



**Adiema & another v Shisikani (Environment & Land Case
E013 of 2021) [2025] KEELC 1311 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E013 OF 2021**

DO OHUNGO, J

MARCH 18, 2025

BETWEEN

SAMMY LIKUYI ADIEMA 1ST PLAINTIFF

DOREEN ONGACHI APAMO 2ND PLAINTIFF

AND

CHARLES SHAMWATI SHISIKANI DEFENDANT

JUDGMENT

1. The Plaintiffs moved the Court through Plaint dated 1st November 2021, wherein they averred that the First and Second Plaintiffs are the registered proprietors of land parcel number South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 respectively while the Defendant is the registered proprietor of land parcel number South Kabras/Shamberere/3882. The three parcels are collectively referred to in this judgment as the “suit properties.” That the suit properties were originally comprised in land parcel number South Kabras/Shamberere/2650 and were created pursuant to an order of the Court of Appeal in Kisumu Civil Appeal No. 3 of 2014 wherein the First Plaintiff was ordered to transfer two acres to the Defendant herein.
2. The First Plaintiff averred that he signed the transfer documents, but the Defendant refused to sign prompting the Deputy Registrar to sign on his behalf. That the Defendant trespassed into land parcel numbers South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 and constructed temporary structures on South Kabras/Shamberere/3855.
3. The Plaintiffs therefore prayed for judgment against the Defendant for:
 - i. A permanent injunction restraining the defendant by himself, his family members, agents, servants and employees or anyone claiming through him from ever laying claims over and/or trespassing onto L.P.N South Kabras/Shamberere/3856 and 3855.



- ii. Demolition of the houses and/or any structures constructed by the defendant, his family members, agents, servants or any other person claiming through him on L.P.N South Kabras/Shamberere/3856 and 3855.
 - iii. Costs of the suit.
4. The Defendant filed Statement of Defence and Counterclaim dated 27th October 2022 where he admitted the existence of the Court of Appeal order and added that the order required that he gets 2 acres of the portion that he had occupied for 12 years. That land parcel number South Kabras/Shamberere/3882 is not the portion that he had occupied for 12 years. The Defendant further averred that he was neither called upon to participate in the process of subdivision and registration of the suit properties nor did the Court of Appeal order empower the Deputy Registrar to sign any documents on his behalf.
5. The Defendant denied trespass to the properties and prayed for cancellation of the suit properties and registration of 2 acres which is his rightful share with his full participation. He also sought dismissal of the Plaintiffs' case on the ground that it is res judicata.
6. At the hearing, Sammy Likuyi Adiema (PW1) adopted his witness statement dated 1st November 2021 and produced copies of the documents listed as item numbers 1 to 6 in his list of documents dated 1st November 2021, photographs in his further list of documents dated 3rd November 2023, as well as copies of the documents listed as item numbers 1 to 6 in his "further further list of documents" dated 5th May 2024, as his exhibits.
7. On cross-examination and re-examination, PW1 stated that the Court of Appeal ordered that he gives two acres to the Defendant which he did. He stated that the Defendant was notified of the subdivision and that the Defendant declined to sign any papers for the subdivision thereby causing the same to be signed on the Defendant's behalf by the Deputy Registrar. He however conceded under cross-examination that pursuant to the order of the Court of Appeal, it was him and not the Defendant who was ordered to sign. PW1 went on to testify that the Defendant had developed a permanent house on South Kabras/Shamberere/3856 and a semi-permanent house on South Kabras/Shamberere/3855 where he was residing.
8. Doreen Ongachi Apamo (PW2) adopted her witness statement dated 2nd November 2023 and stated that the First Plaintiff was her husband to whom she got married in the year 2004. That when title in respect of South Kabras/Shamberere/3855 was issued to her and even by the time she got married to the First Plaintiff, the Defendant was already using the parcel. She added that the Defendant was still in occupation as of the date of her testimony and had built two semi-permanent houses thereon.
9. Elphas Ambani Museve (PW3), a Court Process Server testified that under instructions from the First Plaintiff, he delivered a title deed in respect of South Kabras/Shamberere/3882 to the Defendant on 15th October 2021 and that the Defendant refused to receive it.
10. Lastly, Katabachi Mohamed Luttah (PW4), a surveyor trading as Juliko Geospatial Consultants testified that pursuant to instructions from the First Plaintiff to determine the boundaries of the suit properties, he visited the ground on 12th October 2022 and prepared a report. That he established that there were no distinct boundaries between the suit properties and that he advised the First Plaintiff to engage the Land Registrar and County Surveyor to establish boundaries. He added that if the titles were prepared without any markings on the ground then it was wrong. He further stated that he found houses on South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855.
11. The Plaintiffs' case was thereafter closed.



