



REPUBLIC OF KENYA



KENYA LAW
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**Ogata v Nyandika & 4 others (Environment and Land Appeal
7 of 2021) [2022] KEELC 3260 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL 7 OF 2021**

JM KAMAU, J

JULY 28, 2022

BETWEEN

JAMES OGATA APPELLANT

AND

EVANS MOKUA NYANDIKA 1ST RESPONDENT

JOYCE KERUBO ONSONGO 2ND RESPONDENT

DIRECTOR OF SURVEYS 3RD RESPONDENT

SETTLEMENT FUND TRUSTEE 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

*(Being an Appeal against the Ruling of Hon. B. M. Kimtai – PM
Keroka dated and signed on the 23rd day of June 2021 in the original
Keroka Principal Magistrate’s Court ELC Case No. 11 of 2018)*

JUDGMENT

1. This is an appeal from the Ruling of the Honourable Mr. B. M. Kimtai, Principal Magistrate Keroka dated 23/6/2021 in Keroka ELC Case No. 11 of 2018. In the aforesaid case, the Appellant has sued the Respondents herein for the following orders: -
 - (a) "The 1st and 2nd Defendants and their agents to be ordered to move out of the said acres of land LR No. Gesima Settlement Scheme/4xx belonging to the Plaintiff which they are currently occupying illegally.
 - (b) An order that the correct boundary be reinstated between land parcels, numbers Gesima Settlement Scheme/4xx and Gesima Settlement Scheme/2x



as they existed in 1965 and the 3rd Defendant be ordered to rectify its maps to reflect the original boundaries of 1965.

- (c) The 3rd and 4th Defendants be ordered to rectify their maps to reflect the original boundaries whereby the disputed two acres belong to the Plaintiff's land LR No. Gesima Settlement Scheme/4xx.
 - (d) An order of eviction do issue evicting the 1st & 2nd Defendants and their agents from the said disputed two acres of land.
 - (e) A permanent injunction restraining the 1st and 2nd Defendants, their agents and or servants from trespassing onto the said two acres of land.
 - (f) General damages for trespass.
 - (g) Costs of the suit".
2. He claimed that he is the absolute registered owner of Gesima Settlement Scheme/4xx while the first Respondent is the Legal Representative of the Estate of his late father David Nyandika, the absolute allottee of LR Gesima Settlement Scheme/2x. Both allottees were allocated the parcels of land in 1965 by the 4th Respondent and the two parcels showed a river as a permanent common boundary. The Appellant proceeds to aver that in 1986 the late Nyandika crossed the river and entered into the Appellant's parcel of land and carved out a portion of land measuring approximately 2 Acres which he later sold to the 2nd Respondent's husband, the late Donald Onsongo. The 2 Acres had initially been developed by the Appellant who had planted trees and used it to bake bricks. The 3rd Respondent then tampered with parcel number Gesima Settlement Scheme/488 2 acres now reading the name of David Nyandika where the latter moved into. No transfer has been effected in favour of the 2nd Defendant.
 3. The 2nd Defendant filed a Defence on 20/3/2019 and denied everything and further stated that there was a matter in Kisii High Court over the same subject matter and that there is no cause of action established against her. The other Respondents never entered appearance.
 4. On 27/4/2021 the 2nd Respondent filed a Motion in Court and asked the Court to strike out the matter for being *Res judicata* on the ground that the matter directly and substantially is in issue in a former suit viz that the boundaries between Gesima Settlement Scheme/2x now 4xx and Gesima Settlement Scheme/2x have been determined and Judgment entered and matter finalized in Kisii High Court Civil Case No. 95 of 1987 in which the parties were David Nyandika (Plaintiff) on the one part and the Director of Survey and the late Donald Onsongo as Defendants on the other. The dispute in the latter case was whether the parcel of land measuring 2 Acres or thereabout in Gesima Settlement Scheme/4xx which David Nyandika sold to Donald Onsongo was part of the Plaintiff's land. The matter was referred to District Surveyor, Nyamira to fix the boundaries between Gesima Settlement Scheme/2x and 2x respectively.
 5. A Report by the District Surveyor was later filed and the boundaries were duly fixed and the High Court, Kisii adopted the Report as its judgment bringing the matter to a close. The Appellant, in his Replying Affidavit sworn on 6/5/2021 did admit that he indeed filed Kisii Civil Suit No. 95 of 1987 against David Nyandika, Director of Survey and Donald Onsongo but the suit is neither pending in court nor determined and the court did not adopt the Land Registrar's Report as the Judgment of the Court nor did the matter proceed any further. He summed up his response by stating that the claim in this suit is clearly different as well as the parties being different and that the 2nd Respondent failed to show that she was the Administrator of the Estate of the late Donald Onsongo, her late husband. He prayed that the Application be dismissed with costs.



6. On 23/6/2021 the Honourable Trial Magistrate rendered a Ruling in the following terms:

"From the above, I note that in the previous Suit Kisi High Court Civil Case Number 95 of 1987 and that the parties therein were the same Plaintiff in the current suit i.e. James Ogata, David Nyandika now Deceased and father to Evans, 1st Defendant, Donald Onsongo Deceased and father to Joyce Kerubo Onsongo, 2nd It is clear in my mind that the former suit before the High Court Kisii and the current suit before this Court are the same and further the prayers sought therein are the same as the ones in the current suit.....I find that the matter before me had been determined by a Superior Court and even parties proceeded to court of Appeal, I therefore find merit in the instant application and proceed to strike out this suit with costs to the Plaintiff/Respondent."

7. The Appellant was dissatisfied with said Ruling hence this Appeal.

The doctrine of *Res judicata* is now succinctly embedded in Article 159 (2) (b) of the Constitution which provides that justice ought not to be delayed. To determine whether the doctrine of *Res judicata* applies, the substantive law is found in Section 7 of the Civil Procedure Act Cap 21 which provides 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"

8. The *Black's Law Dictionary* 10th Edition defines "*res judicata*" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

9. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

10. In order therefore to decide as to whether an issue in a subsequent Application is *res judicata*, a court of law should always look at the Decision claimed to have settled, the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

11. There is indeed a nexus between High Court Suit Number 95 of 1987 and Keroka Principal Magistrate's Court ELC No. 11 of 2018 as the parties are the same or litigating on behalf of others and the issues are the same.

12. The learned Trial Magistrate properly found that the suit before him is *Res judicata* and he appropriately applied the law by not allowing the Court to reopen the case by way of entertaining a similar suit when the High Court had already dealt with the matter conclusively. The earlier Decision would only have been overturned on Appeal or by way of Review in an appropriate case.



13. The Appellant, by bringing different suits one after another on the same issue at different times and in different Courts and with different parties is hell bent on frustrating the Respondents by engaging them in the Court corridors forever. This state of affairs cannot be allowed to prevail.

14. This Appeal is therefore dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: - Sibota

Appellant: - Mr. Kimaiyo holding brief for Mr. Momanyi Aunga

Respondents: - Mr. Onyancha holding brief for Mr. Masese

