



**Weyusia v Biketi (Environment & Land Case E005 of 2022)  
[2022] KEELC 2491 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E005 OF 2022**

**BN OLAO, J  
JULY 21, 2022**

**BETWEEN**

**PIUS WAMALABE WEYUSIA ..... APPLICANT**

**AND**

**JOANNES LUNYOLO BIKETI ..... RESPONDENT**

**RULING**

- (1) By a plaint dated 16<sup>th</sup> February 2022 and filed on 21<sup>st</sup> February 2022, Pius Wamalabe Weyusia (the plaintiff) sought Judgment against Joannes Lunyolo Biketi (the defendant) in the following terms with regard to the land parcel No North Malakisi/South Wamono/1110 (the suit land): -
- a. A declaration that the plaintiff is the rightful owner of the land parcel No North Malakisi/South Wamono/1110.
  - b. An order cancelling the current title of the land parcel No North Malakisi/South Wamono/1110 in the name of the defendant and the same be issued in the name of the plaintiff.
  - c. In the alternative, the plaintiff be compensated by the defendant at the current market rates for the land parcel No North Malakisi/South Wamono/1110.
  - d. Costs of the suit.
  - e. Any other relief this Honourable Court may deem just and expedient to grant.
- (2) The basis of the plaintiff's suit is that at all times he has been the rightful owner of the suit land which he has occupied since 1973. That the suit land was purchased for him at a consideration of Kshs. 2,300/= by his late father Zebetayo Nalume Waboma from the late Vincent Chengek through funds provided by the plaintiff who was then working with the Air Force in Uganda.



- (3) Soon after the sale agreement both Vincent Chengek and his mother Victorina Chengek (also deceased) relocated to Muskomabe before transferring the suit land to him. Efforts by the plaintiff's late father to trace Vincent Chengek to transfer the title to the plaintiff were unsuccessful as no one knew where Vincent Chengek and his mother Victorina had settled. Later, the plaintiff was informed that Vincent Chengek had been imprisoned and upon his release, he fraudulently sold and transferred the suit land to the defendant. Particulars of fraud on the part of the defendant are pleaded in paragraph 11(i) to (vi) and include forging the application of the Land Control Board consent as well as the consent. It is the plaintiff's case that not only has he and his family occupied the suit land since 1973 but further, that he has buried his wife, his two sons, his brother and daughter in law thereon.
- (4) Together with the plaint, the plaintiff filed his statement, those of his witnesses namely Nathan Barasa, Eliud Onamu and Wildad Barasa Philip. He also filed the following documents: -
1. Copy of sale agreement dated 3<sup>rd</sup> April 1973 between Vincent Wafula Chengek and Zebetayo Nalume for land parcel No 1110.
  2. Copy of Grant of Letters of Administration issued to the plaintiff in respect to the Estate of Zebetayo Nalume.
  3. Copy of purported application for Consent of the Land Control Board dated 14<sup>th</sup> July 1978.
  4. Copy of purported Letter of Consent from the Land Control Board dated 18<sup>th</sup> July 1998.
- (5) Simultaneously with the plaint, the plaintiff filed a Notice of Motion under Certificate of Urgency seeking the following orders: -
1. The application be certified as urgent and service be dispensed with.
  2. That this Honourable Court be pleased to issue a temporary stay of execution restraining the defendant and his authorized agents from evicting the plaintiff from the land parcel No North Malakisi/ South Wamono/1110 pending inter parte hearing and determination of this application.
  3. That this Honourable Court be pleased to issue a temporary stay of execution restraining the defendant and his authorized agents from evicting the plaintiff from the land parcel No North Malakisi/ South Wamono/1110 pending the hearing and determination of this suit.
  4. That the costs of this application be provided for.
- (6) The application is predicated on the grounds set out therein and is supported by the plaintiff's affidavit dated 16<sup>th</sup> February 2022.
- (7) The gist of the application is that the defendant has obtained a Judgment against the plaintiff in Bungoma H.C.C Case No 73 of 1999 (OS) and may evict him any time from the suit land yet this suit seeks the cancellation of the title thereto issued in the name of the defendant and that the same be issued in the name of the plaintiff. That the plaintiff and his family have established a home on the suit land for the last 49 years and even buried their family members thereon. That the suit land was purchased by the plaintiff's late father Zebetayo Nalume Waboma from the late Vincent Chengek for KShs. 2,300/= which funds were provided by the plaintiff then working in the Air Force Uganda. That if the eviction notice issued in Bungoma H.C.C Case No 73 of 1990 (OS) is executed, the plaintiff will suffer irreparable harm yet he has a prima facie case with high chances of success.
- (8) Annexed to the Notice of Motion are the following documents: -



