



**Khaemba (Suing as administrator of the Estate of Simon Khaemba Mwanja) v Khaemba & 5 others
(Environment & Land Case 15 of 2020) [2023] KEELC 19253 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 15 OF 2020
EC CHERONO, J
JULY 28, 2023**

BETWEEN

**KENNEDY WAKOTO KHAEMBA (SUING AS ADMINISTRATOR OF THE
ESTATE OF SIMON KHAEMBA MWANJA) APPLICANT**

AND

**CLEMENT WAFULA KHAEMBA 1ST RESPONDENT
WYCLIFFE WANJALA KHAEMBA 2ND RESPONDENT
TITUS WAMALWA WANJALA 3RD RESPONDENT
TOM WANYAMA JUMA 4TH RESPONDENT
RAEL NASIMIYU KHAEMBA 5TH RESPONDENT
PAULINA NAFITU KHAEMBA 6TH RESPONDENT**

RULING

1. These proceedings were commenced by Kennedy Wakoto Khaemba, the Applicant herein vide an Originating Summons 8th July 2020 in which the Applicant seeks determination of the following Questions;
 1. Whether the suit land parcel No. E.Bukusu/N.Kanduyi/748 Measuring 4.0Ha. was owned by the late Khaemba Mumelo(deceased) prior to the Succession process by the Respondents as his biological sons and daughters
 2. Whether the late Khaemba Mumelo sold the entire parcel measuring 4.0Ha. to the Applicant between 1982 and 1984
 3. Whether the late Khaemba Mumelo died before transferring the parcel sold to the Applicant in 1985



4. Whether the Applicant has been in peaceful, continuous, open and notorious occupation of the ten acres of land parcel number E.Bukusu/N.Kanduyi/748 for over 30 years
 5. Whether the deceased and his family migrated to Kitale where they stayed all along after his demise to date.
 6. Whether the deceased late brother had sold an extra one acre to the Applicant in 1992 prior to his death
 7. Whether the Applicant has unsuccessfully tried to obtain title to the suit land from the Respondent's in vain.
 8. Whether the Respondents filed full succession of the deceased estate and failed or omitted the names of the Applicant as the purchaser of the estate in the proceedings.
 9. Whether the succession cause No. 409 of 2011 at Bungoma has been concluded and the Respondents are now clothed with title to the suit parcel of land
 10. Whether the Respondents are holding title to E.Bukusu/N.Kanduyi/748 Measuring 7 acres in trust for the Applicant.
 11. Whether the Respondents should transfer the suit title to the Applicant and in default the Executive of the Honourable Court to transfer the same.
 12. Whether the Respondents have settled in Kitale for over 30 years since the suit land was sold by their deceased's father to the Applicant in 1982 and 1984.
 13. Whether the suit for adverse possession vide Bungoma Land and Environment Case No. 289 of 2013 was decided in favour of the plaintiff and the Respondents portions of land Measuring 7 acres.
 - a. Clement Wafula Khaemba -1.4 Acres
 - b. Wycliffe Wanjala Khaemba - 1.4 Acres
 - c. Titus Wamalwa Wanjala - 1.5 Acres
 - d. Tom Wanyama Juma - 1.5 Acres
 - e. Rael Nasimiyu Khaemba - 0.4 Acres
 - f. Paulina Nafifu Khaemba - 0.5 Acres

Have been extinguished by effluence of time hence they are to be transferred to the plaintiff by themselves or Executive Officer of the Honourable court.
 14. Whether costs of this suit should not be paid to the plaintiff
 15. Whether any other order should be made as the Honourable Court may deem fit
2. Despite numerous affidavits of service indicating that the respondents were duly served with Summons and other court processes, no Replying affidavit was filed in response thereto.
 3. After this suit was filed on 15th July, 2020, the Applicant took no steps to prosecute the same for more than twelve months. On 9th March 2022, this case came up for hearing where the applicant was required to attend court and show cause why the suit should not be dismissed for want of prosecution pursuant to order 17 Rule 2 [CPR](#).



4. When the matter was called out, Mr. Sichangi Advocate for Applicant informed the court that the plaintiff has a judgment already over the same land in ELC Case No. 289 of 2013. The learned counsel further urged that there was an oversight on their part since their office file in respect of this case was kept in the wrong file. Based on those submissions, this court was satisfied that sufficient reasons had been given for this suit not to be dismissed for want of prosecution. The matter was fixed for pre-trial directions and finally set down for hearing.
5. When the case came up for hearing on 27/07/2022, the plaintiff identified himself as the son to one Simon Khaemba Mwanja(Deceased) and that he is not related to the defendants herein. The plaintiff also stated that he filed commenced these proceedings by way an Originating Summons on 1st July 2020 together with a supporting affidavit and documents. One of the documents annexed to the supporting affidavit is a copy of a Judgment delivered by this Court in ELC No.289 of 2013. The dispute in the said Judgment revolves around land parcel No.E.Bukusu/N.Kanduyi/748 which is same land in dispute in the present case. The parties were directed to file submissions on whether this suit is not Res-judicata.
6. After the expiry of the timelines given, none of the parties filed submissions as directed.

Analysis and Decision.

