



**Onyancha v Kisilu & another (Environment & Land Case  
13 of 2020) [2022] KEELC 3086 (KLR) (20 January 2022) (Ruling)**

Neutral citation: [2022] KEELC 3086 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 13 OF 2020**

**YM ANGIMA, J  
JANUARY 20, 2022**

**BETWEEN**

**BENEDICT ONYANCHA ..... APPLICANT**

**AND**

**BENJAMIN KAKUTI KISILU ..... 1<sup>ST</sup> RESPONDENT**

**MARY WAMBUI NDUNGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. By an originating summons dated 10<sup>th</sup> June, 2020 grounded upon section 38 of the *Limitation of Actions Act* (cap. 22) and order 37 rule 7 of the *Civil Procedure Rules*, 2010, the Applicant sought determination of various questions in relation to Title No. Nyandarua/Kaimbaga/480 (the suit property). The gist of the summons was the determination of the question of whether or not the applicant had acquired adverse possession of a portion of 26 ha out of the suit property and whether the same should be transferred to him.
2. The said summons was supported by an affidavit sworn by the applicant on June 10, 2020 and the various exhibits thereto. The applicant contended that he bought a portion of the suit property in 1991 from one William Onsare Isaboke and that he took possession thereof and developed it for a period exceeding 12 years.
3. In his supporting affidavit the Applicant acknowledged that he was aware that the suit property had been the subject of legal proceedings in Nyahururu ELC No 457 of 2017 and Nyahururu ELC No 458 of 2017 (the previous suits). The said suits were apparently consolidated and heard together and the Applicant had been sued as a Defendant in No 458 of 2017.



## **B. The 2<sup>nd</sup> Respondent's Preliminary Objection**

4. By a notice of preliminary objection dated June 7, 2020 the 2<sup>nd</sup> respondent objected to the plaintiff's suit for adverse possession essentially on the basis that it was res judicata in view of the previous suits. It was contended that the suit was barred under section 7 of the *Civil Procedure Act* (cap 21) and the doctrine of res judicata. The 2<sup>nd</sup> respondent contended that the Applicant was party to ELC No. 458 of 2017 hence he was bound by the resultant judgment.

## **C. Directions on Submissions**

5. When the matter came up for directions on the preliminary objection, it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the 2<sup>nd</sup> respondent filed her submissions on October 18, 2021 whereas the Applicant filed his on November 2, 2021.

## **D. The Issues for Determination**

6. The court is of the opinion that the main question for determination is whether or not the plaintiff's suit for adverse possession is res judicata in view of the previous suits and the resultant judgment.

## **E. Analysis and Determination**

7. The court has considered the submissions and material on record on the issue. Whereas the 2<sup>nd</sup> respondent submitted that the suit was res judicata in view of the judgment in the consolidated suits, the Applicant contended otherwise. The Applicant submitted that he was merely a defendant in ELC NO 458 of 2017 and that he was absolved from any legal liability hence the doctrine of res judicata could not apply to his own claim for adverse possession.
8. The material on record indicates that the previous suits (OS) were claims for adverse possession in respect of the suit property. The parties in ELC No. 457 of 2017 were Mary Wambui Ndungu (Plaintiff) v Benjamin Kisilu (defendant) whereas in ELC No 458 of 2017 the parties were Mary Wambui Ndungu v Benjamin Kisilu, William Onsare and Benedict Onyancha (defendants). In both suits the plaintiffs were claiming adverse possession of the suit property.
9. The material on record further shows that the said suits were consolidated for hearing and vide a judgment dated and delivered on October 22, 2019 the court (Hon MC Oundo J) granted adverse possession of the suit property to the 2<sup>nd</sup> respondent and issued a permanent injunction against William Onsare restraining him from remaining, using or occupying the suit property. It is instructive that the applicant in this suit claims to have bought a portion of the suit property from the said William Onsare.
10. It is also apparent from the record that the applicant did not participate in the previous suits even though he was aware of them. The explanation for his failure to participate in contained in paragraph 13 of the affidavit in support of his originating summons as follows:

” That I did not enter appearance in the said suit as I was made to believe that I would be called upon as a witness to testify on behalf of the Plaintiff in Nyahururu ELC No 457 of 2017 (OS) which was consolidated with Nyahururu ELC No 458 of 2017 as the said dispute in both suits touch on the same property.”



11. Section 7 of the *Civil Procedure Act* provides, inter alia that :-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directed and substantially in issue in a former suit between the same parties, or between parties under whom they or any of their claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such court.”

12. In the case of *Kamunye & others v The Pioneer General Assurance Society Ltd* (1971) EA 263 at page 254, the test for res judicata was summarized as follows:

“The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time. Green – halgn v Mallard, [1974] 2 All E.R 255. The Subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply *Jadva Karsan v Harnam Singh Bhogal* [1953], 20 E.A.C.A 74.”

13. The material on record reveals that the parties in the instant suit were also parties in the previous suits. The suit property in both instances was Title No. Nyandarua/Kaimbaga/480. The issue in both instances was who not entitled to the suit property on account of adverse possession. The court is of the opinion that even though the Applicant in the instant suit was sued as a Defendant in the previous suits he had an opportunity to raise and ventilate his claim even by means of a counter – claim.

14. The Applicant’s explanation for failure to participate in the previous proceeding is not plausible at all. A person who has been sued as a defendant cannot simply sit back and wait to be called as a mere witness in the proceedings. He is not entitled to ignore the proceedings in the hope that he shall institute his own proceedings later on. A party who considers to have a legitimate claim is not entitled to litigate by instalments otherwise litigation shall never come to an end.

15. The rationale for the doctrine was res judicata was explained in the case of *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & Others* [2015] 2 EA 236 as follows:

“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. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of



general application and it matters not whether the proceedings in which it is raised are constitutional in nature.”

16. The court is thus satisfied that the applicant in the instant suit is trying to re-open and re-litigate issues which were canvassed and determined in the previous suits. The plaintiff had every opportunity to canvass his competing claim for adverse possession in the previous suits but he did not choose to avail himself of the opportunity. In case the court is wrong on the issue of res judicata, the court is of the opinion that the plaintiff’s claim is untenable for another reason. The judgment which was rendered in the previous suits was a judgment in rem. It declared the rights of the 2<sup>nd</sup> respondent against the whole world. The doctrine of issue estoppel may thus bar the applicant in the instant suit from re-opening or overturning the said judgment other than through an appeal or review. If the court were to accede to the applicant’s quest and hear the instant suit there would be a real danger of the court making two inconsistent decisions on the same issue of adverse possession.

#### **F. Conclusion and Disposal**

17. The upshot of the foregoing is that the court finds merit in the 2<sup>nd</sup> respondent’s notice of preliminary objection on the competence of the applicant’s suit. Accordingly, the preliminary objection is hereby sustained and the applicants’ originating summons dated June 10, 2020 is hereby struck out with no order as to costs.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20<sup>TH</sup> DAY OF JANUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

No appearance for the Applicant

Mr. Nderitu Komu for the 2<sup>nd</sup> Respondent

No appearance for the 1<sup>st</sup> Respondent

C/A - Carol

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**Y. M. ANGIMA**

**ELC JUDGE**

