



REPUBLIC OF KENYA



KENYA LAW
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**Ndege & another v Okinda & 2 others (Environment & Land Case
11 of 2021) [2022] KEELC 3369 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 11 OF 2021
GMA ONGONDO, J
MAY 31, 2022
FORMERLY MIGORI ELC CASE NO. 40 OF 2019**

BETWEEN

**JOHN NDEGE 1ST PLAINTIFF
ODHIAMBO NDEGE 2ND PLAINTIFF**

AND

**PETER OWINO OKINDA 1ST DEFENDANT
LAND REGISTRY HOMA BAY LAND REGISTRY 2ND DEFENDANT
THE HON. ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. On June 18, 2019, the applicant through M/S Agure Odero & Company Advocates mounted this suit by way of Originating Summons dated June 17, 2019 pursuant to, inter alia, sections 7 and 8 of the *Limitations of Actions Act*, cap 22 Laws of Kenya as read with section 1A, 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya and order 37 rule 7 and 14 of the *Civil Procedure Rules*, 2010. The plaintiffs claim to have acquired a portion of land measuring approximately six decimal three three hectares (6.33 Ha) in area being part of L.R. No. Kabuoch/K/K/Koguta/1245 measuring approximately fifteen decimal six six hectares (15.66 Ha) in area (the suit property herein) by way of adverse possession.
2. The plaintiffs allege that the 1st defendant registered the whole of the suit property in his name after the demise of his father, Okinda Midialo (deceased), without carrying out succession as envisaged under the *Law of Succession Act* chapter 160 Laws of Kenya. That the plaintiffs' occupation and possession of 6.33 Ha of the suit property, has been long and uninterrupted. That they have built structures, planted trees, grown crops and fruits thereon.



3. The plaintiffs pray that the court be pleased to order the 1st respondent to execute the necessary transfer instruments to facilitate transfer and registration of the suit property in the names of the plaintiffs. That in default of the same, then the Deputy Registrar of the honourable court to execute the transfer instruments in favour of the plaintiffs through the 2nd and 3rd defendants.
4. Further, the plaintiffs urged the court to set aside Homa Bay Magistrate's Court Misc Application No. 18 of 2006 in favour of the plaintiffs' claim No. 163 of 2008 initially lodged at Riana Land Disputes Tribunal. That the said Tribunal had no jurisdiction in dealing with a parcel that had a title deed.
5. The plaintiffs annexed several documents to their Originating Summons including copy of proceedings in Ndhiwa Law courts Civil Case No. 41 of 1973 and copy of decree in Homa Bay Magistrate's Court Misc Application No. 18 of 2006. Together with the Originating Summons, the plaintiffs filed a Notice of Motion Application dated 17th June 2019 on 18th June 2019. The applicants prayed for conservatory orders by way of injunction restraining the defendant by himself, servants, agents and/or employees or otherwise whoever from constructing, trespassing, interfering, tilling and/or cultivating and/or in any manner whatsoever dealing with the suit property pending the hearing and determination of this suit. However, upon hearing the parties on 19th January 2022, the court ordered and directed the parties to maintain the prevailing status quo over the suit property pending the hearing and determination of this suit.
6. It is noteworthy, that the suit against the 2nd and 3rd defendants was withdrawn with no orders as to costs on 2nd February 2021. This followed an application by the plaintiff's counsel which was allowed accordingly.
7. On 3rd November 2021, the 1st defendant through the firm of Kijana and Company Advocates, filed a Notice of Preliminary Objection dated 1st November 2021 and a supporting affidavit of twenty nine paragraphs sworn on even date. The 1st defendant deposed therein, inter alia, that the honourable court lacks jurisdiction to entertain, determine and grant the reliefs sought as against the 1st defendant. That the suit offends the provisions of section 7 of the Civil Procedure Act as the suit herein is res-judicata.
8. The 1st defendant further deposed that the suit parcel of land has been the subject of litigation right from the Riana Land Disputes Tribunal Claim No. 163 of 2008 which upheld the decision in Ndhiwa Law Courts Civil Case No.41 of 1973 which decision was upheld on appeal to the Minister. That the plaintiffs were moved to K/K/Oguta/1263 and the suit property was given to the 1st defendant's family.
9. The 1st defendant asserted that the award of Riana Land Dispute Tribunal was adopted as an order of the court in Homa Bay Law Courts Misc. Application No. 18 of 2008 which ordered the family of Ndege Wangadi to vacate the suit property and further pay the claimant compensation. Consequently, an order of injunction against the plaintiffs herein was granted vide a decree issued on March 6, 2012 in Homa Bay Law Courts Misc Application No. 18 of 2008 against the plaintiffs herein.
10. The suit property was also the subject of litigation in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 3 of 2020.
11. On 9th November 2021, this court issued interim preservation orders as captured in Paragraph 5 hereinabove. The court directed that the Preliminary Objection dated 1st November 2021 and duly filed on November 4, 2021 be argued by way of written submissions.
12. On February 21, 2022, the honourable court directed that since Homa Bay Misc Application No. 18 of 2008 and Ndhiwa PM's court Environment and Land case No. 3 of 2020 prominently featured in the originating summons and the preliminary objection on record, the court would peruse the record