12. The Defendant testified next. He adopted his witness statement dated 11th October 2022 and produced copies of the documents listed as item numbers 1 to 5 in his list of documents dated 27th October 2022, as his exhibits. He stated that in Kakamega HCCC No 50 of 2008, the Court ordered that he be given 3 acres of South Kabras/Shamberere/2650 while in Civil Appeal No. 3 of 2014, the Court of Appeal ordered that he be given 2 acres of the said parcel and that the Deputy Registrar executes documents if the First Plaintiff herein refused to sign. He added that he had never signed any transfer form for South Kabras/Shamberere/2650 and was not involved in the Land Control Board application process. That no survey was done to establish where he was occupying prior to the issuance of the title in respect of South Kabras/Shamberere/3882 and that no title deed was ever taken to him.
13. DW1 went on to deny that any he refused to co-operate with the First Plaintiff. He stated that after the judgment of the Court of Appeal, he went to the ground and found that the First Plaintiff had changed the parcel numbers and that parcel South Kabras/Shamberere/2650 had been closed. He added that he constructed the semi-permanent house that the Plaintiffs referred to in the year 2020 and the permanent one in the year 2021. He also stated that he constructed them on the portion he had occupied since he purchased the land which is the same position he occupied at the point of delivery of the judgment in the Court of Appeal.
14. The defence case was then closed. Directions were thereafter given that parties file and exchange written submissions. The Plaintiffs filed submissions dated 5th November 2024 while the Defendant filed submissions dated 26th November 2024.
15. I have carefully considered the pleadings, evidence, and submissions. The issues that arise for determination are whether the suit is res judicata and whether the reliefs sought should issue.
16. Res judicata is a doctrine of general application which has been statutorily encapsulated in Section 7 of the *Civil Procedure Act* 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.
17. The ingredients that must be established for res judicata to be upheld are that there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent Court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
18. As the Supreme Court stated in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR, the doctrine of res judicata allows a litigant only one bite at the cherry by preventing the litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action or submitting to Court issues that have been heard and determined by a competent Court. The doctrine prevents a multiplicity of suits and ensures that litigation ends. So resolute is the dragnet of res judicata that cosmetic facelifts to an old dispute will not escape its iron shield. See *E.T. v Attorney General & another* [2012] eKLR.



19. There is no dispute that the First and Second Plaintiffs are the registered proprietors of land parcel number South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 respectively while the Defendant is the registered proprietor of land parcel number South Kabras/Shamberere/3882. All three parcels trace their roots to parcel number South Kabras/Shamberere/2650.
20. Further, there is no dispute that the First Plaintiff and the Defendant herein litigated in Kakamega HCCC No 50 of 2008 wherein judgment was delivered on 14th November 2013 and that an appeal, Kisumu Civil Appeal No. 3 of 2014, was preferred against the said judgment. The First Plaintiff herein was the Appellant in the appeal while the Defendant herein was the Respondent. Equally, it is not in dispute that parcel number South Kabras/Shamberere/2650 was the subject of both proceedings in the High Court and the Court of Appeal. Specifically, the Defendant herein claimed to be entitled to a 2-acre portion of South Kabras/Shamberere/2650 by adverse possession.
21. The Court of Appeal stated as follows in the judgment:

It is therefore plain that the respondent was in adverse possession from 1985 to the date of the suit before the High Court. From 1985 to the time of the suit, in 2008, the full circle of twelve, 12 years adverse possession had long been completed.

