



**Onyango v Ochieno (Environment & Land Case E008 of 2022)
[2023] KEELC 18938 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E008 OF 2022**

BN OLAO, J

JULY 18, 2023

BETWEEN

JOHN OUMA ONYANGO PLAINTIFF

AND

HERBERT ONGORA OCHIENO DEFENDANT

RULING

1. John Ouma Onyango (the plaintiff herein and then suing as the Administrator of the Estate of Onyango Ogutu) first moved to this Court by filing Busia Elc Case No. 9 of 2018 on 8th February 2018 seeking against Herbert Ongora Ochieno (the defendant herein) judgment in the following terms with regard to the land parcel No Samia/Luchululo/Bukhulungu/44 (the suit land):
 1. An order that the land register for Samia/Luchululo/Bukhulungu/44 be rectified by cancelling the partition of the same.
 2. An order that the name of the defendant be deleted as a co-owner of Samia/Luchululo/Bukhulungu/44.
 3. Costs of the suit be paid by the defendant.
2. The plaintiff's case was that the deceased Onyango Ogutu was the registered proprietor of the suit land but unknown to him, the defendant had fraudulently caused himself to be registered as a co-owner of the same in 1977. Particulars of fraud were pleaded in paragraph 4 of the plaint.
3. The Defendant filed a defence and counter-claim questioning the plaintiff's capacity to file the suit and denying the allegations of fraud. He added that he was infact a joint owner of the suit land where he had established his home since 1967. That the plaintiff, upon being appointed an Assistant Chief of Bukhulungu Sub-Location, had illegally encroached onto the defendant's portion and later sub-



divided the suit land to create two portions being Samia/Luchululo/Bukhulungu/2011 and 2012. He too pleaded fraud against the plaintiff and sought the following orders as per his counter-claim:

- i. A declaration that the defendant is the lawful registered owner of the land parcel NO Samia/Luchululo/Bukhulungu/2012 measuring 2.3 Ha and is lawful holder of the title deed issued on 8th May 2015.
- ii. A mandatory injunction do issue compelling the relevant government land surveyor to proceed with the survey process of ascertaining and demarcating the proper boundaries of the two parcels of land parcel Samia/Luchululo/Bukhulungu/2011 and 2012.
- iii. An injunction restraining the plaintiff, his servants and/or agents from occupying, tilling, cultivating or in any other way interfering with the defendant's parcels of land Samia/Luchululo/Bukhulungu/2012.
- iv. Damages against the plaintiff for trespass including aggravated damages.
- v. Costs of the suit and interests.
- vi. Any other relief that this Honourable Court may deem fit and just to grant.

The suit was heard by Kaniaru J and in a judgment delivered on 27th May 2020, the plaintiff's case was dismissed and judgment was entered for the defendant as per his counter-claim in prayers NO (i), (ii), (iii) and (v) only.

4. The plaintiff, still suing as the Administrator to the Estate of Onyango Ogutu has again approached this Court vide his plaint dated 31st May 2022 seeking judgment against the defendant in the following terms:

1. A declaration that the whole partition / sub-division exercise undertaken in respect of land parcel No Samia/Luchululo/Bukhulungu/44 sub-dividing it into land parcels NO Samia/Luchululo/Bukhulungu/2011 and 2012 was un-procedural, unlawful null and void.
 2. The mutation dated 24/201/2014 sub-dividing land parcel NO Samia/Luchululo/Bukhulungu/2011 and 2012 and the registration thereof of the mutation and the resultant numbers be and is hereby revoked and respective entries in the register of land parcel NO Samia/Luchululo/Bukhulungu/44 cancelled.
 3. A fresh partition in respect of land parcel NO Samia/Luchululo/Bukhulungu/44 be undertaken strictly in accordance to principles set out under Section 94 of the [Land Registration Act](#).
 4. The defendant's homesteads and the homesteads of the defendant's children be and it is hereby ordered are preserved.
 5. Costs of this suit.
 6. Any other relief the Honourable Court may deem just and expedient.
5. Again, and as he pleaded in Busia Elc Case No 9 of 2018, the plaintiff repeated that the late Onyango Ogutu who died in 1989 was a co-owner of the suit land having settled on one portion and the defendant in the portion with well-defined boundaries. That the issue of co-ownership was discovered during the proceedings in Busia Elc Case No 9 Of 2018 after which the defendant embarked on partitioning the suit land to create parcels NO Samia/Buchululo/Bukhungu/2011 and 2012. The defendant then registered himself as the proprietor of the land parcel NO Samia/Luchululo/



