



REPUBLIC OF KENYA



**Ogwe v Wire & 3 others (Environmental and Land Originating Summons  
E005 of 2022) [2023] KEELC 18981 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18981 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2022  
GMA ONGONDO, J  
JULY 25, 2023**

**BETWEEN**

**MARY ATIENO OGWE ..... PLAINTIFF**

**AND**

**EVERLINE ADHIAMBO WIRE ..... 1<sup>ST</sup> DEFENDANT**

**STEVEN OCHIENG OOKO ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LAND HOMABAY ..... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a preliminary objection dated February 28, 2023 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through Ondego Garo and Company Advocates, the plaintiff's originating summons and notice of motion application dated June 15, 2022 on points of law thus;
  - a. This court has no jurisdiction to entertain and/or determine this matter.
  - b. The originating summons brought by the applicant is bad in law as the same offends those provisions of section 6 and 7 of the [Civil Procedure Act](#). (The CPA herein).
  - c. The originating summons herein are res sub judice and res-judicata.
  - d. The originating summons and application's subject matter are similar to a suit filed by Counsel Ogwe and Associates advocates in HomaBay Chief Magistrates courts Environment and Land case no E033 of 2022
  - e. Application and the entire suit and originating summons and suit is an abuse of the process of the court.



- f. The application and the entire suit and originating summons is one meant to confuse and bring conflict between this court and the Environment Court at the Chief Magistrates Court at HomaBay; thus the courts dignity is at risk of being abused by the applicant
  - g. The orders sought are not capable of being granted by this court.
2. In the originating Summons, the plaintiff through Ogwe and Associates Advocates sued the four defendants claims as follows:
- a. To be entitled to be registered as the owner of a portion containing by approximately 25X100 feet of all that Property known as Kanyada/Kanyango/Kalanya/8762 a resultant subdivision of Kanyada/Kanyango/Kalanya/476 (hereinafter referred to as the property situate in HomaBay County.
  - b. For an order that the said property, be registered in the name of the applicant as the owner by virtue of adverse possession thereof.
  - c. An order inhibiting the registration of any dealing on the said property other than the registration of the said portion/property in the applicant's name or until further orders of this court.
  - d. The costs of this application be provided for
- And for determination of the following questions.
- a. Having been in peaceful, continuous and uninterrupted occupation and utilization of the said land for more than (12) years, (precisely 18 years); is the applicant entitled to be registered as the owner thereof by virtue of adverse possession.
  - b. Is the applicant entitled to an order of inhibition as claimed hereinabove;
  - c. Is the applicant entitled to costs:
- And further premised on the grounds set out in the affidavit of Mary Atieno Ogwe, the nature of the case and on such other or further grounds to be adduced at the hearing hereof.
3. Simultaneous with the originating summons, the plaintiff filed the application dated June 15, 2022 for a temporary injunction against the defendants. Nonetheless, the same was disposed of on October 25, 2022.
  4. In a replying affidavit sworn on November 7, 2022 by the 1<sup>st</sup> defendant, the originating summons is opposed. She claimed that she is a bona fide purchaser for value in respect of the suit land, LR NO. Kanyada/Kanyango/Kalanya/8762.
  5. The preliminary objection was heard by way of written submissions further to the directions of this court given on March 13, 2023.
  6. The plaintiff's counsel filed submissions dated June 9, 2023 and implored the court to dismiss the preliminary objection to save precious judicial time. Counsel submitted that this suit is not affected by sections 6 and 7 of the *CPA* and relied on article 159 (2) (d) of the *Constitution* of Kenya, 2010 as regards determination of matters on merit.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel did file submissions dated May 12, 2023 and prayed that this entire suit be struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Counsel relied on the case of *Republic v Paul*



*Kihara Kariuki, Attorney-General & 2 others Ex-parte Law Society of Kenya* (2020) eKLR and *Ann v RMK* (2021) eKLR, and argued that this suit offends sections 6 and 7 of the CPA.

8. So, the issues that emerge for discussion crystallize to whether this suit is Sub-judice and Res judicata as well as the just orders to make thereby.
9. The preliminary objection is based on points of law hence, in line with the decision in the case of *Mukisa Biscuit manufacturing Co. Ltd---West End Distributors Limited* (1969) EA 696.
10. Indeed, the court has given due attention to the preliminary objection; see *Kakuta Maimai Hamisi... Peris Pesi Tobiko and 2 others* (2013) eKLR.
11. Notably, section 6 of the *CPA* stipulates;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.
12. *Res judicata* principle is premised upon, section 7 of the *CPA* which reads;

“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 issue has been subsequently raised, and has been heard and finally decided by such court”.
13. I have duly considered this suit and Homa Bay CM Environment and Land case E033 of 2022. The same subject matter namely land reference No. Kanyada/Kanyango/Kalanya/8762 is the same subject matter therein and the four defendants herein are also the defendants therein. That the said suit before the magistrate’s court is pending ruling set for August 11, 2023.
14. In the obtaining scenario, it would not be right for the said twin matters to be heard simultaneously by the two courts of competent jurisdiction; see also *Judicial Commission of Inquiry into Goldenberg Affair and 3 others v Kilach* (2003) KLR 249 at 265 and 266.
15. In conclusion, it is the finding of this court that this court cannot entertain this suit at this stage by dint of the doctrine of sub-judice. The preliminary objection is partially merited and upheld accordingly.
16. Thus, this suit is hereby stayed under section 6 of the *CPA* pending the outcome of Homa Bay Chief Magistrate’s Court Environment and Land case E033 of 2022 with no orders as to costs.
17. It is so ordered.

**DELIVERED AND DATED AT HOMABAY THIS 25<sup>TH</sup> JULY, 2023**

**G.M. A ONG’ONDO**

**JUDGE**

Present;

Charlotte Elly instructed by Ondego Garo, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Okello, court assistant

