



**Chengwali (Suing as Administrator of Chengwali Walukha) v Anjelimo & 7 others (Environment and Land Appeal E001 of 2024) [2025] KEELC 3526 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3526 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
EC CHERONO, J  
APRIL 30, 2025**

**BETWEEN**

**MICHAEL WASWA CHENGWALI ..... APPELLANT  
SUING AS ADMINISTRATOR OF CHENGWALI WALUKHA**

**AND**

**MAURICE ANJELIMO ..... 1<sup>ST</sup> RESPONDENT  
SOLOMON WEKESA ANJELIMO ..... 2<sup>ND</sup> RESPONDENT  
ANDREW WANYAMA ANJELIMO ..... 3<sup>RD</sup> RESPONDENT  
MOSES ANJELIMO ..... 4<sup>TH</sup> RESPONDENT  
GEOFFREY ANJELIMO MUKWANA ..... 5<sup>TH</sup> RESPONDENT  
JUMA ANJELIMO ..... 6<sup>TH</sup> RESPONDENT  
BEATRICE BARASA ..... 7<sup>TH</sup> RESPONDENT  
CHARLES WANYONYI ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling of HON. Gladys Adhiambo, SPM  
delivered on 29/11/2023 in Kimilili SPM-ELC NO. 49 of 2020)*

**JUDGMENT**

1. The Appellant, Michael Waswa Chengwali was the plaintiff while the Respondents were defendants in the former suit before the Senior Principal Magistrate at Kimilili SPM-ELC No.49 of 2020.
2. Vide a plaint dated 3<sup>rd</sup> September 2020, the Appellant/Plaintiff sought an order of a permanent injunction and eviction against the Respondents/Defendants from land parcel No. Kimilili/Kamakuywa/1026



3. The Defendants filed a joint statement of defence dated 4<sup>th</sup> February 2022 and sought to have the suit dismissed with costs. Before the suit was heard and determined, the Respondent filed a Notice of Motion application dated 12/09/2023 seeking to struck out the former suit for being Res-judicata. The said application was supported by the affidavit of Mourice Anjelimo sworn on even date. A copy of a Judgment from the High Court in HCCC No. 121 of 1999 and Court of Appeal in CA No.216 of 2010 were annexed marked MWA1 and 2 respectively. The said application was opposed with grounds of opposition dated 29/09/2023. The parties agreed to canvass the said application by way of written submissions. While rendering herself on 30/11/2023, the trial Magistrate allowed the said application and struck out the Appellant/Plaintiff's suit with costs. Being aggrieved with the decision, the Appellant has preferred the present appeal on the following three grounds;
  1. The learned trial Magistrate erred in law and fact in holding that the suit was res-judicata contrary to the evidence on record.
  2. The learned trial Magistrate erred in law and fact in failing to appreciate that the prayers in the suit were distinct from the previous suits and thus the suit was not res-judicata.
  3. The Ruling was against the weight of evidence on record.
  4. The Appellant through the Firm of M/s Athung'a & Co. Advocates filed his submissions dated 30/01/2025 while the Respondents filed theirs through the Firm of M/s Mukisu & Co. Advocates dated 15/01/2025.

#### **Appellants Submissions**

5. In his submissions, the Appellant admitted having sued one Azelimo Wanyama Chemiat in Bungoma High Court Civil Case No. 121 of 1999 which was allowed and the name Azelimo Wanyama Chemiat was cancelled. He submitted that the said Azelimo Chemiat appealed at Eldoret in Civil Appeal No.216 of 2010 which was dismissed. He submitted that the former suit is not res-judicata and that the ingredients under section 7 of the [Civil Procedure Act](#) do not fit the case before the trial court. He submitted that the parties in the suits mentioned above are not the same as the current Respondents and that the prayers sought in the plaint were distinct from the previous one. He submitted that for res-judicata to apply, the issues must be the same.

#### **Respondents Submissions**

6. The Respondents on the other hand combined the three grounds of appeal into one ground namely; Whether the learned trial Magistrate's ruling striking out the Appellant's suit for being Res-judicata was correct. They submitted that section 7 of the [Civil Procedure Act](#) prohibits courts from adjudicating upon matters which are Res-judicata. They argued that the Appellant previously filed Bungoma HCCC No. 121 of 1999 (Michael Waswa Chengwali v Anzelimo Wanyama Chemiat) which was heard and judgment delivered by Justice F.N Muchemi (as she then was) on 9/6/2010. The Appellant was dissatisfied and preferred an appeal to the court of appeal at Eldoret being C.A No. 216 of 2010 between Anzelimo Wanyama Chemiat v Michael Waswa Chengwali. The said appeal was heard by a three judge bench who delivered their verdict on 15/5/2013. They submitted that the Appellant herein, Michael waswa Cheng'wali was a party in Bungoma HCCC No. 121 of 1999 while the Respondent herein were the sons to Cheng'wali Walukha while the 7<sup>th</sup> Respondent was the spouse. They submitted that the previous suit and the current suit are between same parties and that the defendants herein occupy land parcel No. Kimilili/Kamakuywa/1026 courtesy of their deceased father and that the subject matter in the previous suit was the same as the suit property in the former suit before the trial magistrate. It is also submitted that the prayers sought in the lower court were



substantially in issue in the previous suit and in order to avoid multiplicity of suits and contradictory judgments, a party should make all the prayers that are capable of being granted in a suit. The following case was relied; Zephaniah Gichure Ndungu v Rwaikamba Rwathia Trading CO. Ltd & Anor [2014] eKLR

7. In conclusion, the Respondents submitted that the trial Magistrate did not err in striking out the Appellant's case and urged the court to find that this appeal lacks merit and have it dismissed with costs.