Bukhulungu/2011 and the plaintiff's father was registered as the proprietor of the land parcel NO Samia/Luchululo/Bukhulungu/2012.

6. Upon completion of the trial in Busia Elc Case No 9 of 2018, surveyors visited the suit land to sub-divide it and in the process, the plaintiff's homestead was placed in land parcel NO Samia/Luchululo/Bukhulungu/2012 and he and his family stand to be evicted. The plaintiff is aggrieved by that partition which is not in accordance with the principles set out in Section 94 of the [Land Registration Act](#) and is likely to result in untold losses, eviction and displacement of the plaintiff and his family. He therefore filed this suit and sought the orders set out above.
7. The defendant's reaction was to file a Notice of Preliminary Objection dated 17th January 2022 (must be 2023) raising the following issues:
 1. The matter as pertains the land parcel NO Samia/Luchululo/Bukhulungu/44, NO Samia/Luchululo/Bukhulungu/2011 and NO Samia/Luchululo/Bukhulungu/2012 is res judicata as per Section 7 of the [Civil Procedure Act](#) having been fully heard and determined on merit in Busia Elc Case No 9 of 2018.
 2. The issue of sub-division and mutation of the said parcel is live before a competent Court of law with proper jurisdiction thus a duplicity as per Section 6 of the [Civil Procedure Act](#).
8. Annexed to the Preliminary Objection are the following documents:
 1. Copy of judgment delivered on 20th May 2020 in Busia Elc Case No 9 of 2018.
 2. Copy of decree in Busia Elc Case No 9 of 2018.
 3. Copy of plaint, defence and counter-claim in BUSIA Elc Case No 9 of 2018.
 4. Copy of order and application for Police escort for survey of the land parcels NO Samia/Luchululo/Bukhulungu/2011 and 2012.
 5. Copy of affidavit of service dated 2nd November 2021.
 6. Copy of order dated 14th February 2022.
 7. Copy of Notice of Appeal.
 8. Copy of Notice of withdrawal of Appeal.
 9. The Preliminary Objection is the subject of this ruling. It has been canvassed by way of written submissions. These have been filed by Mr Sala instructed by the firm of Sala & Mudany Advocates for the defendant and by Mr Makokha instructed by the firm of J. P. Makokha & Company Advocates for the plaintiff.
 10. I have considered the Preliminary Objection, the pleadings both in this case and in Busia Elc Case No 9 of 2018 as well as the submissions by counsel.
 11. I must start by observing that although the defendant's list of documents filed on 23rd March 2023 in support of the Preliminary Objection shows that a total of eight (8) documents were filed, the only documents actually filed were NO 1 to 3. There was no application for Police Escort, affidavit of service dated 2nd November 2021, order issued on 14th February 2022, Notice of Appeal and withdrawal of Appeal. Counsel must take care to ensure that their list of documents as filed is an accurate reflection of what was actually filed. It is not the responsibility of the court to fish for the documents alleged to have been filed. Further, the Preliminary Objection is dated 17th January 2022 for a suit filed on 31st May 2022!!



12. Having said so, a Preliminary Objection was defined in the *locus classicus* case of *Mukisa Biscuit Manufacturing Co Ltd -v- West End Distributors Ltd* 1969 E.A 696 as follows as per LAW J.A

“... so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” Emphasis mine.

In the same case, Sir Charles Newbold P. added that:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” Emphasis mine.