1. Copy of sale agreement between Vincent Wafula Chengek And Zebetayo Nalume for land parcel No1110 dated 3<sup>rd</sup> April 1973.
  2. Copy of Grant of Letters of Administration in respect to the Estate of Zebedayo Nalume issued to Pius W. Weyusio on 14<sup>th</sup> July 1998.
  3. Copy of letter dated 15<sup>th</sup> November 2021 from J. O. Makali & Company Advocates addressed to the plaintiff being a notice to vacate the suit land.
- (9) When the Notice of Motion was placed before me on 22<sup>nd</sup> February 2022 for directions and in view of the plaintiff's own reference to the fact that the defendant had previously obtained a Judgment and orders of eviction against him in Bungoma H.C.C Case No 73 of 1999 (OS), I immediately got a slight whiff that this suit may in fact be res – judicata. My suspicions were heightened when I called for and perused Bungoma H.C.C Case No 73 of 1999 (OS) and Bungoma SRM Civil Case No 8 of 1982 which are readily available at this Court. I took the liberty to do so because res – judicata is a legal and jurisdictional issue which a Court can even raise suo – moto if seized of all the relevant information. In the case of *Kenya Commercial Bank Ltd .v. Benjob Amalgamated Ltd* 2017 eKLR, the Court of Appeal cited with approval the decision in *Lal Chand .v. Radh Kishan Air* 1977 SC 789 where it was held that: -

“The practical effect of the res – judicata doctrine is that it is a complete estoppel against any suit that runs a foul of it, and there is no way of going round it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction from entertaining such suit.” Emphasis mine.

- [10] Arising out of my suspicion that this suit may in fact be res – judicata, I declined to issue any ex – parte orders or certify the application as urgent. Instead, I directed that the defendant file his response to the Notice of Motion and the same be canvassed by way of written submissions.
- (11) The defendant filed both a Notice of Preliminary Objection dated 20<sup>th</sup> April 2022 and a replying affidavit dated 19<sup>th</sup> April 2022 in opposition to the Notice of Motion.

The following objections were raised: -

1. That this suit is res – judicata Bungoma H.C.C Case No 73 of 1999.
2. That this suit runs counter to the provisions of Section 7 of the *Limitation of Actions Act* and is therefore time – barred.
3. That consequently, this Honourable Court lacks the jurisdiction to entertain this suit.

In his replying affidavit, the defendant deposed, inter alia, that the application is frivolous, vexatious and an abuse of the process of this Court. That it is also an academic exercise as the issues have been determined in Bungoma H.C.C Case No 73 of 1999 and is therefore res – judicata, contravenes the provisions of Section 7 of the *Limitation of Actions Act* and this Court has no jurisdiction in the matter.

- (12) The defendant adds that he is the registered proprietor of the suit land having purchased it in 1978 at a consideration of KShs. 15,000/= from the late Vincent Wafula Chengek. That the plaintiff and his brother one Maurice Wafula Nalume (deceased) approached him claiming to have bought the suit land before him. That Maurice Wafula Nalume even sued him and Vincent Chengek vide Bungoma SPMCC Case No 8 of 1982 claiming ownership of the suit land and seeking his eviction therefrom and surrender of the title which suit was dismissed on 31<sup>st</sup> August 1988. That the plaintiff, being dissatisfied, filed Kakamega High Court Civil Appeal No 100 of 1988 which was also dismissed with



costs on 17<sup>th</sup> June 1992 and the plaintiff and his late brother were evicted from the suit land. The plaintiff returned to the suit land and filed Bungoma H.C.C Case No 73 of 1999 which was also dismissed.

- (13) This suit is therefore similar to Bungoma H.C.C CaseNo 73 of 1999 and is a waste of precious Judicial time. It should be dismissed for lack of merit. The defendant annexed the following documents to his replying affidavit: -
1. Copy of Judgment inBungoma SPMCC Case No 8 of 1982.
  2. Copy of Judgment in Kakamega High Court Civil Appeal No 100 of 1988.
  3. Copy of Judgment in Bungoma H.C.C Case No 73 of 1999.
- (14) Submissions were thereafter filed both by Mr Mechiinstructed by the firm of Mechi & Associates Advocatesfor the plaintiff as well as Mr Murungainstructed by the firm of J. O. Makali & Co Advocatesfor the defendant.
- (15) I have considered the Notice of Motion, the rival affidavits, the Preliminary Objection as well as the submissions by Counsel.
- (16) Although the plaintiff has approached this Court for an order of temporary stay of execution restraining the defendant from evicting him from the suit land pending the hearing, the defendant has, in response to the application, not only filed a replying affidavit opposing it but has gone further and filed a Preliminary Objection raising issues of law which I have already referred to above. It is not in dispute that those issues meet the test set out in the case of *Mukisa Biscuits Manufacturing Co Ltd .v. West End Distributors* 1969 E.A 696, the locus classicus on Preliminary objections where LawJ A stated:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” Emphasis mine.

