costs.
15. On her part, the Appellant submitted that the lower court suit and the Kisumu suit concerned different causes of action. The Appellant submitted that in the Kisumu suit, the Appellant sought to restrain the Respondent from evicting her from her matrimonial home while in the lower court, the Appellant had sought the cancellation of the fraudulent transfer of the suit property to the Respondent and the return of the property to the name of the deceased. The Appellant submitted that the suit before the court was not res judicata. In a ruling dated 1st October 2020, the lower court held that the lower court suit and the Kisumu suit were similar and as such the lower court suit which was the last to be filed was res judicata. The lower court having held that the lower court suit was res judicata struck out the same with costs to the Respondent. It was that decision that triggered the present appeal.

The appeal:

16. In her Memorandum of Appeal dated 2nd October 2020, the Appellant challenged the lower court's ruling on the following grounds;



1. The Learned Magistrate erred in law and fact in reaching a finding that the issues in Kisumu Civil Case No. 172 of 2020, Florence Anyango Osamba v. Samuel Okelo Osamba and Nyando ELC No. 36 of 2020 Florence Anyango Osamba v. Samuel Okelo Osamba were substantially the same and had been substantially and fully heard and decided upon.
 2. The Learned Magistrate erred in law and fact in failing to analyse the pleadings in both cases before reaching his conclusion.
 3. The Learned Magistrate erred in law and fact in failing to analyse the submissions and case law referred to in the submissions of the Appellant herein before reaching his conclusion.
 4. The Learned Magistrate erred in Law and fact in failing to find that Kisumu Civil Case No. 172 of 2020 was a civil case touching on injunction relief while Nyando ELC No. 36 of 2020 was a case on fraudulent obtaining of land and the substances of the two cases were essentially different and could not be canvassed in the same case.
 5. The Learned Magistrate erred in law and fact in concluding that the issues raised in ELC No. 36 of 2020 could be raised and canvassed in Kisumu Civil Case number 172 of 2020 yet the prayers in the pleadings were completely different.
 6. That the Learned Magistrate erred in law and fact in completely failing to appreciate the principle of res judicata.
 7. That the Learned Magistrate erred in law and fact in failing to peruse and consider in totality the Appellant's pleadings, evidence and submissions before reaching his conclusion.
 8. The Learned Magistrate erred in law and fact in closing out the Appellant's case in Nyando ELC 36 OF 2020 and thereby denying the Appellant a forum to prove fraudulent obtaining of land parcel number KSM/Nyakach/1273.
17. The Appellant prayed that the ruling of the lower court be set aside and an order be made dismissing the Respondent's preliminary objection in the lower court. The court was also asked to place the lower court matter before another competent magistrate of the lower court for hearing and determination of the main suit. Lastly, the Appellant prayed for the costs of both the lower court suit and this appeal.
 18. The Appeal was argued by way of written submissions. The Appellant filed her submissions on 28th January 2022 while the Respondent filed his submissions on 27th January 2023.

The Appellant's submissions:

19. The Appellant reiterated that the facts giving rise to Kisumu CMCC No. 172 of 2020 (the Kisumu suit) and Nyando ELC No. 36 of 2020 (the lower court suit) were not the same as found by the lower court. The Appellant submitted that in the Kisumu suit, the Appellant sought injunctive relief against the Respondent while in the lower court suit, the claim related to the ownership of the suit property. The Appellant submitted that the lower court locked her out of the seat of justice since the issues that she had raised in the lower court had never been substantively heard and determined.

The Respondent's submissions:

20. On his part, the Respondent supported the decision of the lower court. The Respondent submitted that the suits that were filed by the Appellant in Kisumu (the Kisumu suit) and at Nyando (the lower court suit) raised substantially similar issues and as such the lower court acted properly by striking out the lower court suit so that the Appellant could pursue the Kisumu suit that was the first in



time to conclusion. The Respondent submitted that the Appellant had failed to extract the order or decree appealed against and as such the appeal was defective and should be dismissed. The Respondent submitted that in the absence of an order or decree appealed against, there was no valid appeal before the court. In support of this submission, the Respondent relied on Nakuru HCCA NO. 358 of 2003, Samuel Mburu Kiratu v. Daniel Nganga Kiratu.

Analysis and determination:

21. I have considered the ruling by the lower court, the grounds of appeal put forward by the Appellant and the submissions by the advocates for the parties. The following is my view on the matter: I am in agreement with the Appellant that the decision of the lower court was wrong for several reasons. The first and most glaring error on the part of the lower court was to extend the scope of the Respondent's preliminary objection that was limited to the Appellant's Notice of Motion application dated 13th August 2020 to cover the main suit. The Respondent's preliminary objection that I have reproduced earlier in this judgment was specific in content and target. The lower court erred in striking out the Appellant's entire suit while the objection was raised against an interlocutory application only. The Respondent's objection was premised on the doctrine of res judicata. The Respondent's argument was that an application similar to the one that the Appellant had filed in the lower court suit had been filed in the Kisumu suit which was between the same parties and which concerned the same subject matter, heard and conclusively determined. The Respondent's argument was that this subsequent application in the lower court suit was res judicata in the circumstances. The main suit in Kisumu had not been heard and determined. I am unable to see therefore how the lower court suit could be said to be res judicata even if the two suits concerned the same parties and the same subject matter. It is my finding therefore that the lower court erred in striking out the entire suit while the objection was raised only against the injunction application.
22. I am also in agreement with the Appellant that there were no similarities between the Kisumu suit and the lower court suit. As rightly submitted by the Appellant, the Kisumu suit was filed by the Appellant in his personal capacity to ward off the Respondent who was threatening her with eviction from her matrimonial home. The lower court suit on the other hand, was brought by the Appellant in her capacity as the legal representative of the deceased Joshua Okelo Osamba to recover the suit property which the Appellant claimed had been transferred by the Respondent to his name from that of the deceased fraudulently. It follows therefore that while the first suit was a personal claim, the second suit was brought on behalf of the estate of the deceased. Procedurally, the two claims could not be brought in one suit as suggested by the Respondent and the lower court.
23. Order 3 Rule 7 of the Civil Procedure Rules provides as follows:

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”
24. As I have stated, the Kisumu suit was a personal claim by the Appellant. The Appellant did not plead in that suit that her claim arose with reference to the estate of the deceased. As at the time of instituting that suit, the Appellant had not even obtained a grant of letters of administration in respect of the estate of the deceased and as such could not have sued on behalf of the estate. In the circumstances, I cannot see any relationship between the Kisumu suit and the Nyando suit (the lower court suit). The two suits were independent of each other and could proceed separately.



25. As concerns the merit of the preliminary objection by the Respondent against the Appellant's Notice of Motion dated 13th August 2020, I am in agreement with the Appellant that the application was not res judicata. Section 7 of the *Civil Procedure Act* provides as follows:

“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.”

26. In *Bernard Mugo Ndegwa v. James Nderitu Githae and 2 Others* [2010] eKLR, the court stated as follows on the conditions to be satisfied before a matter is said to be res judicata;

- i. The matter in issue is identical in both suits;
- ii. The parties in the suits are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

27. In *E.T v. Attorney General & Another* [2012] eKLR the court held that:

“The courts must always be vigilant to guard against 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 a new cause of action which has been resolved by a court of competent jurisdiction.”

28. I have set out herein earlier the orders that the Appellant sought in the Kisumu suit and the lower court suit. In the Kisumu suit, the Appellant sought an injunction to restrain the Respondent from evicting her or interfering with the peaceful occupation of her house and home. In the lower court suit that was based on a different cause of action altogether, the Appellant in her capacity as the administrator of the estate of the deceased sought an order restraining the Respondent who was alleged to have acquired the suit property fraudulently from among others selling, charging or transferring the suit property pending the hearing of the suit. In my view, the two applications were brought by the Appellant in different capacities, the same were based on different causes of action and were intended to protect different interests. I am therefore not persuaded that the Appellant's application in the lower court dated 13th August 2020 was res judicata. As correctly submitted by the Appellant, the issues on which the application dated 13th August 2020 was based were not determined in the Kisumu suit application. The orders that were sought and those that were granted in the Kisumu suit application were not the same orders sought in the lower court application. It is my finding in the circumstances that the Notice of Motion application dated 13th August 2020 was not res judicata and as such the same should have been heard on its own merits.

29. On the Respondent's contention that this appeal is incompetent, I have found no merit in the argument. The issue of the decree or order appealed against should have been raised earlier in the proceedings. The Respondent cannot be allowed to wait until the submissions stage to raise such an issue. I am in agreement with the Respondent that the Appellant should have extracted the decree or order appealed against. This is because an appeal is against an order or a decree of the court. It



is important therefore for the court to have on record the order or decree the subject of the appeal. That however does not mean that failure to extract the order or decree appealed against renders the appeal defective. That position is not supported by the rules or authority. The authority cited by the Respondent was from the Court of Appeal and the decision was based on the Court of Appeal Rules and not the rules of this court. If the court was in doubt as to the nature of the Appellant's appeal due to lack of an order or decree from the record, what this court would do is to order that the decree or order be extracted and filed before it proceeds with the writing of the judgment. In this case, I do not think such a step is necessary since the appeal is a straightforward one. The other reason why I will not penalise the Appellant is that the court to some extent contributed to the lack of the order or decree appealed against from the record. The appeal should have gone through the admission process pursuant to section 79B of the *Civil Procedure Act* soon after the filing of the record of appeal. At that stage, the court should have confirmed that all the essential documents formed part of the record before the appeal was admitted. The court should not have given directions on the hearing of the appeal before confirming that the order or decree appealed against was on record.

30. Order 42, Rule 2 of the Civil Procedure Rules provides as follows:

“2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

31. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that:

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”



Conclusion:

32. For the foregoing reasons, I find merit in the appeal before the court. The appeal is allowed on the following terms;
1. The order made on 1st October 2020 by Hon. S.Temu, PM in Nyando Principal Magistrate's Court ELC No. 36 of 2020 striking out the Appellant's suit with costs is set aside.
 2. The Respondent's Notice of Preliminary Objection in the lower court dated 24th August 2020 is dismissed.
 3. The Appellant's Notice of Motion in the lower court dated 13th August 2020 is reinstated for hearing on merit before any other magistrate other than Hon. S. Temu.
 6. The costs of the Appeal and the preliminary objection in the lower court are awarded to the Appellant.
 7. The Deputy Registrar shall return the lower court file forthwith to the Principal Magistrate's Court at Nyando for further action.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MAY 2023

S. OKONG'O

JUDGE

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

Mr. Mare h/b for Ms. Owino for the Appellant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