The issues raised by the defendant are that this suit is both sub-judice and res-judicata. Those are pure points of law provided for under Sections 6 and 7 respectively of the [Civil Procedure Act](#). Clearly therefore, this is a proper Preliminary Objection as defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors (supra)*. I will consider it under those heads.

Sub-judice

13. This is provided for under Section 6 of the [Civil Procedure Act](#) as follows:

“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.” Emphasis mine.

The term sub-judice is defined in [Black’s Law Dictionary](#) 10th Edition to mean:

“Before the Court of Judge for determination...”

Among the documents filed by the defendant in support of his Preliminary Objection is the judgment by Kaniaru J delivered on 20th May 2020 and the subsequent decree issued on 27th May 2020. And although the defendant’s list of documents listed a copy of application for Police Escort, copy of affidavit dated 2nd November 2021, copy of order issued on 14th February 2022 and copy of Notice of Appeal and copy of withdrawal of Appeal (items NO 4 to 8 respectively) those documents were not filed. This court is therefore not in a position to know if there is any pending application in Busia Elc Case NO 9 of 2018 as to render any support to the plea of sub-judice. All that this Court has on record is the judgment delivered on 20th May 2020 and the decree issued on 27th May 2020.

14. The plea of Sub-judice is clearly not available to the defendant in the circumstances.



Res-judicata

15. This is provided for 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.” Emphasis mine

It is clear from the above that for res judicata to apply, the party invoking it must satisfy the following conditions:

1. The matter in dispute in the former suit must be directly and substantially in dispute in the subsequent suit.
2. The former suit must have been between the same parties or those under whom they claim litigating under the same title.
3. The former suit must have been heard and finally decided.
4. The Court or Tribunal which heard and determined the former suit must have been competent to do so.

The term Res-judicata is also defined in [Black’s Law Dictionary](#) 10th Edition as:

“Latin ‘a thing adjudicated’. An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are

- (1) an earlier decision on the issue
- (2) a final judgment on the merits, and
- (3) the involvement of the same parties, or parties in privity with the original parties.”

Finally, in the case of [James Njuguna Chui -v- John Njugu Kimani](#) C.a Civil Appeal No 322 of 2014 [2017 eKLR], the Court described the rationale of *res judicata* and said:

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to re-litigate or re-agitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue courtesy of the repeat litigation.”



16. The same Court held in *Ngugi -v- Kinyanjui & Others* 1989 KLR 146 that Section 7 of the *Civil Procedure Rules* is a bar and an injunction against the re-litigation of a matter already heard and finally determined by a competent forum. And in the case of *John Florence Maritime Services Ltd & Another -v- Cabinet Secretary For Transport & Infrastructure & Others* 2015 eKLR, it was stated thus:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

17. Guided by the above jurisprudence, it is common ground that the parties herein previously litigated in Busia Elc Case No 9 of 2018 over the same suit land. The case was heard and finally decided by a competent Court and a judgment was delivered on 20th May 2020 followed by a decree one week later.

18. In Busia Elc Case No 9 of 2018, the plaintiff sought the following main orders:

- a. The Land Registrar for parcel NO Samia Luchululo/Bukhulungu/44 be rectified by cancelling the partition of the same.
- b. An order that the name of the defendant be deleted as a co-owner of Samia/Luchululo/Bukhulungu/44.

19. After hearing the parties, Kaniaru J in paragraph 37 of his judgment said the following with respect to the plaintiff’s claim:

“The fourth and final issue is whether the parties are entitled to the remedies they are seeking. Given what I have said concerning the plaintiff’s case heretofore, it is clear that he has not demonstrated sufficiently what he set out to prove. His case is therefore for dismissal and I hereby dismiss it with costs.”