A Preliminary Objection can only be sustained if it raises a pure point of law and is argued on the assumption that all the facts pleaded are correct. It cannot therefore be up – held if the Court has to ascertain facts or if what is sought is the exercise of Judicial discretion. More fundamentally, a proper Preliminary Objection if up – held, should be able to dispose of the main suit thereby saving parties costs and Judicial time and other resources as well. I must therefore consider the Preliminary Objection as I am satisfied that it raises pure points of law.

### **Res – Judicata**

- (17) This is provided for under Section 7 of the *Civil Procedure Act* as follows: -

7: “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.”

The doctrine of res – judicata if successfully raised, will bar a suit upon proof of the following: -



- a. The matter or issue raised was directly and substantially in issue in a former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. The parties were litigating under the same title.
- d. The Court that heard the former suit was competent to try such suit.
- e. The former suit was heard and finally decided.

The onus is therefore on the party raising the plea of res – judicata to place before the Court all the relevant evidence as proof that a suit is indeed res – judicata.

- (18) In support of his plea that this suit is indeed res – judicata, the defendant cited the previous suit between the parties being Bungoma H.C.C Case No 73 of 1999 although he went on to annexe Judgments in other Courts. In my view, the Judgment in Bungoma H.C.C Case No 73 of 1999 will suffice to prove that this suit is infact res – judicata. From the Judgment in that suit, it is clear that the plaintiff herein had approached the Court seeking against Vincent Chengekand the defendant herein an order that he was entitled to the suit land by way of adverse possession. The suit was heard by MukunyaJ who dismissed it with costs in a Judgment delivered on 3<sup>rd</sup> October 2017. There is nothing to suggest that any appeal was ever filed against that Judgment. Counsel for the defendant has submitted that the cause of action in Bungoma H.C.C Case No 73 of 1999 is the same one being raised in this suit and it is therefore res – judicata.
- (19) However, Counsel for the plaintiff citing the case of *John Florence Maritime Services Ltd & another.v. Cabinet Secretary Transport And Infrastructure & others* 2021 eKLR takes the view that this suit is not res – judicata. He has submitted as follows: -

“Your Lordship, in a comparison of the two suits herein, the fourth element that must be satisfied according to the Supreme Court of Kenya so as to invoke res – judicata fails to tick all the required boxes. The parties are the same, subject matter is the same but the cause of action is different in both cases. The cause of action in Bungoma H.C Civil Case No 73 of 1999 is adverse possession while the current suit challenges the validity of the title and seeks revocation of the same title N. Malakisi/S. Wamono/110.

We submit that the suit Bungoma ELC No 5 of 2022 is not res – judicata in as far as the two previous suits are concerned. In light of this, this Preliminary Objection must fail.”

It is common ground that the parties herein litigated over the suit land in Bungoma H.C.C. Case No 73 of 1999. It is also not in dispute that the Court that heard Bungoma H.C.C Case No 73 of 1999 was a competent Court and that the suit was heard and finally decided. However, Counsel for the plaintiff is of the view that since the suit in Bungoma H.C.C Case No 73 of 1999 was hinged on a claim of adverse possession of the suit land while this suit seeks the cancellation of the title to the said land for having been obtained fraudulently, then this suit is not res – judicata. I don’t think that that proposition, attractive as it may sound, is supported by the law or can defeat the claim that this suit is res judicata. Section 7 of the *Civil Procedure Act* cited above has several explanations. Explanation No 4 reads: -

- (4) “Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

What that means is that the plaintiff was required to bring forth his whole case in relation to the suit land in the previous suit. This was expounded in *Henderson .v. Henderson* 1843 67 E.R. 313 a dictum



which the Privy Council described in *Yat Tung Investment Co Ltd .v. Dao Dao Heng Bank Ltd* 1975 A.C 581 as the locus classicus of this aspect of res - judicata, Wigram V.C said thus:-

“..... where a given matter becomes the subject of litigation in an adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res – judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” Emphasis mine.

Since the plaintiff’s suit in Bungoma H.C.C Case No 73 of 1999 hinged on the ownership of the suit land, it follows from the decision in *Henderson .v. Henderson*(supra) and which has been applied in our Courts, that he was required to bring forward his “whole case” and not just part of it. This is to avoid repetitive litigation over the same subject matter in different Courts perhaps to achieve a more favourable result. As was held in the case of *John Florence Maritime Services Ltd & another.v. Cabinet Secretary For Transport And Infrastructure*(supra): -

“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.”

