



**Saisi v Lochoson & 2 others (Environment & Land Case 108 of 2016)
[2022] KEELC 12711 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 108 OF 2016
BN OLAO, J
SEPTEMBER 29, 2022**

BETWEEN

BENEA MUGASIA SAISI PLAINTIFF

AND

JASON NGALA LOCHOSON 1ST DEFENDANT

JAELO ODINGA OMUTAKHA 2ND DEFENDANT

THE PRINCIPAL KEVEYE SECONDARY SCHOOL 3RD DEFENDANT

JUDGMENT

- [1] Benea Mugasia Saisi the plaintiff (herein referred to as Saisi) first moved to this Court *vide* his plaint dated September 28, 2016 and later amended on June 29, 2017 in which he sought various orders against Jason Ngala Lochoson (lochoson), Jael Odinga Omutakha (omutakha) And The Board of Management Keveye Secondary School (the 1st, 2nd and 3rd defendants respectively) with respect to the land parcel No Bungoma/Kabuyefwe/587 (the suit land): -
- [2] Those orders are: -
- (a) A declaration that the whole process by which the 3rd defendant got registered as the proprietor of land parcel No Bungoma/ Kabuyefwe/587 was a nullity.
 - (b) A declaration that the 2nd defendant is holding the land parcel No Bungoma/Kabuyefwe/587 measuring four (4) acres in trust for the plaintiff.
 - (c) An order compelling the 2nd defendant to transfer the land parcel Bungoma/Kabuyefwe/587 measuring four (4) acres to the plaintiff.
 - (d) Costs of this suit.



The basis of the plaintiff's claim is that in 1989, he purchased from the 1st defendant Omutakha a parcel of land measuring 4 acres which was to be hived off from the land parcel No Kabuyefwe Scheme/ Naitiri/Tongaren /332 at a consideration of Kshs 96,000/=. He paid the full consideration and took possession of the land which however was not transferred to him because he fell ill before the transfer process could be completed. The 1st defendant promised to sub – divide the land and transfer the four (4) acres to him once he got back the title from the 3rd defendant where he had given it as security for arrears of fees. Unknown to the plaintiff, the 1st defendant had sub – divided the land and fraudulently transferred the suit land to the 3rd defendant which then transferred it to the 2nd defendant yet the plaintiff was in occupation therefore.

[3] The particulars of fraud were pleaded against the 1st and 3rd defendants as follows: -

As Against 1st Defendant: -

1. Embarking on the transfer of the suit land while knowing that the plaintiff was in occupation.
2. Causing the 3rd defendant to be registered as the owner of the suit land while aware that the plaintiff was in occupation and was the first purchaser having paid a consideration of Kshs 96,000/=.

As Against 3rd Defendant: -

1. Accepting the suit land while aware that the plaintiff was in occupation.
2. Selling the suit land hurriedly to the 2nd defendant to defeat the plaintiff's right.
3. Selling the suit land to the 2nd defendant while knowing that the plaintiff was in occupation.

The plaintiff also filed his statement and list of documents both dated September 28, 2016.

[4] In his statement, he confirms having purchased a portion of land from the 1st defendant measuring 4 acres out of the land parcel No Bungoma/ Kabuyefwe/332. He went into occupation of the 4 acres but fell ill before he could get the consent of the Land Control Board to have the 4 acres transferred to him. In the year 2004, he discovered that the 1st defendant had transferred the 4 acres which he still occupies and which is the suit land to the 3rd defendant. He filed a complaint at the then Naitiri (tongaren) Land Disputes Tribunal where the 1st defendant testified that he had been tricked by the 3rd defendant which then sold the suit land to the 2nd defendant. That the 1st defendant agreed to refund the 3rd defendant it's money and also admitted that the plaintiff was the owner of the suit land. That the 3rd defendant knew all along that the plaintiff was in occupation of the suit land and the transfer to the 2nd defendant was done fraudulently to defeat the plaintiff's claim. That he has been in occupation of the suit land since 1989 having extensively developed it and no other person has utilized it and his previous suit was dismissed by this Court for want of prosecution hence this suit.