7. I have considered the brief testimony by the plaintiff and the Originating Summons. I have also considered the affidavit in support of Originating Summons as well as the annexures thereto.
8. One of the documents annexed to the affidavit in support of the suit is a copy of Judgment in Bungoma ELC No. 289 of 2013 between *Simon Khaemba Mwanja-(Deceased) Substituted with his son Kennedy Wakoto Khaemba)v Jamin Wasike Khaemba & Johnston Waswa Khaemba*. The subject matter of that former suit is land parcel No. E.Bukusu/N.Kanduyi/748 Measuring 4.0 Hectares. The Respondents in that case filed Replying affidavits contesting the claim by the Applicant. The case proceeded for hearing where the plaintiffs testified and closed their case. The defendants failed to attend court during the hearing and their defence case was closed. In a Judgment delivered on 27th May 2020, the plaintiffs' claim was allowed as follows;
 1. An order is made that the plaintiff is entitled to be registered as proprietor of 3.0 acres out of the land parcel No. East Bukusu/North Kanduyi/748 by way of adverse possession.
 2. The rights of the defendants in 3.0 acres out of the land parcel No. East Bukusu/North Kanduyi/748 has been extinguished by effluxion of the law.
 3. The defendants shall execute all the relevant documents to facilitate the registration of 3.0 acres out of the land parcel No.east Bukusu/North Kanduyi/748 in the name of the plaintiff within 30days from today.
 4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute such documents on behalf of the defendants herein.
 5. The defendants shall meet the Costs of the suit.
9. Looking at the copy of the said judgment in the former suit No. 289 of 2013, it is clear that the subject matter of the dispute is the same with that in the present case. It is also not in contention that the proceedings in the former suit are between the same parties or between parties under whom they or any of them claim. Section 7 of the *Civil Procedure Act* Cap. 21 Laws of Kenya gives the principles where



litigants come back to court to re-litigate on disputes that are concluded. The said Section provides as follows;

“7. 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. The *Black's law Dictionary* 10th Edition defines “res judicata” as

“ An issue that has been definitely settled by judicial decision..the three essentials are (1) an earlier decision on the issue; (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties—“

11. In the case of *Njenga v Wambugu & Anor*, Nairobi HCCC No.2340 of 1991(unreported), Kuloba J(as he then was) held;

“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.”

12. I agree with decision in the above mentioned case. The plaintiff in this case identified himself as the son to Simon Khaemba Mwanja(deceased) who was the plaintiff and whom he later substituted as the plaintiff in the former suit No.289 of 2013. The subject matter in this suit was directly and substantially in issue in the former suit and the matter was heard and finally decided by this court which is competent to try the same.

13. In my view, the present suit is incompetent and an abuse of the court process for being re judicata.

14. Suffice to say that when the plaintiff filed the former suit No.289 of 2013(Bungoma), he was claiming against the two defendants, namely Jamin Wasike Khaemba and Johnson Waswa Khaemba 4.0 Hectares.

15. In the Preamble of his judgment delivered by this Court in the former suit No.289 of 2013, Olao J observed as follows;

“-----According to the Certificate of search annexed to the plaintiff's Originating Summons dated 31st October 2013 and filed herein on the same day, the land parcel No.east Bukusu/ North Kanduyi/748(hereinafter the suit land) and which measures 4.0 Hectares registered in the names of Jamin Wasike Khaemba(1st defendant) and Johnson Waswa Khaemba (2nd defendant) who respectively own 1.5 acres and 1.8 acres together with 6 other proprietors. The names of the other proprietors was given as follows;

- (a) Jamin Wasike Khaemba -1.5 acres
- (b) Johnson Waswa Khaemba -1.8 acres
- (c) Clement Wafula Khaemba -1.4 acres
- (d) Wycliffe Wanjala Khaemba -1.4 acres
- (e) Titus Wamalwa Wanjala -1.5 acres



- (f) Tom Wanyama Juma -1.5 acres
- (g) Rael Nasimiyu Khaemba -0.4 acres
- (h) Paulin Naffu Khaemba -0.5 acres

16. The learned trial judge in the judgment remarked in obiter as follows;

“In the proceeding paragraph of this judgment, I have deliberately used the words “part of the land” for reasons that I shall now explain.

At the commencement of this judgment, I wondered aloud as to why the plaintiff had only filed this Originating Summons as against the 1st and 2nd defendants yet the suit is currently registered in the names of those two defendants and their six siblings. It must be remembered that the two defendants have not been sued as the Administrators of the Estate of Mumelo. They have been sued in their own capacities as the current registered proprietors of the suit land which in any event is no longer registered in the names of Mumelo. In the circumstances, I do not think that any orders in adverse possession can be made against the other six owners of the registered land without them having been enjoined in this suit as defendants---“

17. After realising that he made a fatal mistake by suing only two defendants, the plaintiff is now attempting to come back to this court for a “second bite” by instituting this subsequent suit against the four defendants who are the remaining siblings for the balance of land to add upto 4.0Hectares. Unfortunately, the principles of res judicata has got up with him.
18. For the foregoing reasons, I find that based on the judgment of this Honourable Court delivered on 27/5/2020 which heard and conclusively settled all the issues in controversy in Bungoma ELC No. 289 of 2013, the present suit is *Res judicata* and an abuse of the Court process. Consequently, the Originating Summons dated 8th July, 2020 is therefore struck out and dismissed with costs to the defendants.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY, 2023

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Sichangi for the plaintiff
2. Defendants-absent
3. M/S Joy Court Assistant present

