



**Omolo v Registered Trustees Dala Hera & another (Environment and Land Case Civil Suit E9 of 2020) [2022] KEELC 3584 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E9 OF 2020**

**A OMBWAYO, J  
MAY 13, 2022**

**IN THE MATTER OF AN APPLICATION FOR EXTINCTION OF RIGHTS OF  
OWNERESHIP, INTEREST IN LAND OF THE REGISTERED TRUSTEES DALA  
HERA CHURCH IN FAVOUR OF THE APPLICANT AND INQUISITION OF THE  
1ST RESPONDENT'S ACQUISITION OF LAND REFERENCE NUMBER KISUMU/  
MUNICIPALITY/13556 MEASURING APPROXIMATELY 4.168 HECTARES (10.50 ACRES)**

**BETWEEN**

**BONIFACOMULO OMOLO. .... APPLICANT**

**AND**

**REGISTERED TRUSTEES DALA HERA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The matter for determination is the preliminary objection dated May 3, 2021 filed by the respondents herein on the following grounds:
  1. That the matter before the honourable court is *res judicata* having already been dismissed in ELC No 785 OF 2015 and ELC No 302 of 2017.
  2. That at the time the suit was filed on October 10, 2020, there was already another suit filed before this honourable court between the same parties and the cause of action ELC No 302 of 2017 and thus invoking the *res sub-judice* rule.
2. When the matter came up for mention on December 9, 2021, parties agreed to canvass the preliminary objection by way of written submissions. Boniface Omulo Omolo, the applicant herein filed a replying affidavit on February 7, 2022 where he deposed and stated that he is the plaintiff in ELC No 302 of 2017 which was dismissed by the court on April 12, 2021 for non-attendance.



3. That ELC No 302 of 2017 was never heard and determined on merit and therefore the objection raised that the instant originating summons is *res judicata* is neither here or there and is farfetched by the defendant. That Kisumu ELC No 302 of 2017 did not raise the issues of adverse possession as pleaded in the instant originating summons.
4. He stated that under the *Limitations of Actions Act*, a statutory condition is provided that for that adverse possession to which only the judge of the Environment and Land Court has jurisdiction can only be commenced by way of originating summons and therefore the intended preliminary objection is academic in the circumstances.
5. He further stated that the National Land Commission is a party to the instant originating summons and the honourable court has jurisdiction to consolidate all matters which the same subject matter in regards to the orders sought and give a determination thereof. He prayed that the court dismisses the preliminary objection and allow the suit to be heard and determined on merit.

### **Respondents' Submissions**

6. I have perused the file and do confirm that the respondents herein failed to file their submissions with respect to the preliminary objection.

### **Applicant's Submissions**

7. The applicant herein filed his submissions on March 22, 2022 where he stated that *res judicata* entails that the issue raised in the later litigation should have been directly and substantially in issue with the former one and that in ELC No 302 of 2017, the applicant sought for injunctive orders against the respondents while in the current suit, the applicant is seeking the relief of adverse possession which can only be commenced by way of originating summons therefore the issues are different as the current issue of adverse possession was not raised in either of the two former suits. The applicant relied in the case of *IEBC v Maina Kiai & 5 Others* (2017) e KLR.
8. It was submitted that the respondent has the option of applying to court for consolidation since this court has jurisdiction to consolidate all matters with the same subject matter in regard to the orders sought and give a determination thereof as was held in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya* (2020) e KLR and also in the case of *Law Society of Kenya v The Centre for Human Rights and Democracy*.
9. It was the applicant's submission that the preliminary objection be dismissed with costs.

### **Analysis and Determination**

10. The respondents herein have filed this preliminary objection on grounds that the matter before this court is *res judicata* having already been determined in ELC No 785 of 2015 and ELC No 302 of 2017 and that at the time of the time the suit was filed on October 10, 2020, there was already another suit filed before this court between the same parties in ELC No 302 of 2017 invoking *res sub judice* rule.
11. Section 7 of the *Civil Procedure Act* which stipulates as follows:

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.”



12. In the case of *Oraro v Mbaja* [2005] 1 KLR 141}} Ojwang, J (as he then was) expressed himself as follows; -

.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

13. I have looked at the supporting affidavit in the originating summons where the applicant herein attached the pleadings in Kisumu ELC No 302 of 2017 where in the plaint , he sought for orders that a declaration that the plaintiff through his family and patrilineal lineage have been in occupation of the suit property for over 70 years and hence the plaintiff’s customary interest and right rank in priority to that of the defendant, an order directing the defendant to cede and excise a portion measuring 0.4 Hectares and transfer the same into the name of the plaintiff from Land Reference Kisumu Municipality No 13556, an order of permanent injunction restraining the defendant by itself, its agents, servants, members , officials or persons claiming under it from fencing off, blocking road of access, constructing or continuing with construction of structures , demolition, or interfering with the plaintiff’s interest in the land where his homestead is currently located and costs of the suit.
14. The applicant in his replying affidavit to the preliminary objection stated that Kisumu ELC No 302 of 2017 was dismissed was dismissed for non-attendance. It is clear that in Kisumu ELC No 302 of 2017, the applicant herein did not seek for orders of adverse possession. It should be noted that neither of the parties attached pleadings or Judgment in ELC 785 of 2015 and this court is not in a position to ascertain whether the same is *res judicata* or *res sub-judice*.
15. The doctrine of *res judicata* was discussed by the Supreme court in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR where in paragraph 86, the court restated the elements that must be proved before a court may arrive at the conclusion that a matter is *res judicata*. The court stated:

"For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:

- a.) There is a former judgement or order which was final.
- b.) The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and
- c.) There must be between the first and second action identical parties, subject matter and cause of action."

16. In the case of *Dr Kiama Wangai v John Mugambi & Republic*, [2012] eKLR which restated the *res sub judice* principle as provided for in section 6 of the *Civil Procedure Act* that,

"A court shall not proceed with any proceedings in which the matter in issue is also directly and substantially in issue in previously instituted proceedings between the same parties



where such proceedings are pending before the same or any other court having jurisdiction to grant the same relief claimed.”

17. In the case of *ET v Attorney General & Another* where Hon Justice Majanja stated that:

The courts must be vigilant to guard against 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 the court in another way and in a form of a new cause of action which has been resolved by court of competent jurisdiction.”

18. Based on the case law above, this court has established that this matter is not *res judicata* or *res sub-judice* to Kisumu ELC No 302 of 2017 and that for ELC No 785 of 2015, I am unable to establish whether the same is *res sub-judice* or *res judicata* as parties have failed to attach the pleadings. The respondents have failed to demonstrate to this court how the present suit is *res judicata* as well as *res sub-judice*. This court therefore finds that the preliminary objection herein is dismissed with costs to the applicant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