[5] The plaintiff also filed the following documents: -

1. Copy of Green Card for the land parcel No Bungoma/ Kabuyefwe/587.
2. Agreement between the plaintiff and the 1st defendant dated July 29, 1989.
3. Proceedings in Tongaren Land Disputes Tribunal CaseNo 24 of 2006.
4. Proceedings in Kimilili Senior Resident Magistrate's Court Land Case No 24 of 2006.



I must point out that although the plaintiff's list of documents had item No 5 as photographs, no such photographs were filed.

- [6] The 1st defendant (Lochoson) filed as defence and Counter – Claim dated December 5, 2016 in which he denied that the plaintiff had paid the full consideration for the suit land. That the sale agreement provided that the balance of the purchase price would be paid within 2 years of the sale agreement but there was inordinate delay on the part of the plaintiff yet the 1st defendant was always ready and willing to execute the sale agreement. The 1st defendant denied the allegations of fraud and added that the sale agreement dated July 29, 1989 is null and void for want of the consent of the Land Control Board.
- [7] In his Counter – Claim, the 1st defendant pleaded that he is the registered proprietor of the suit land but the 3rd defendant fraudulently sold it to the 2nd defendant behind his back. He therefore sought the main remedy that the registration of the suit land in the name of the 2nd defendant be nullified and the same to revert in his name.
- [8] In his un – dated statement filed on December 6, 2016, the 1st defendant confirmed that by an agreement dated July 29, 1989 he agreed to sell the suit land to the plaintiff at a consideration of Kshs 96,000/= of which the sum of Kshs 48,000/= was paid at the time of executing the agreement and the balance of Kshs 48,000/= was to be paid in instalments within 2 years and so time was of the essence. The plaintiff did not fulfil his obligations and only paid the final instalment of Kshs 20,000/= on July 22, 1997. Meanwhile, the 1st defendant had deposited the title to the suit land to the 3rd defendant as security for fees but the land was sold to the 2nd defendant without his knowledge. That the agreement between him and the plaintiff was frustrated by laches and want of the consent of the Land Control Board and is therefore null and void. That the title to the suit land should therefore revert to him.
- [9] The 1st defendant filed a list of documents dated December 5, 2016 indicating that he had filed following: -
1. Copy of sale agreement dated July 29, 1989.
 2. Copy of Green Card.
- However, those documents were not infact filed but that is not fatal because the plaintiff had already filed the said documents. That is an excusable lapse on the part of the 1st defendant who is acting in person.
- [10] The plaintiff filed a reply to defence and a defence to the 1st defendant's Counter – Claim. He reiterated the contents of his plaint and joined issues with the 1st defendant.
- [11] He pleaded that the 1st defendant was registered as the proprietor of the suit land following it's sub – division from the land parcel No Bungoma/ Kabuyefwe/332. He denied that the sale agreement between him and the 1st defendant had been nullified by operation of the law due to want of consent of the Land Control Board. He added that infact the 1st defendant had informed him that the title to the suit land had been deposited with the 3rd defendant as security for arrears of fees and that the transfer would be effected once the plaintiff recovered from his illness. He therefore sought the striking out of the 1st defendant's defence and the dismissal of his Counter – Claim with costs.
- [12] The 2nd defendant also filed a defence and Counter – Claim dated November 24, 2016 in which she denied having purchased the suit land hurriedly from the 3rd defendant. She also denied that the plaintiff is in possession of the suit land and put him to strict proof thereof.



[13] The 2nd defendant pleaded that this suit is res – judicata as there have been previous suits between her and the plaintiff over the suit land including Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006, Bungoma High Court Civil Case No 41 of 2006 and Kimilili Resident Magistrate’s Court Civil Case No 24 of 2006.

[14] The 2nd defendant pleaded that the plaintiff is a trespasser on the suit land and his claim should be struck out with costs for being bad in law, vexatious and an abuse of the process of this Court.

[15] The 2nd defendant similarly sought in her Counter – Claim Judgment against the plaintiff in the following terms: -

- (a) Absolute vacant possession of the land parcel No Bungoma/ Kabuyefwe/587.
- (b) An order for the eviction of the plaintiff from the land parcel NO Bungoma/Kabuyefwe/587.
- (c) Alternatively, and in default thereof, an order of permanent injunction restraining the plaintiff from interfering with the land parcel No Bungoma/Kabuyefwe/587.