When the plaintiff filed Bungoma H.C.C Case No 73 of 1999 seeking orders of adverse possession with respect to the suit land, he also had the option of electing to challenge the defendant’s title thereto. He opted to pursue the former yet the Court had jurisdiction to grant him whatever remedies he sought. Having canvassed his claim to the suit land in the previous suit by way of adverse possession, the doctrine of res – judicata bars him from re – agitating a claim to the same land through an allegation that the defendant obtained registration of the suit land fraudulently. That will be an affront to the law.

[20] The plea of res – judicata is well founded. It is up – held.

### **Statute Barred**

(21) The second limb of the Preliminary Objection by the defendant is that this suit is time barred and runs Counter to the provision of Section 7 of the *Limitation of Actions Act*. That provision reads: -

7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

In support of the submission that this suit is statute barred, Counsel for the defendant has submitted that the disputes revolving around the suit land date back to 1982. That when the plaintiff testified in Bungoma H.C.C Case No 73 of 1999, he knew about the elements of fraud being pleaded in this suit. In any event, a claim founded on fraud ought to have been filed within three years.



(22) However, Counsel for the plaintiff has submitted as follows on the same issue: -

“Your Lordship, Section 7 of the Limitation of Actions Act states that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person. However, the plaintiff’s main cause of action for this suit is the fraudulent acquisition of title to land parcel number N. Malakisi/S. Wamono/1110. Section 26 of the Limitation of Actions Act provides that in the case of fraud or mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake. The plaintiff only discovered the fraud involved in this matter after visiting the Land Control Board at Sirisia seeking to look for the Land Control Board Meeting Minutes which authorized the purported transfer of title to the defendant in 1978. It is after the aforementioned Minutes were found not to be existent that the staff at the Board asked the plaintiff to go to Bungoma Land Registry to seek documents in regards to the transfer of 1978 to the defendant. Crucial documents such as transfer forms were found to be missing at the registry. The forged application for LCB and the forged LCB consent found at the registry were issued on the 25<sup>th</sup> November 2021 as indicated on the copies of the documents and goes further to reiterate that the fraudulent registration was only discovered on the 25<sup>th</sup> November 2021, less than a year ago. In light of this, this Preliminary Objection must fail.”

However, Counsel for the plaintiff has left out an important ingredient of the said Section 26(c) of the Limitation of Actions Act which adds that: -

“..... the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.” Emphasis mine.

(23) It cannot be true, as submitted by Counsel for the plaintiff, that the fraud was only discovered in 2021. In his statement dated 16<sup>th</sup> February 2022 and filed in support of his claim, the plaintiff has stated as follows: -

“Eventually, my father Zebetayo passed on on 2<sup>nd</sup> July 1979 without having the title deed transferred to his name. I later got information that Vincent had earlier been released from prison having learnt that my father Zebetayo was critically ill, fraudulently resold and transferred the title of the same parcel of land we had bought to the defendant Joannes Lunyolo Biketi in 1978.” Emphasis mine.

The above is repeated in paragraph 9 of the plaintiff’s affidavit in support of the Notice of Motion. It is also clear from the Judgment in Bungoma H.C.C CaseNo 73 of 1999 that the plaintiff and his family were evicted from the suit land on 3<sup>rd</sup> July 1999. Given the above undisputed facts, the plaintiff, “with reasonable diligence,” should have visited the Land Control Board at Sirisia earlier than 2021 to confirm when the fraud was perpetrated. The Letter of Consent for the transfer of the suit land from Vincent Wafula Chengek to the defendant is dated 18<sup>th</sup> July 1978. The date of 25<sup>th</sup> November 2021 is when the said Letter of Consent was certified as a True Copy hence the initials “C.T.C 25.11.2021” That is when the plaintiff collected that document. However, having known about the fraudulent transfer of the suit land at least by 1999 when he moved to Court vide Bungoma H.C.C Case No 78 of 1999, the plaintiff, “with reasonable diligence,” could certainly have brought forward the documents which he has now done. He did not have to wait for another 22 years to do so. In any event, there is no evidence that he ever wrote to the Land Registrar Bungoma seeking those documents and that they were not made available.



- (24) It is also not lost to this Court that the plaintiff is seeking an order to stay the execution of the Judgment obtained by the defendant in Bungoma High Court Civil Case No 73 of 1999 (OS). Such an order can only be obtained in the matter in which it was issued or on appeal. This Court would not have any jurisdiction to grant such an order no matter how deserving it may be.
- (25) The up – shot of all the above is that the Preliminary Objection dated 20<sup>th</sup> April 2022 is well taken. It is therefore up – held with the following consequences: -
1. The plaintiff's suit is both res – judicata and statute bared.
  2. Both the Notice of Motion dated 16<sup>th</sup> February 2022 and the plaint upon which it is premised are hereby struck out.
  3. The plaintiff shall meet the costs thereof.

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF JULY 2022.**

**BOAZ N. OLAO.**

**J U D G E**

**21<sup>ST</sup> JULY 2022.**