### **Legal Analysis And Decision**

8. I have considered the Record of Appeal, the submissions by the parties and the relevant law. This appeal arises from the Ruling of a Notice of Motion dated 12<sup>th</sup> September, 2023 where the Defendants/ Respondents had sought to have the Appellants' former suit struck out for being Res-judicata. According to the defendants/Respondents, the issues raised in the former suit were directly and substantially in issue in a previous suit being Bungoma HCCC No. 121 of 1999 between Michael Waswa Cheng'wali v Anzelimo Wanyama Chemiat and that the subject matter in the aforementioned case was land parcel No. Kimilili/Kamakuywa/1026. It was alleged that the Judgment in the aforesaid suit was delivered by Lady Justice F.N Muchemi on 9<sup>th</sup> June, 2010. That the Appellant who is the 1<sup>st</sup> Appellant in this appeal preferred an appeal to the Court of Appeal at Eldoret vide CoA No. 216 of 2010 between Anzelimo Wanyama Chemiat v Michael Waswa Cheng'wali. That a three judge bench constituting Justice D.K Maraga, Justice Otieno Odek and Justice Ole Kantai JJA rendered themselves on 15<sup>th</sup> May 2013 dismissing the said appeal and confirming the judgment by the trial judge. They contend that the issues litigated upon in Bungoma HCCC No. 121 of 1999 and Eldoret CA No. 216 of 2010 are similar to the ones in the former suit as they are based on the legal proprietorship of the suit land parcel No. Kimilili/Kamakuywa/1026.
9. Section 7 of the Civil Procedure Act speaks to Res-judicata in the following terms;

“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 can 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. From the provisions of the law, it is clear that for the doctrine of res judicata to apply, the previous suit which has been determined and the subsequent suit must conjunctively bear the following three elements;
  - i. Both matters must have been addressing similar issues directly and substantially.
  - ii. Both matters must have had similar parties whether such parties claim in their own right or through others; and
  - iii. The previous matter must have been determined by a court of competent jurisdiction.
11. I have looked at the application before the trial Magistrate dated 12<sup>th</sup> September 2023 and the judgments in respect of the two cases being Bungoma HCCC No. 121 of 1999 between Michael Waswa Cheng'wali v Anzelimo Wanyama Chemiat and the Court of Appeal case at Eldoret No. 216 of 2010 between Anzelimo Wanyama Chemiat v Michael Waswa Chebg'wali as well as the submissions by the parties. The Plaintiff in the previous suit being Bungoma No. HCCC No. 121 of 1999 was Michael Waswa Chang'wali who was also the plaintiff in the former suit being Kimilili PM-ELC No.49 of 2020. After the hearing of the previous suit, Judgment was entered in favour of Michael Waswa



Cheng'wali, the then plaintiff. Anzelimo Wanyama Chemiat, the defendant therein was aggrieved and preferred an appeal to the Court of Appeal sitting at Eldoret in CA No. 216 of 2010. On 15<sup>th</sup> May 2013, the Court of Appeal rendered itself by dismissing the appeal with costs and confirmed the judgment of the High Court.