The basis of the 2nd defendant’s Counter – Claim is that she is the registered proprietor of the suit land having purchased it in 1998 from the 3rd defendant. That she tilled it until 2003 when she received reports that someone was claiming it. That she followed the law in obtaining title to the suit land and the plaintiff has refused to vacate it. That the 2nd defendant filed a case at Webuye Court being case No 337 of 2006 which was determined in her favour. That the plaintiff filed at Bungoma High Court Civil Suit No 41 of 2006 but which was dismissed for want of prosecution.

[16] The 2nd defendant filed her statement and list of documents both dated November 24, 2016.

[17] In her statement which is basically a rehash of her pleadings, she states that she purchased the suit land and started utilizing it before the plaintiff started trespassing thereon and so she served him with notices to vacate but he refused. So the 2nd defendant filed a suit in Webuye Court which was determined in her favour. The plaintiff then filed an Originating Summons which was dismissed for want of prosecution.

[18] The plaintiff did not appeal the Judgment of the Court at Webuye and has only filed this case to delay justice for the 2nd defendant. That this case is similar to the case filed at Webuye Court being case No 337 of 2006 and the plaintiff has come to this Court with un – clean hands only to subvert justice. The plaintiff’s suit should therefore be dismissed and the 2nd defendant’s Counter – Claim allowed as prayed.

[19] The 2nd defendant filed the following documents in support of her case: -

1. Letter dated November 1, 2004.
2. Letter dated October 28, 2005.
3. Letter dated August 22, 2005.
4. Letter dated November 9, 2005.
5. Proceedings in Webuye Senior Resident Magistrate’s Court CaseNo 337 of 2006.
6. Sale agreement dated March 18, 1990between 1st and 3rd defendants.
7. Title deed for the land parcel No Bungoma/Kabuyefwe/587.
8. Green Card for the land parcel No Bungoma/Kabuyefwe/587.



9. Certificate of Search for land parcel Bungoma/Kabuyefwe/587.

The plaintiff filed a reply to the 2nd defendant's defence and a defence to the Counter – Claim in which he joined issues with the 2nd defendant and denied that his suit is *res – judicata*. The plaintiff pleaded that the previous suits did not touch on the root of the title to the suit land. The plaintiff added that the 2nd defendant's title was obtained fraudulently and she is therefore holding it in trust for the plaintiff. He therefore sought the dismissal of the 2nd defendant's Counter – Claim with costs.

[20] In its defence, the 3rd defendant denied the allegations of fraud levelled against it adding that it purchased the suit land from the 1st defendant in 1989 and processed the title through the Land Control Board and obtained the title thereto on October 26, 1995 which it then transferred to the 2nd defendant on December 1, 2005. It denied that the plaintiff was in occupation of the suit land or any knowledge that the plaintiff had purchased it. The 3rd defendant added that it was not aware about the proceedings in the Tongaren Land Disputes Tribunal or the case at Kimilili Court. It therefore sought the dismissal of the plaintiff's case with costs.

[21] The 3rd defendant filed the statement of its principal Christine Naswa Sifuna and a list of documents both dated January 31, 2020.

[22] In her statement, she confirmed that the 3rd defendant purchased the suit land from the 1st defendant in 1989 and obtained the title thereto on October 26, 1995. Then on December 1, 2005, it transferred the same to the 2nd defendant. It denied having sold the suit land to the 2nd defendant hurriedly adding that it was not aware that the plaintiff had constructed a building thereon and there was no encumbrance registered against the title.

[23] The 3rd defendant filed the following documents: -

1. Certificate of Search for the land parcel Bungoma/Kabuyefwe/587
2. Receipt issued to the 3rd defendant.
3. Green Card to the land parcel Bungoma/Kabuyefwe/587.

The plaintiff filed a reply to the 3rd defendant's defence denying all the averments therein and putting the 3rd defendant to strict proof thereof.

[24] The plaintiff (Saisi) and the 1st defendant (Lochoson) were the only witnesses who testified in respect of their respective cases. The 2nd and 3rd defendants did not testify.

[25] The plaintiff and 1st defendant adopted as their evidence their respective statements contents of which I have already summarized above. They also produced their respective documentary evidence as filed herein.

