



**Mbuya alias Raphael Odhiambo Oundo v Mwaro & 2 others (Environment & Land Case E008 of 2023) [2023] KEELC 18338 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E008 OF 2023**

**AY KOROSS, J**

**JUNE 20, 2023**

**BETWEEN**

**RAPHAEL ODHIAMBO MBUYA ALIAS RAPHAEL ODHIAMBO  
OUNDO ..... PLAINTIFF**

**AND**

**CHARLES OOKO MWARO ..... 1<sup>ST</sup> DEFENDANT**

**BENARD OCHIENG MWARO ALIAS OCHIENG MWARO .... 2<sup>ND</sup> DEFENDANT**

**JESEPH ODHIAMBO OLOO ALIAS OKOTH OLOO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On April 22, 2021, the plaintiff in this matter obtained judgment against the defendants in Kisumu ELC 58 of 2018 (OS) where the court held he had acquired a portion of 1.4 Ha of land parcel no LR North Ugenya/Ndenga/271 ('suit parcel') by adverse possession. The court also issued orders of permanent injunction restraining the defendants and or their agents from interfering with this 1.4 Ha of the suit property ('defined portion').
2. The plaintiff herein who was the plaintiff in the previous suit executed the judgment against the defendants who are also the defendants herein.
3. The suit property was subdivided into two portions to create North Ugenya/Ndenga/1780 ('defined portion') and North Ugenya/Ndenga/271 ('defendants' portion'). A portion of the suit property was ceded to create a public road.
4. The plaintiff further subdivided the defined portion to create North Ugenya/Ndenga/1798 and 1799 ('subdivisions'). However, the defendants allegedly defied the court orders and descended on the subdivisions.



5. Upon institution of contempt proceedings in Kisumu ELC 58 of 2018 (OS), my brother Okong'o J, on 1/02/2023 released the 1<sup>st</sup> defendant on his personal undertaking he would comply with the judgment of the court.
6. The court further ordered that in the event of disobedience by way of entering or trespassing on the defined portion, the officer commanding Ukwala Police Station (O.C.S.) should carry out an arrest and bring the 1<sup>st</sup> defendant for sentencing for being in contempt.
7. It appears the 1<sup>st</sup> defendant did not comply with his personal undertaking hence the institution of these proceedings. When this matter came before me to fix a hearing date, I reserved it for ruling.
8. 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 the just, expeditious, proportionate and affordable resolution of civil disputes. Section 3 of the latter [Act](#) stipulates as follows;
  - ‘3. Overriding objective
    - (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.
    - (2) The Court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).
    - (3) The parties and their duly authorised representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.’
9. 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.’
10. Section 7 of the [Civil Procedure Act](#) is expounded by giving 6 elucidations that govern the said doctrine 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.’
11. Jurisdiction is a matter of law which this Court can raise suo motu as it goes to the authority of the court and the court does not need to necessarily invite the parties to file written submissions. The Court of Appeal in the case of [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2015] eKLR expressed itself as follows on the process of moving the court when *res judicata* was imminent in a suit.
 

‘The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process ...’ [Emphasis added].
12. It is trite law that jurisdiction is everything and without which the court must down its tools. In the celebrated case of [Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil \(Kenya\) Limited](#) [1989] KLR, the Court of Appeal held inter alia that:-



‘A question of jurisdiction may be raised by a party or by a Court on its own motion and must be decided forth with on the evidence before the Court.’ [Emphasis added].

13. An analysis of the two suits demonstrates the parties in the two suits were the same, subject matter was the same, title was the same and the suit was determined by a competent court.
14. However, at the time of rendering the previous judgment, the defendants had not trespassed on the suit property. Even if the plaintiff had exercised reasonable diligence, it was not tenable for him to have brought forward at the time, a claim of alleged eviction. It is on that basis that I do not find the suit *res judicata*. This was well stated in the Court of Appeal decision of *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR thus: -

In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in *Henderson v Henderson* (supra) stated:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in 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. The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.” [Emphasis added].

15. Notwithstanding this suit is not *res judicata*, there are pending contempt proceedings in Kisumu ELC 58 of 2018 (OS) which by Section 6 of the *Civil Procedure Act* renders this suit sub judice. This provision of law bars this court from trying a matter that is before another court of competent jurisdiction where parties and subject are the same and litigating under the same title.
16. This doctrine prevents a situation of having conflicting orders emanating from two or more different courts over the same subject matter. There is no reason at all why the plaintiff cannot conclude the contempt proceedings he instituted in Kisumu ELC 58 of 2018 (OS). I find this suit sub judice to Kisumu ELC 58 of 2018 (OS). Consequently, I hereby issue the following final disposal orders: -
  - a. The suit herein is hereby stayed under Section 6 of the *Civil Procedure Act* pending conclusion of contempt proceedings in Kisumu ELC 58 of 2018 (OS).
  - b. Matter shall be mentioned to establish the status of Kisumu ELC 58 of 2018 (OS) and further directions on November 22, 2023.
  - c. There are no orders as to costs.

**DELIVERED AND DATED AT SIAYA THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

20/6/2023

Ruling delivered in the Presence of:

Mr. Odera for the plaintiff



N/A for the defendants

Court assistant: Ishmael Orwa