In our view, and for the reasons given above, the respondent established, on a balance of probabilities, a title to his portion by adverse possession which was, in an imprecise manner, pleaded in his defence and counter-claim.
22. The Court of Appeal concluded the judgment by making the following final orders:

In the premises the ground of appeal challenging the award of 3 acres to the respondent, despite our analysis, succeeds. Save for this limited success, we find no merit in the rest of the grounds of appeal. We set aside the High court Judgment by which the appellant was directed to sub-divide plot number S/KABRAS/SHAMBERERE/2650 and transfer 3 acres to the respondent and substitute therefor an order directing the appellant to sub-divide the same plot and transfer two (2) acres thereof to the respondent within (90) days from the date hereof failing which the Deputy Registrar of the High Court at Kakamega shall execute all the relevant documents which will enable the respondent obtain his rightful share of the suit land, that is two (2) acres.

Each party shall bear their own costs of this appeal.
23. In the present case, the Plaintiff is seeking a permanent injunction to restrain the Defendant from accessing and claiming South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 which are subdivisions of parcel number South Kabras/Shamberere/2650. The Plaintiff is also seeking to demolish the Defendant's houses and structures on the said parcels. It will be noted that the Defendant's occupation and proprietorship of 2 acres of South Kabras/Shamberere/2650 was approved by the Court of Appeal in its judgment. The Court of Appeal conferred title on the Defendant, and it is not open to the Plaintiffs to seek to limit that title through a permanent injunction or demolition order. The issue is res judicata and the Plaintiff cannot seek to relitigate it in this Court. As will be manifest later in this judgment, parcel numbers South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 were created contrary to the judgment of the Court of Appeal. Their introduction into this matter is a cosmetic facelift to the old claim which cannot give the Plaintiff another bite at the cherry.
24. I have also examined the defendant's counterclaim against the doctrine of res judicata. The Defendant has sought cancellation of the titles in respect of land parcel numbers South Kabras/Shamberere/3856,



- South Kabras/Shamberere/3855 and South Kabras/Shamberere/3882 (the suit properties). In none of the previous cases has the issue of cancellation of the titles in respect of the suit properties ever been heard and determined on the merits. The said titles were all excised from South Kabras/Shamberere/2650 after the judgments of the High Court and the Court of Appeal. I am satisfied that the Defendant's counterclaim is not *res judicata*.
25. The Defendant's claim for cancellation of the titles in respect of the suit properties is based on the grounds that he was neither called upon to participate in the process of subdivision and registration of the suit properties nor did the Court of Appeal order empower the Deputy Registrar to sign any documents on his behalf. He has further contended that South Kabras/Shamberere/3882 is not the portion that he had occupied for 12 years which the Court of Appeal awarded him.
 26. A registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Pursuant to Section 26 of the Act, courts are obligated to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The provisos limit the grounds on which a title can be nullified to fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
 27. There is no dispute that the Deputy Registrar signed transfer documents on behalf the Defendant, leading to registration of South Kabras/Shamberere/3882 in the Defendant's name. The First Plaintiff has claimed that he applied to have the Deputy Registrar to sign when the Defendant did not cooperate. A reading of the judgment of the Court of Appeal however makes its clear that the Defendant was the successful party and that the Deputy Registrar was to sign on behalf of the First Plaintiff and not the other way round. The reason for incorporating the Deputy Registrar in such an order is usually to ensure that the decree holder gets title notwithstanding any non-cooperation by the judgment debtor. The Plaintiffs have not offered any evidence to show that they gave the Defendant an opportunity to participate in the proceedings that led to them getting the Deputy Registrar to sign on the Defendant's behalf. Getting the Deputy Registrar to sign on behalf of the Defendant was contrary to the judgment of the Court of Appeal was clearly an act of misrepresentation and illegality on the part of the First Plaintiff.
 28. I have perused the title documents that the Plaintiffs produced. I note that the First Plaintiff was registered as proprietor of South Kabras/Shamberere/3856 on 8th October 2014, some two months before the judgment of the Court of Appeal was delivered. Similarly, a perusal of the title document in respect of South Kabras/Shamberere/3855 reveals that the register in respect of the said parcel was opened on 8th October 2014 and that the Second Plaintiff was registered as proprietor thereof much later, on 21st February 2018. Further, the title document in respect of South Kabras/Shamberere/3882 states that the register in respect of the said parcel was opened on 12th February 2015 and that the said parcel is a subdivision of South Kabras/Shamberere/3854 and not South Kabras/Shamberere/2650 as was ordered by the Court of Appeal.
 29. Even though no copy of the register or title in respect of South Kabras/Shamberere/3854 was produced, going by the sequence in the parcel numbers 3854, 3855 and 3854, it is very likely that South Kabras/Shamberere/3854 was also created on 8th October 2014, before the judgment of the Court of Appeal was delivered. The First Plaintiff has not offered any explanation why he subdivided South Kabras/Shamberere/2650 when there were active proceedings in the Court of Appeal and after the judgment of the High Court which was also in the Defendant's favour.



