



**Okingo v Nyakako (Environment and Land Appeal E079 of 2021)
[2023] KEELC 21066 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E079 OF 2021
SO OKONG'O, J
OCTOBER 26, 2023**

BETWEEN

SIMEON OKINGO APPELLANT

AND

BENTER JUMA NYAKAKO RESPONDENT

*(Administrator of the Estate of Vitalis Omach Ondele) (Being an Appeal
from the ruling made in Kisumu Chief Magistrate's Court ELC Case
No. 38A of 2021 by Hon. W.K. Onkunya SRM on 27th October 2021)*

JUDGMENT

Brief Facts

1. This appeal is challenging the ruling of Hon. W.K. Onkunya SRM delivered on 27th October 2021 in Kisumu Chief Magistrate's Court ELC Case No. 38A of 2021. Sometime in June 2014, the Appellant herein together with 4 others filed a suit before this court namely, Kisumu HCCC No. 160 of 2014(O.S) against the Respondent herein and one, Leonida Achieng Omach seeking among others, a determination of whether the Appellant and the said other persons should be registered as the proprietors of a portion of all that parcel of land known as Title No. Kisumu/Kolunje/898 (from now on also referred to only as "the suit property") measuring a total of approximately 6 acres of which the Appellant was entitled to 3 acres by virtue of adverse possession. The Appellant averred that the Respondent and the said Leonida Achieng Omach were the administrators of the estate of Vitalis Omach Ondele, deceased (from now on also referred to only as "the deceased") who was the registered proprietor of the suit property. The Appellant averred that his father was registered as the proprietor of all that parcel of land known as Title No. Kisumu/Kolunje/897 (from now on also referred to only as "Plot No. 897"). The Appellant averred that unknown to the Appellant and his father, the deceased caused a portion of Plot No. 897 measuring 3 acres to be fraudulently registered as part of the suit property. The Appellant averred that the deceased and the Respondent herein had never used the



- said portion of Plot No. 897 measuring 3 acres which was included as part of the suit property. The Appellant averred that he had occupied and used the said parcel of land measuring 3 acres for over 40 years and that his said occupation and use of the said parcel of land had been peaceful and open.
2. In response to the Appellant's claim, the Respondent herein and Leonida Achieng Omach filed a suit against the Appellant and his co-plaintiffs in Kisumu HCCC No. 160 of 2014(O.S), before this court namely, Kisumu ELC No. 116 of 2014 (also referred to as ELC No. 126 of 2014), Benta Juma Nyakako & Another v. Simeon Okingo & 4 Others. In that suit, the Respondent herein, Benta Juma Nyakako sought an order for the eviction of the Appellant herein and his co-defendants in that suit from the portion of the suit property that they were occupying and damages for trespass. ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 were consolidated. In a judgment delivered on 27th June 2019, this court dismissed the claim by the Appellant herein and his co-plaintiffs in ELC No. 160 of 2014(O.S) over the suit property, Kisumu/Kolunje/898 and ordered the Appellant herein and his said co-plaintiffs to vacate the portions of the suit property which they were occupying within 45 days. The Appellant herein and his said co-plaintiffs were also ordered to hand over possession of the said portions of the suit property to the Respondent herein and Leonida Achieng Omach and to pay Kshs. 200,000/- as damages together with the costs of the suit.
 3. On 6th April 2021, the Appellant herein filed another suit against the Respondent in her capacity as the administrator of the estate of Vitalis Omach Ondele (deceased) in the lower court namely, Kisumu Chief Magistrate's Court ELC Case No. 38A of 2021, Simeon Okingo v. Benter Juma Nyakako(Sued as administrator of Vitalis Omach Ondele) (from now on also referred to only as "the lower court suit"). In his lower court suit, the Appellant averred that the Appellant's family discovered in 1978 that the suit property, Kisumu/Kolunje/898 then owned by the deceased had encroached on Kisumu/Kolunje/897 owned by the Appellant's family and the two parties agreed that the deceased would surrender the portion of the suit property that had encroached on Kisumu/Kolunje/897 to the Appellant's family. The Appellant averred that he was the registered proprietor of Kisumu/Kolunje/897 and that he had stayed on and used the portion of the suit property that had encroached on Kisumu/Kolunje/897 for more than 66 years and that he had acquired the same by adverse possession. In his amended plaint dated 19th April 2021, the Appellant averred that there was no pending or concluded suit between the parties over the same subject matter. The Appellant sought a permanent injunction restraining the Respondent from interfering with, trespassing or occupying Kisumu/Kolunje/897 and the portion of the suit property, Kisumu/Kolunje/898 that had encroached or overlapped into Kisumu/Kolunje/897. The Appellant also sought an order for the resurvey of the two parcels of land and the transfer of or return of the portion of the suit property, Kisumu/Kolunje/898 that had encroached or overlapped into Kisumu/Kolunje/897 back to Kisumu/Kolunje/897.
 4. The Respondent filed her defence in the lower court on 18th May 2021 in which she denied the Appellant's claim in its entirety. The Respondent averred further that the Appellant's suit was res judicata in that there was a concluded suit between the same parties over the same subject matter namely; ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 (Consolidated). On 18th May 2021, the Respondent filed an application in the lower court by way of Chamber Summons dated 17th May 2021 seeking the striking out of the Respondent's suit for being res judicata. The Respondent averred that in ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 (Consolidated) that was between the same parties over the same subject matter, this court had in a judgment delivered on 27th June 2019 found that the Respondent had proved her claim against among others the Appellant in respect of the suit property and that the Appellant had failed to prove his adverse possession claim over the same property. The Respondent averred that the court ordered among others the Appellant to vacate the suit property