[26] Submissions were thereafter filed both by Mr Simiyu instructed by the firm of Wamalwa Simiyu & Company Advocates for the plaintiff and by MS Nanzushi instructed by the firm of Lucy Nanzushi & Company Advocates for the 3rd defendant.

[27] I have considered the evidence by the plaintiff and the 1st defendant who are the only parties who testified as well as the submissions by Counsel for the plaintiff and the 3rd defendant.

[28] This Court has to determine the following claims in this suit with respect to the suit land: -

1. The plaintiff's claim against the defendants.
2. The 1st defendant's Counter – Claim against the 2nd defendant.



3. The 2nd defendant's Counter – Claim against the plaintiff.
4. Who bears the costs.

The following are not in dispute: -

1. The suit land is a resultant sub – division of the land parcel Bungoma/Kabuyefwe Scheme/332.
2. The suit land measures 1.6 Hectares (3.95 acres).
3. The suit land was first registered in the names of the 1st defendant on June 7, 1991.
4. It was then transferred to the 3rd defendant who obtained title thereto on October 26, 1995 and has since December 1, 2005 been registered in the names of the 2nd defendant Jael Odinga Omutakha (now deceased and substituted with Franklin Omutakha Asikare).

I will now consider those cases in that order.

1: Plaintiff's Case Against the Defendants.

Although the plaintiff has only alleged fraud against the 1st and 3rd defendants in paragraph 8 of his plaint, he proceeded to seek Judgment as against all the three (3) defendants.

[29] In paragraphs 10 and 11 of her defence, however, the 2nd defendant pleaded that the plaintiff's suit is infact res – judicata because there have been previous suits between her and the plaintiff over the suit land. She identified those previous suits as follows: -

1. Webuye Senior Resident Magistrate's Civil Case No 337 of 2006.
2. Bungoma High Court Civil Case No 41 of 2006.
3. Kimilili Resident Magistrate's Civil CaseNo 24 of 2006.

Res – judicata is a complete bar to any proceedings if it is up – held. It is provided for in Section 7 of the [Civil Procedure Act](#) in the following terms: -

- 7 “No Court shall try any suit 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.”

[30] The 2nd defendant did not avail any pleadings or Judgment in Bungoma High Court Civil Case No 41 of 2006 and so this Court is not able to tell who the parties or subject matter were. And with regard to Kimilili Resident Magistrate's Court Civil Case No 24 of 2006, the suit involved ownership of the suit land and was commenced by the plaintiff herein as against the 1st and 2nd defendants at the then Tongaren Land Disputes Tribunal which made an award in favour of the plaintiff. That award was subsequently adopted as an order of the Subordinate Court in Kimilili on February 20, 2007 and the parties were given 30 days to appeal. It is not clear if any appeal was preferred. At least no record of any appeal was filed by any of the parties. That should have brought the dispute over the ownership of the suit land to an end.



[31] However, the 2nd defendant herein (Omutakha) proceeded to the Senior Resident Magistrate's Court At Webuye where she filed Civil Case No 337 of 2006 against the plaintiff and one Damaclean Rachel Mukasia over the suit land. That suit was determined in favour of the 2nd defendant herein and it would appear that the proceedings in the Kimilili Resident Magistrate's Court Civil Case No 24 of 2006 were not brought to the attention of the Court at Webuye. What is important, however, is that having heard the parties in that case, the trial Magistrate B Ombewa (Acting Senior Resident Magistrate) delivered a Judgment on July 13, 2012 in which he found in favour of the 2nd defendant who was the plaintiff therein. In the said Judgment, the trial Magistrate made the following finding at page 38: -

“It is therefore clear that the plaintiff bought the subject land for Keveye Girls High School and followed the due process and eventually obtained the title deed. The title deed was issued on December 1, 2005. The *Registered Land Act (repealed)* gave the plaintiff all the rights and privileges appertaining to the land subject only to any encumbrances and other overriding. I have further noted that the defendants are claiming land parcel number Bungoma/Kaburengu/332 which is different from the subject land.”

The trial Magistrate then made the following order in the final paragraph of his Judgment: -

“In the end, I enter Judgment for the plaintiff against the defendants jointly and severally for an order of injunction as prayed for under paragraph 16A of the amended plaint. The plaintiff shall have costs of the suit. Orders accordingly.”

