



**Ongele v Obano (Environment & Land Case 45 of 2021)
[2022] KEELC 3368 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 45 OF 2021
GMA ONGONDO, J
MAY 31, 2022
(FORMERLY MIGORI ELCC NO. 778 OF 2017)**

BETWEEN

CHARLES JUMA ONGELE PLAINTIFF

AND

CONSOLATA OGONDI OBANO DEFENDANT

JUDGMENT

1. On 16th May, 2014, the plaintiff, Charles Juma Ongele acting in person filed the present suit by way of an Originating Summons dated 12th May, 2014, pursuant to Order 37 Rule 3 and 7 of the [Civil Procedure Rules](#), 2010. The plaintiff contends that he has acquired by adverse possession, the suit land, title number Kabuoch/Kachieng/1824 measuring approximately three decimal eight hectares (3.8 Ha) in area.
2. The originating summons is anchored on a nine (9) paragraphed supporting affidavit of the plaintiff sworn on 12th May 2014 and filed on 16th May 2014 annexed thereto. The plaintiff deposed, inter alia, that he is the son of the late Benard Ongele Oyugi. That in Homa Bay Magistrate's Court Miscellaneous Application No. 34 of 2009 between the plaintiff's deceased father and the defendant herein, the court ordered that the land dispute between the said parties be arbitrated by Riana Land Disputes Tribunal (The Tribunal herein). That the award of the Tribunal was thereafter adopted as an order of the court.
3. The plaintiff further stated that the Tribunal gave an award in its case No. 43 of 2008 and directed that the original land Kabuoch/Kachieng/213 be subdivided into two portions; the suit land belonging to the plaintiff's deceased father and Kabuoch/Kachieng/1825 belonging to the defendant herein.
4. The plaintiff lamented that following the demise of his father, the defendant has trespassed into and occupied his late father's land thereby depriving him of peaceful occupation, enjoyment and use of the



- suit land. That the plaintiff obtained a Limited Grant of Letters of Administration Ad Litem in respect of the estate of his late father in Succession Cause No. 157 of 2014 at Rongo Law Courts on 14th April 2014 annexed to the plaintiff's supporting affidavit alongside a copy of the death certificate of Benard Ongele Oyugi and copy of the decree in Homa Bay Miscellaneous Application No. 34 of 2009.
5. On 19th November 2020, the current defendant, Consolata Ogondi Obano who substituted the original defendant, Obano Ogony (Deceased) further to an application by way of a notice of motion dated 22nd November 2019 and allowed on 18th December 2020, through learned counsel, Odera Nyakwana filed an amended replying whereby she opposed the originating summons. She deposed, inter alia, that judgment was entered against the plaintiff and his brothers in Kisii High Court Land Case Number 336 of 2013 (Kisii ELC Case herein). That the said judgment be upheld by this court as the issues raised herein are res judicata and that the suit be dismissed.
 6. The said defendant deposed that she is the registered beneficiary of the original land, Kabuoch/Kachieng/213. That a dispute over the suit land was filed by the plaintiff's father, Benard Ongele Oyugi, now deceased, at the Tribunal Case No. 43 of 2008. That the matter was heard and determined ex parte and the award forwarded to Homa Bay Law Courts vide Miscellaneous Application No. 34 of 2009 for adoption. That the Honourable court adopted the award and issued a decree accordingly.
 7. The defendant contends that he filed an application seeking a review of the award of the Tribunal but before the application could be heard, the parties agreed to set aside the award by mutual consent and the matter be referred back for hearing by the Tribunal. However, before the matter could be heard, the Land Disputes Tribunal Act No. 19 of 1990 was repealed and the tribunals ceased to exist.
 8. It was the defendant's case that after the demise of the plaintiff's father, the defendant herein filed a suit, Kisii ELC Case against Peter Ongele alias Charles Juma Ongele, the plaintiff herein, and his two brothers namely Ogony Ongele and James Ongele as stated in paragraph 5 hereinabove. That the defendants therein had trespassed into the suit land which is registered in the name of the deceased original defendant herein.
 9. The defendant stated that despite proper service being effected, the plaintiff and his brothers never entered appearance in the Kisii ELC Case. Judgment in default of appearance was thus, entered. Accordingly, the case proceeded to formal proof and was finally disposed of after proof that the plaintiff and his brothers therein had been properly served.
 10. The defendant contends that Peter Ongele and Charles Juma Ongele is one and the same person. That the instant suit is res judicata as the issues raised herein were heard and determined in the Kisii ELC Case.
 11. The defendant annexed a copy of the Decree in Homa Bay Law Courts Miscellaneous Application No. 34 of 2009, Copy of the affidavit in support of the application for review of the award in the Tribunal Case No. 43 of 2008 dated 2nd March 2011, copy of the order of the court dated 18th April 2011 wherein the parties agreed by mutual consent to set aside the award of the Tribunal, copy of plaint in Kisii ELC Case, among others.
 12. When the matter came up for hearing on 2nd November 2017, this Honourable court gave the parties an opportunity to resolve the matter through Alternative Disputes Resolution methods pursuant to Article 159 (2) (c) of *the Constitution* of Kenya, 2010. However, parties failed to reach an amicable solution hence, necessitating the hearing of the suit. The matter was heard by way of both viva voce evidence and affidavit evidence.