12. The issues that this Honourable Court must ask itself is whether the three elements outlined under section 7 of the [Civil Procedure Act](#) are present. The first is whether both the previous suit and the former suit have addressed similar issues directly and substantially, have had similar parties claiming in their own right or through other parties and whether the previous suit was determined by a court of competent jurisdiction. On the first issue, the previous suit being Bungoma HCCC No. 121 of 1999 was between Michael Waswa Cheng'wali as the plaintiff who was also the plaintiff in the former Suit being Kimilili PM-ELC No. 49 of 2020 while the defendant was Anzelimo Wanyama Chemiat and his sons in the subsequent/former suit. The claim by the plaintiff against the defendant in the previous suit was for a declaration that the defendant's registration as proprietor of land parcel No. Kimilili/Kmukuywa/1026 was erroneous and that the said land to be transferred to the plaintiff as the administrator of the estate of Cheng'wali Walukha Nguti. The trial court agreed with the plaintiff and entered judgment in his favour. From the analysis by the trial judge, it is apparent that the Cheng'wali Walukha Nguti (deceased) who was father to the plaintiff occupied the suit land and stayed therein with his family for more than 20 years. No pleadings were availed before the trial Magistrate to establish whether the defendants were in possession and occupation of the suit land at the time the previous suit was instituted. At paragraph 7 of the statement of defence by the defendants in the former suit being Kimilili PM-ELC No. 49 of 2020 dated 4<sup>th</sup> February 2022, the defendants averred that they are in actual occupation and possession of the suit land parcel No. Kimilili/Kmukuywa/1026 and have been in such occupation and possession since 1960s. In his plaint dated 3<sup>rd</sup> September 2020, the plaintiff sought orders for inter-alia a permanent injunction and eviction of the defendants from the suit land. However, the plaintiff did not indicate when the defendants allegedly trespassed onto the suit land. From the averments in the plaint, the plaintiff has given the background and sequence of his claim to the suit land dating back to the filing of the previous suit and the subsequent appeal by Anjelimo Wanyama Chemiat who was the defendant/Appellant. On this ground, I find that both the previous suit and the former/subsequent suit was between the same parties or between parties under whom they or any of them could claim, litigating under the same title in a court of competent jurisdiction. The doctrine of res judicata is premised on the understanding that a party ought to bring his claim as a whole and not in bits. The Defendants in their statement of defence in the former suit averred that they were in occupation and possession of the suit land and have been living therein since 1960s. The plaintiff did not file a reply to the defence denying the defendants' averments. If the Defendants/ Respondents were indeed in occupation and possession of the suit land at the filing of the previous suit being Bungoma HCCC No. 121 of 1999 which is not denied, then the subsequent claim by the Appellant in the former suit ought to have been brought as additional prayers in the previous suit. The Appellant cannot be allowed to bring his claims in bits. The law stops him from filing a subsequent suit for additional prayers over the same property twelve (12) years after the determination of the previous suit. Therefore, the issues which were determined in the previous suit (Bungoma HCCC No.121 of 1999) were directly and substantially in issue in the former suit being Kimilili PM-ELC No. 49 of 2020. It is important to note that the court which determined the previous suit (HCCC No. 121 of 1999) was a court competent to try the issues in finality.



13. Kuloba J in the case of Jangu v Wambugu and Another; Nairobi HCCC No. 2340 of 1991(unreported) held as follows;

“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....”

14. Again in the Court of Appeal case of Siri Ram Kaura v M.J.E Morgan CA No. 71/1960 [1961] EA, the Court stated as follows;

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata....

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of the new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not by reasonable diligence have ascertained by me before...”

15. Guided by the above jurisprudence, it is common ground that the parties herein either in their own names or parties under whom they or any of them claim or was sued previously litigated in Bungoma HCCC No. 121 of 1999 over the same suit land. The case was heard and finally decided by a competent court and a judgment was delivered on 9<sup>th</sup> June, 2010 by Lady Justice F.N Muchemi. The Defendant was dissatisfied and preferred an appeal to the Court of Appeal at Eldoret being CA No. 216 of 2010. The said appeal was also heard and judgment was delivered on 15<sup>th</sup> May 2013.
16. In Kimilili PM-ELC No. 49 of 2020, the plaintiff sought orders for inter-alia a permanent injunction and eviction. The defendants, though not parties in the previous suit averred that they have been in occupation and possession of the suit land since the 1960s. Those averments are not controverted. If the defendants were indeed in occupation and possession of the suit property since 1960s, it follows that when the appellant instituted the previous suit HCCC No.121 of 1999, he should have sought the subsequent orders he was seeking in the former suit as additional prayers. It is obvious from the above pleadings that not only was the suit land the subject in both the previous suit No. Bungoma HCCC No.121 of 1999 and in the former suit NO, Kimilili PM-ELC No. 49 of 2020 and further, that the twin issues in both cases was the ownership of the suit land parcel No. Kimilili/Kamukuywa/1026. In an attempt to persuade this court that this suit is not res judicata, as the issues are different, Counsel for the Appellant has submitted at page 2 of his submissions as follows;

“....The prayers sought in the plaint were distinct from the previous one. The Appellant prayed majorly for eviction and injunction whereas in the earlier suits the issue was whether Azelimo Wanyama bought the land. For res judicata to apply the issues must be the same. In this case the issues are not the same...”



17. If I understand Counsel well, and I think I did, he is conceding that although the issues canvassed in Bungoma HCCC No. 121 of 1999 and the former suit No. Kimilili PM-ELC 49 of 2020 are identical, the unique issue is that the prayers sought in the twin cases are different.

18. In the case of John Florence Maritime services ltd & Another v Cabinet Secretary for Transport & Infrastructure & Others [2015] eKLR, the court held;

“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 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 seek to re-open the same.”

19. In Henderson v Henderson [1843] 67 E.R 313 the Court held 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, 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.”

20. Clearly, the issue that the prayers in the subsequent/former suit (Kimilili PM-ELC No. 49 of 2020) being distinct from the previous suit (Bungoma HCCC No.121 of 1999) is one which could and should have been brought up in the previous suit being Bungoma HCCC No. 121 of 1999.

21. From my re-evaluation and reconsideration above, I have no reason to fault the decision by the trial Magistrate in striking out the former suit for being res judicata. Consequently, I find this appeal devoid of merit and the same is hereby dismissed. To promote unity and cohesion between the parties who are neighbours, I order each party to bear their own costs.

22. Orders accordingly.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF APRIL, 2025**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Athung'a for the Appellant

M/S Akinyi H/B for Mukisu for the Respondent

Bett C/A

