



**Andete v Walala (Deceased) Substituted By Shangwe (Environment & Land  
Case 9 of 2021) [2023] KEELC 21167 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21167 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 9 OF 2021  
DO OHUNGO, J  
OCTOBER 31, 2023**

**BETWEEN**

**PATRICK ASHALI ANDETE ..... PLAINTIFF**

**AND**

**SAMWEL SHANGWE WALALA (DECEASED) SUBSTITUTED BY ANJELINA  
MOI SHANGWE ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit as Bungoma ELCC No. 61 of 2018, through originating summons (OS) dated 9<sup>th</sup> June 2018. The matter was later transferred to this court, hence its new case number. The plaintiff averred in the OS that he had become entitled to the parcel of land known as Marama/Shinamwenyuli/568 (the suit property) through adverse possession.
2. The OS was supported by an affidavit sworn by the plaintiff on 9<sup>th</sup> June 2018. He deposed that the defendant was the registered proprietor of the suit property as of the date of his affidavit and that in the year 1988, his uncle Wabuna Luka Wanyama who was then the registered proprietor gifted him the suit property. That he had extensively developed the suit property by growing such crops as maize, beans, groundnuts, cassava and even sugar cane under contract with Mumias Sugar Company Limited. That he built three houses on the suit property, two of which he occupied with his family while the third one was occupied by his mother. He added that he had continuously occupied the suit property to the exclusion of the defendant since 1988 and that the defendant filed a case in court in the year 2016 to have him evicted from the suit property.
3. The defendant (Samwel Shangwe Walala) opposed the OS through his replying affidavit sworn on 8<sup>th</sup> June 2020. He deposed inter alia that he filed Butere SPMCC Number 3 of 2016 against the plaintiff and that the said case was determined in his favour on 17<sup>th</sup> March 2020 wherein the plaintiff was ordered to vacate the suit property. He added that the plaintiff was also a party in Bungoma ELCC No. 109



of 2012 (originally Bungoma HCCC No. 93 of 2005) which suit was dismissed. That, consequently, the plaintiff's case herein is *res judicata*.

4. The initial defendant (Samwel Shangwe Walala) passed away and was substituted by Anjelina Moi Shangwe pursuant to an order made on 28<sup>th</sup> April 2022.
5. At the hearing, the plaintiff testified as PW1 and called Henry Mukalo Wandati (PW2), Joseph Shangwe Anyama (PW3) and Patrick Okinda Chitechi (PW4). The plaintiff that Butere SPMCC Number 3 of 2016 was determined and added that he filed a counterclaim therein seeking to be declared owner of the suit property herein. He further stated that he filed Kakamega ELC Appeal No. 13 of 2020 against the judgment and that the appeal was determined on 31<sup>st</sup> May 2022. PW2 conceded that Bungoma ELCC No. 109 of 2012 (originally Bungoma HCCC No. 93 of 2005) was filed.
6. Anjelina Moi Shangwe testified as DW1 and called Willis Edwin Oponyo Wabwoto (DW2). DW1 produced copies of pleadings and court decisions in the above cases.
7. I have highlighted only the evidence as above since, as will be manifest later in this judgment, I do not need to determine whether the plaintiff has established adverse possession. At the conclusion of the hearing, parties filed and exchanged written submissions.
8. I have considered parties' pleadings, evidence, and submissions. The issues that arise for determination are whether this suit is *res judicata*, whether adverse possession has been established and whether the reliefs sought should issue.
9. *Res judicata* is jurisdictional issue which can be raised at any stage of proceedings. The doctrine has found statutory expression at 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.

10. The Supreme Court addressed the doctrine in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR where it stated:
  - (54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
11. Thus, a plea of *res judicata* will succeed if there had been 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 *Maitihene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
12. There is no dispute that Samwel Shangwe Walala filed Butere SPMCC No. 3 of 2016 against the plaintiff herein seeking his eviction from the suit property herein as well as a permanent injunction to



restrain him from dealing with suit property. Judgment was delivered in the said case on 17<sup>th</sup> March 2020 wherein both eviction orders and permanent injunction were granted. Aggrieved, the plaintiff herein filed Kakamega ELC Appeal No. 13 of 2020.

13. This court delivered judgment in the above appeal on 31<sup>st</sup> May 2022. This court stated as follows:
  15. The record shows that the respondent filed the suit that is the genesis of this appeal on 21<sup>st</sup> January 2016 and that among other reliefs in his plaint, he sought eviction of the appellant from the suit property. Even if there was any time running in favour of the appellant, the respondent effectively reset the countdown to zero years on 21<sup>st</sup> January 2016 when he filed the claim for eviction or repossession. As at 2<sup>nd</sup> March 2016 when the appellant filed his defence with a claim for adverse possession, the requisite 12 years of uninterrupted adverse occupation were far from being met.
  16. Even if I were to be wrong on the effect of the respondent's claim for eviction in the suit in the subordinate court, I note that there is no dispute that the suit property was the subject of litigation in Bungoma High Court Civil Case Number 93 of 2005, a case which was filed by the appellant's grandfather against the respondent herein and in which he sought revocation of the respondent's title to the suit property. The appellant conceded that he substituted his said grandfather and hence became the plaintiff in the said case. He further conceded that the respondent filed a counterclaim in the said matter. A perusal of the counterclaim which was filed on 3<sup>rd</sup> July 2012 shows that the respondent sought eviction of the appellant from the suit property. Consequently, time stopped running as at 3<sup>rd</sup> July 2012 such that by 2<sup>nd</sup> March 2016 when the appellant filed his claim for adverse possession, only slightly less than 4 years had lapsed, a far cry from the requisite 12 years of uninterrupted adverse occupation.
14. The plaintiff filed this suit in the year 2018. In view of the decisions in Butere SPMCC No. 3 of 2016 and Kakamega ELC Appeal No. 13 of 2020, it is manifest that the question of whether the plaintiff could retain possession of the suit property was determined conclusively. Possession and adverse possession go hand in hand. One cannot sustain a claim for adverse possession if his possession has been terminated by the decree of a competent court.
15. I find that the plaintiff's case *res judicata*. That being so, I do not need to determine whether adverse possession has been established and whether the reliefs sought should issue.
16. In view of the foregoing, I strike out the plaintiff's case with costs to the defendant.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**D. O. OHUNGO**

**JUDGE**