20. In this suit, the plaintiff seeks the following main remedies:

1. A declaration that the whole partition/sub-division exercise undertaken in respect of land parcel NO Samia/Luchululo/Bukhulungu/44 sub-dividing it into parcels No Samia/Luchululo/Bukhulungu/2011 and 2012 was unprocedural, unlawful and null and void.
2. The mutation dated 24/201/2014 sub-dividing land parcel No Samia/Luchululo/Bukhulungu/44 into land parcels No Samia/Luchululo/Bukhulungu 2011 and 2012 be revoked and the entries in the register for land parcel NO Samia/Luchululo/Bukhulungu/44 be cancelled.
3. Fresh partition in respect of land parcel NO Samia/Luchululo/Bukhulungu/44 be undertaken strictly in accordance to the principles set out under Section 94 of the *Land Registration Act*.
4. The defendant’s homesteads and the homesteads of the defendant’s children be and it is hereby ordered are preserved.



21. It is obvious from the above pleadings that not only was the suit land the subject in both Busia Elc Case No 9 of 2018 and in this case but further, that the twin issues in both cases was the ownership of the suit land and the rectification by cancellation of the partition to create the land parcels NO Samia/Luchululo/Bukhulungu 2011 and 2012. In an attempt to persuade this Court that this suit is not res judicata as the issues in the two cases are different, counsel for the defendant has submitted as follows in page 2 of his submissions:

“The Court considered the issues and reached a determination, dismissing the plaintiff’s claim and upholding the co-ownership of the land between the defendant and the plaintiff’s father and the sub-division thereof of Samia/Luchululo/Bukhulungu/44 to create parcels NO Samia/Luchululo/Bukhulungu/2011 and 2012.

The instant case however challenges the process through which the parties having been granted orders to partition the land and going about the process of partitioning. And the argument is that the entire partition was not done in compliance with Section 94 of the [Land Registration Act](#), 2012. This is not the same issue similar to what was adjudicated upon in Busia Elc No 9 of 2018.

The plaintiff herein discloses in the plaint dated 31st May 2022 at paragraph 6 and 9 the existence of Busia Elc No 9 of 2018 and proceeds to draw the uniqueness of the instant suit as against the former suit.

And the unique thing between the instant suit and the former suit is the implementation of Section 94 of the [Land Registration Act](#) No 3 of 2012 which was not an issue in the previous suit.”

22. If I understood counsel well, and I think I did, he is conceding that although the issues canvassed in Busia Elc Case No 9 of 2018 and this case are identical, the unique issue in this case is that “the implementation of Section 94 of the [Land Registration Act](#) NO 3 of 2012 (which) was not an issue in the previous suit.” I do not, however, see how that submission can defeat the defendant’s plea of res judicata. Firstly, the plaintiff was at liberty in Busia Elc Case No 9 of 2018 to plead that the rectification and partition of the suit land be done in accordance with the provisions of Section 94 of the [Land Registration Act](#). Section 7 of the [Civil Procedure Act](#) has the following explanation in paragraph 4:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

23. In the case of [John Florence Maritime Services Ltd](#) (*supra*) the Court went further to say:

“The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. Res judicata based on a cause of action arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings; the latter having been between the same parties or their privies and having involved the same subject matter.

Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings



between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open the issue.”

24. In *Henderson -v- Henderson* 1843 67 E.R 313 a decision which has been followed in this Country, it was stated thus:

“ ... 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 under 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 parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time...” Emphasis mine.

Clearly, the issue of Section 94 of the *Land Registration Act* is one which could and should have been brought up in Busia Elc Case No 9 of 2018.

25. Secondly, the plaintiff has pleaded in paragraphs 9, 10 and 11 of his plaint that following the conclusion of Busia Elc Case No 9 of 2018 and the subsequent visit by surveyors to mark the boundaries of the land parcels NO Samia/Luchululo/Bukhulungu/2011 and 2012, his homestead has been interfered with and he and his family face eviction. That is an issue that ought to have been taken up in Busia Elc Case No 9 of 2018. It cannot be the subject of another suit as *res judicata* frowns against such proceedings.
26. The up-shot of all the above is that having considered the Preliminary Objection herein, I make the following orders:
1. The Preliminary Objection is up-held.
 2. The plaintiff's suit is struck out with costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 18TH DAY OF JULY 2023.

BOAZ N. OLAO

JUDGE

18TH JULY 2023