and handover vacant possession to the Respondent within 45 days. The Respondent averred that the Appellant's suit in the lower court was res judicata and as such an abuse of the process of the court.

5. The Appellant opposed the Respondent's application in the lower court through a replying affidavit sworn on 23rd June 2021. The Appellant admitted that in ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 (Consolidated), the court had ordered him to give vacant possession of the portion of the suit property that he was occupying to the Respondent. The Appellant contended however that the cause of action in ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 (Consolidated) was different from the cause of action that he had pleaded in the lower court. The Appellant contended that his cause of action in the lower court concerned "encroachment or intrusion into Kisumu/Kolunje/897" which was not the subject of ELC No. 160 of 2014(O.S) and ELC No. 116 of 2014 (Consolidated). The Appellant averred that the lower court suit was not res judicata since it concerned Kisumu/Kolunje/897 rather than Kisumu/Kolunje/898.
6. The Respondent's application seeking to strike out the lower court suit for being res judicata was heard by the lower court and in a ruling delivered on 27th October 2021, the lower court found that the lower court suit was res judicata and struck it out with costs to the Respondent.

The appeal

7. The Appellant was dissatisfied with the said ruling of the lower court. In his Memorandum of Appeal dated 21st November 2021, the Appellant challenged the lower court's ruling on the following grounds;
 1. The Learned Magistrate erred in law by not determining the principle or doctrine of res judicata in the case.
 2. The Learned Magistrate erred in law by not taking into account that the issue that was determined in ELC Case No. 160 of 2014 as consolidated with Kisumu ELC No. 126 of 2014 was different from what was to be determined in ELC Case No. 38A of 2021.
 3. The Learned Magistrate erred in law in "that the two grounds for determination in this two files were an adverse passion(sic) and encroachment but not parties in the ELC No. 160 of 2014 as consolidated with Kisumu ELC No. 126 of 2014 and ELC Case No. 38A of 2021."
 4. The Learned Resident Magistrate erred in law by not interpreting section 7 of the [Civil Procedure Act](#) in the best way for the benefit of the Appellant.
8. The Appellant prayed that the appeal be allowed and the ruling of the lower court be set aside. The Appeal was argued by way of written submissions. The Appellant filed submissions and supplementary submissions on 10th May 2023 and 6th July 2023 respectively in which he mostly reiterated the submissions that he made in the lower court in opposition to the Respondent's application. The Respondent filed her submissions on 6th June 2023. The Respondent also reiterated the submissions that she made before the lower court.