30. It is apparent that the Defendant was presented with a fait accompli; accept South Kabras/Shamberere/3882 or nothing. That is not what the Court of Appeal ordered and certainly not how a successful litigant who holds a decree in his favour should be treated.
31. The dispute that was before the High Court and the Court of Appeal was centred on the Defendant's use and occupation of the portion of land for period of at least 12 years. The Defendant persuaded both Courts, hence the decree in his favour. The 2 acres that the Defendant was to get were to be in respect of the area that he had occupied for period of at least 12 years prior to filing the suit in the High Court. The Plaintiffs' own witness, Katabachi Mohamed Luttah (PW4), testified that when he went to the ground, he found that there were houses on the area covered by both South Kabras/Shamberere/3855 and South Kabras/Shamberere/3855. Those were the Defendant's houses. The Plaintiffs' claim that the Defendant is not entitled to the portion where his houses stand is obviously without basis considering that the Court of Appeal was satisfied as to the Defendant's use and occupation of the land and further considering that the First Plaintiff subdivided South Kabras/Shamberere/2650 prior to delivery of the judgment of the Court of Appeal.
32. I am satisfied that the titles in respect of South Kabras/Shamberere/3856, South Kabras/Shamberere/3855 and South Kabras/Shamberere/3882 were issued illegally, un-procedurally and through misrepresentation. The Defendant has made a case for their impeachment. Indeed, the only way to ensure full implementation of the judgment of the Court of Appeal is to cancel the titles in respect of the suit properties.
33. In view of the foregoing discourse, I find merit in the Defendant's counterclaim. I therefore make the following orders:
 - a. The Plaintiffs' suit is struck out for being res judicata.
 - b. The titles in respect of South Kabras/Shamberere/3856, South Kabras/Shamberere/3855 and South Kabras/Shamberere/3882 are hereby cancelled.
 - c. Parties to strictly comply with the judgment delivered by the Court of Appeal on 9th December 2014 in Kisumu Civil Appeal No. 3 of 2014.
 - d. If there is no compliance by the First Plaintiff within 90 (ninety) days from the date of delivery of this judgment, the Deputy Registrar will be at liberty to sign all necessary documents on behalf of the First Plaintiff, to ensure that the judgment of the Court of Appeal is complied with.
 - e. The Defendant shall have costs of this case.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 18TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiffs

Ms Munihu for the Defendant

Court Assistant: B Kerubo