in the said cases before making appropriate determination of the preliminary objection and the entire suit. Interim preservation orders of November 9, 2021 were extended accordingly.

13. From the foregoing, the following are the issues that fall for determination:
 - a. Whether the instant suit is res judicata
 - b. If the answer to issue no. (a) is in the negative, whether the plaintiffs have proved their case against the defendants to warrant grant of the orders sought in the Originating Summons; and
 - c. Who should bear the costs of this suit?
14. It is important to note that the doctrine of res judicata is set out in section 7 of the [Civil Procedure Act](#) (supra) which stipulates thus:

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.
15. The doctrine of res judicata thus, ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Section 7 (supra) reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
 - i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. The former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
16. I have duly perused the records in Homa Bay Magistrate's Court Misc Application No. 18 of 2008 and Ndhiwa PM's court Environment and Land case No. 3 of 2020. I proceed to make the findings infra.
17. Homa Bay Magistrate's Court Misc Application No. 18 of 2018 was between the plaintiffs and the 1st defendant herein. The subject matter was the suit property herein. On December 17, 2008, the honourable court adopted the award of the Riana Land Disputes Tribunal Claim No. 163 of 2008 and ordered the family of Ndege Wayadi to pay a compensation amounting to KES 80,000/- for the years they have used the land by force to the family of Okinda Midialo.
18. No appeal was preferred against the said judgment. The plaintiffs also did not file an application for review from the judgment.
19. In Ndhiwa Law Courts Environment and Land Case No. 3 of 2020, the parties were similar. The suit property was also the same. The court found in favour of the 1st defendant herein as against the plaintiffs.



20. The plaintiffs herein then made an application to court by way of notice of motion application dated 6th November 2020 seeking for orders that the court be pleased to review or vary and set aside the proceedings and judgment thereof alleging that service was not effected or at all. The plaintiffs also stated that there was a pending suit, Migori Environment and Land Case No. 40 of 2019 (OS) filed by themselves, touching on the same subject matter, hence the suit before court was sub judice.
21. In dismissing the application, the learned trial magistrate held that at the hearing of Ndhiwa Law Courts Environment and Land Case No. 3 of 2020, the court was not in the know that this suit, formerly Migori ELC No. 40 of 2019 (OS), had been filed. Further, that a pronouncement in Ndhiwa Law Courts Environment and Land Case No. 3 of 2020 had been made and a decree issued. On the issue of service, the court stated that the plaintiffs herein did not prove that they were not served. The court was of the considered view that plaintiffs herein were supposed to lodge an appeal against the decree of the court or apply for judicial review.
22. It is my considered view that the issues raised in the instant suit were also directly in issue in the Riana Land Disputes Tribunal Case No. 163 of 2008, Homa Bay Magistrate's Court Miscellaneous Application No.18 of 2018 and Ndhiwa Law Courts Environment and Land Case No. 3 of 2020.
23. Clearly, the plaintiffs herein did not prefer an appeal nor lodge an application for review against the judgment in Homa Bay Magistrate's Court Misc Application No. 18 of 2018 which adopted the award of the Riana Land Disputes Tribunal Claim No. 163 of 2008. The suit in Ndhiwa Law Courts Environment and Land Case No. 3 of 2020 was superfluous.
24. Be that as it may, I endorse the orders and directions issued by the learned magistrate in Ndhiwa Law Courts Environment and Land Case No. 3 of 2020. Indeed, the plaintiffs did not lodge an appeal against the decree of the court or apply for judicial review against the judgment in that suit.
25. It is therefore, my finding that the doctrine of res judicata is applicable to this suit.
26. A fortiori, I find the Notice of preliminary objection dated November 1, 2021 and lodged in court on the November 3, 2021 merited. I proceed to uphold the same and dismiss this suit commenced by way of an Originating Summons dated June 17, 2019 and filed on June 18, 2019 with costs to the 1st defendant.
27. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 31ST DAY OF MAY 2022

In the presence of:

Ms. E Kijana, learned Counsel for the 1st defendant