13. The plaintiff, Charles Juma Ongele (PW1), testified on 17th April 2018 that the original defendant registered the original land, No. Kabuoch/Kachieng/213 in the defendant's name without the knowledge of the plaintiff's late father who was away working in Mombasa. He further stated that the original land, Kabuoch/Kachieng/213 was later subdivided into the suit land and Kabuoch/Kachieng/1825, which parcels of land belonged to his late father and the defendant respectively. He admitted that they have never occupied the suit land but only cultivate it.
14. PW1 relied on his documents, to wit, Certificate of death, Decree dated 9th September 2009, Limited Grant of Letters of Administration ad litem dated 14th April 2014 and field diagram of the suit land and Land reference number Kabuoch/Kachieng/ 1825 which were produced and marked as PExhibits 1 to 4 respectively.
15. On cross examination, the plaintiff admitted that he is also known as Peter Ongele and was summoned to attend court in the Kisii ELC Case. He stated that he was aware of the award in the Tribunal's case no. 43 of 2008, which award was later adopted by the court in Homa Bay SRM Court in Misc. Application No. 34 of 2009. He, however, denied knowing that the award was set aside by mutual consent of the parties but admitted that the court referred them back to the tribunal for resolution of the dispute. He also stated that the Title deed to the original land was issued on 25th November 2009 in the name of the original defendant (deceased).
16. With leave of court, the plaintiff filed a list of documents dated 27th September 2018 serial numbers 2 to 6 which were admitted and marked as PExhibits 5 to 9 respectively, on 2nd October 2018.
17. On 26th January 2021, the current defendant namely Consolata Ogondi Obano (DW1), testified that the suit land belongs to the her and the original defendant (deceased), having obtained the same from one Siprianus Okambo Oyugi way back in 1960s. DW1 added that they had lived in that land until they decided to move to Kasungu. That the suit land had been the subject in several law suits. The defendant's amended replying affidavit together with the annexures thereto were admitted and marked as DExhibits 1 to 5.
18. On 27th October 2021, Kullow J. sitting at Migori Environment and Land Court directed that the suit be transferred to Homa Bay Environment and Land Court for further hearing and determination as the suit land is situated within Homa Bay county; see Article 48 of *the Constitution* of Kenya, 2010.
19. On 20th January 2022, DW2, Eliakim Bwana Gafna, the Assistant Chief of the area, testified and relied on his statement dated 16th March 2015 as part of his evidence and the same was adopted by the honourable court accordingly. He testified that he knew that the original defendant, Obano Ogony (deceased), had obtained the suit land from Siprianus Okambo Oyugi as a gift.
20. After the close of the parties' respective testimonies, the court then directed the parties to file and exchange submissions on or before 1st March 2022 for directions.
21. Consequently, the plaintiff filed submissions on 26th February 2022. He reiterated the contents of the supporting affidavit on record and urged the court to direct the Land Registrar to effect the transfer of the suit land in his name.
22. The defendant's counsel filed submissions dated 22nd March 2022 on 24th March 2022 and stated that the suit land belongs to the original defendant (deceased), having obtained the same from Siprianus Okambo Oyugi. Counsel submitted that the plaintiff had failed to adduce any evidence in support of his case and urged the honourable court to dismiss the suit with costs to the defendant.
23. From the foregoing, the issues for determination are thus:



- a. Whether the instant suit is res judicata
 - b. If the answer to issue number (a) hereinabove is in the negative, whether the plaintiff has proved his case to warrant grant of the orders sought in this suit; and
 - c. Who should bear the costs of this suit?
24. It is noteworthy that the doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya which stipulates 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.”
25. Thus, the doctrine of res judicata ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction. Essentially, there must be a former suit involving the same parties or parties litigating under the same title.
26. 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 as infra:
- 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.
27. It is noted that in Homa Bay Magistrate’s Court Miscellaneous Application No. 34 of 2009, the parties were Benard Ongele Oyugi–vs- Obano Ogony. Both are now deceased.
28. The said dispute involved ownership of the original land herein Kabuoch/Kachieng/213. The Honourable court adopted the award of the Tribunal in case No. 43 of 2008 as judgment of the court in Homa Bay Magistrate’s Court Miscellaneous Application No. 34 of 2009.
29. The award was later set aside by mutual consent of the parties. By an order dated 18th April 2011, the court referred the dispute back to the Tribunal for resolution.
30. Before the said suit could be heard, the Land Disputes Tribunal Act No. 19 of 1990 was repealed and the tribunals ceased to exist. The suit land therefore, remained registered in the names of the original defendant.
31. The present suit involves the plaintiff, a son of the late Benard Ongele Oyugi. The current defendant is wife of the deceased original defendant and she substituted him as stated in paragraph 5 hereinabove.
32. In the Kisii ELC Case, the parties were Obano Ogony (Deceased) the original defendant herein – versus- Peter Ongele alias Charles Juma Ongele, the plaintiff herein, and his two brothers namely Ogony Ongele and James Ongele. It was alleged that the plaintiff herein and his brothers trespassed into the original land which was registered in the name of the deceased original defendant. One of the



orders sought by the defendant therein was a permanent injunction orders against the plaintiff herein and his two brothers restraining them, their agents, servants, relatives and/or representatives from in any way interfering with the plaintiff's occupation and/or ownership of the original land.

33. The plaintiff admitted that despite proper service being effected upon him, he failed to enter appearance in the Kisii ELC Case. Therefore, judgment was entered for the defendant herein as against the plaintiff herein on 18th July 2014.
34. 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. 43 of 2008, Homa Bay Miscellaneous Application No.34 of 2009 and the Kisii ELC Case. The cases were between the same parties concerning the same land.
35. It is crystal clear that in the Kisii ELC Case, the matter was heard. Finally, judgment was entered for the defendant herein as against the plaintiff herein on 18th July 2014.
36. Clearly, no appeal was preferred against the said judgment.
37. It is therefore, the finding of this court that the doctrine of res judicata is applicable to this case.
38. Moreover, the cardinal principle is that litigation has to come to an end; see The Halsbury's Laws of England (4th Edition) Volume 22 at page 273.
39. In that regard, the plaintiff is not entitled to the orders sought in this suit.
40. A fortiori, I find the instant suit lodged by way of an Originating Summons dated 12th May, 2014 and lodged in court on 16th May, 2014 res judicata. I proceed to dismiss the same.
41. Costs of this suit to be borne by the plaintiff.
42. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

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

G.M.A ONG'ONDO

JUDGE