Analysis and Determination

9. I have considered the pleadings in the lower court, the Respondent's application in the lower court, the ruling of the lower court on the application, and the grounds of appeal put forward by the Appellant. I have also considered the submissions made both in the lower court and before this court. The application that was before the lower court was a straightforward one. What the court was called upon to determine was whether the Appellant's suit was res judicata in view of the earlier proceedings between the parties over the same subject matter. The court found that the lower court suit was res judicata. That finding has been challenged on various grounds. What I need to determine is whether



- the lower court erred in its finding that the lower court suit was res judicata and in striking out the Appellant's suit.
10. Res judicata is provided for in Section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya which provides that:
- 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”
11. In [Black's Law Dictionary](#) 10th Edition “res judicata” is defined 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...”
12. In [Christopher Kenyariri v. Salama Beach](#) [2017] eKLR, the court stated as follows on res judicata:
- ...the following elements must be satisfied...in conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit;
 - b) Former suit between same parties or parties under whom they or any of them claim;
 - c) Those parties are litigating under the same title;
 - d) The issue was heard and finally determined;
 - e) The court was competent to try the subsequent suit in which the suit is raised.”
13. In [E.T v. Attorney General & Another](#) [2012] eKLR the court stated that:
- “The Courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”
14. In [Omondi v. National Bank of Kenya Limited and Others](#) [2001] EA 177 the Court stated that:
- “Parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”
15. In that case, the Court cited Kuloba J., in the case of [Njangu v. Wambugu and another](#) Nairobi HCCC No.2340 of 1991 (unreported) where he stated that:
- 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....”



16. I have no doubt in my mind that the Appellant's suit in the lower court was *res judicata*. In his Originating Summons in ELC No. 160 of 2014, the Appellant and 4 others sued the Respondent herein together with one, Leonida Achieng Omach. The two were sued in their capacities as the administratrixes of the estate of Vitalis Omach Ondele, deceased. The Appellant was the registered owner of Kisumu/Kolunje/897 while the deceased was the registered owner of Kisumu/Kolunje/898. In the suit, the Appellant claimed that a portion of his land that was supposed to be part of Kisumu/Kolunje/897 measuring 3 acres had been registered as part of Kisumu/Kolunje/898 owned by the deceased. The Appellant sought the recovery of that land by adverse possession from the Respondent herein and her then co-defendant. At the same time, the Respondent and her said co-defendant brought a counter-suit against the Appellant and his co-plaintiffs in ELC No. 160 of 2014(O.S). The Respondent's suit was ELC No. 116 of 2014(also referred to as ELC No. 126 of 2014). In ELC No. 116 of 2014, the Respondent claimed that the Appellant herein and his co-plaintiffs in ELC No. 160 of 2014(O.S) were trespassers on Kisumu/Kolunje/898 and sought their eviction from the portions of the said property that they were occupying and damages for trespass. The two cases were consolidated and heard by a court of competent jurisdiction. The court found no basis for the Appellant's claim over a portion of Kisumu/Kolunje/898. The court found merit in the Respondent's contention that the Appellant and his co-plaintiffs in ELC No. 160 of 2014(O.S) were trespassers on Kisumu/Kolunje/898 and ordered them to vacate the portions of the property that they were occupying. The court also condemned them to pay damages for trespass. The said decision of the court was not appealed. I am in agreement with the Respondent that the issue of the ownership of a portion of Kisumu/Kolunje/898 that the Appellant claimed to belong to him and should have formed part of Kisumu/Kolunje/897 was conclusively determined by the court in favour of the Respondent.
17. In the suit that was brought by the Appellant in the lower court (Kisumu Chief Magistrate's Court ELC Case No. 38A of 20210) the Appellant raised for determination once again the issue of whether or not part of his land, Kisumu/Kolunje/897 was included as part of the Respondent's land, Kisumu/Kolunje/898. The court had found no merit in this claim. The Appellant could not revive this determined dispute by bringing in the issue of a resurvey. If the Appellant wanted a resurvey, it should have formed part of his claim in the earlier suit. Explanation 4 to Section 7 of the *Civil Procedure Act* aforesaid provides that:
- "Any matter which might and ought to have been made a 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."
18. In *Uhuru Highway Development Ltd. v. Central Bank of Kenya & Others* CA No. 36 of 1996, the court stated that:
- "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 judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
19. I am of the view that the issues such as, whether or not the title No. Kisumu/Kolunje/898 had overlapped the Appellant's title No. Kisumu/Kolunje/897 and whether or not a re-survey of the two properties was necessary to determine the alleged overlap and encroachment belonged to the first suit between the parties and ought to have been raised in the same either in the Appellant's Originating Summons or the Respondent's suit. The same could not form a basis for a new suit.



Conclusion

20. I find no merit in the appeal before me. The same is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

The Appellant in person

Ms. Khisa for the Respondent

Ms. J.Omondi-Court Assistant