At the commencement of that Judgment, it was clear that the case involved the suit land herein. This is how the Judgment commences: -

“The plaintiff Jael Odinga Omutakha vide an amended plaint amended on July 24, 2006 sued the defendants Damaclean Rachel Mukasia (1st defendant) and Benea Mugasia Saisi (2nd defendant) for an order of injunction restraining the defendants by themselves or their servants from entering, using interfering using the parcel of land parcel Bungoma/Kabuyefwe/587, costs and interest on costs. The plaintiff averred that she is the registered sole proprietor of land parcel number Bungoma/Kabuyefwe/587 the subject land having purchased the same for valuation (sic) consideration in the year 1998 from Keveye Secondary School. The plaintiff further averred that in the year 2004, the 1st defendant started to claim that the land parcel number Bungoma/Kabuyefwe/587 belonged to her which claim had no basis.”

The 2nd defendant in that case was of course the plaintiff herein while the plaintiff is now the 2nd defendant in these proceedings. It is clear that the issue and subject matter was ownership of the suit land which is still the issue in these proceedings. It is also important to note that in that case, a former principal of the 3rd defendant herein testified on behalf of the plaintiff who is the 2nd defendant in this case.

[32] The plaintiff herein was therefore at liberty to Counter – Claim in Webuye Senior Resident Magistrate's Court Civil Case No 337 of 2006 seeking the same orders which he now seeks in this case. There is nothing to suggest that the Subordinate Court had no jurisdiction to grant those reliefs. In any event, the issue of that Court's jurisdiction to hear the dispute was determined in a ruling delivered by J O Magori (resident Magistrate) on January 29, 2008 against which there was no appeal. Before res – judicata can apply, the following conditions must exist: -



1. The issues in dispute in the former suit must be directly and substantially in issue in the suit where the doctrine of res – judicata is being pleaded.
2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.
3. The former suit must have been heard and finally decided.
4. The Court or Tribunal which determined the former suit must have been competent.

In *Henderson v Henderson* 1843 67 E R 313, a decision which has been applied in this country, Wigram VC held that: -

“Where a given matter becomes the subject of litigation in and 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 in contest but which was not 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 case, 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.

Similarly, under explanation No 4 of Section 7 of the *Civil Procedure Act*, it is stated thus: -

“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.”

- [33] The 2nd defendant’s case in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 was that she obtained a good title to the suit land from the 3rd defendant. The trial Magistrate agreed with her as is clear from the Judgment. It can only therefore mean that the 3rd defendant obtained a good title from the 1st defendant which it then passed to the 2nd defendant in this case. All the parties in this case are therefore “litigating under the same title” in this case which is what was at stake in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 and as captured under Section 7 of the *Civil Procedure Act*. The 1st and 3rd defendants were not parties in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 but the manner in which the 3rd defendant obtained title to the suit land was considered by that Court and found to have been procedural. That issue cannot again be revisited in these proceedings otherwise this Court will be sitting on an appeal against the decision of the trial Magistrate, a matter that is not before this Court.
- [34] Although the 1st and 3rd defendants were not parties in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006, it was held in *Omondi v National Bank of Kenya Ltd & others* 2001 EA 177 that a party cannot evade the application of the doctrine of *res – judicata* by merely adding new parties or causes of action in subsequent suits. Simply giving a case a new complexion will not help.
- [35] In his submissions on the issue of res – judicata, Counsel for the plaintiff has taken the position that what was in issue in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 was an application for injunction and therefore res – judicata cannot apply. Counsel has cited the



commencement and end of the Judgment delivered on July 13, 2012 and proceeded to submit as follows: -

“It is trite that an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand – alone remedy. In most cases, it accompanies declaratory orders. The rules for handling an injunctive order are well settled by cases as provided under Order 40 of the Civil Procedure Rules.”

- [36] Counsel for the plaintiff appears to suggest that what was before the Subordinate Court is Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 was an application for injunction under Order 40 of the Civil Procedure Rules. That, however, was not the case although I must remind Counsel that *res – judicata* applies both to applications as well as suits – *Kanororo River Farm Ltd & Others v National Bank of Kenya Ltd Milimani HCCC No 699 of 2001*.

See also *Mburu Kinyua v Gachini Tuti* 1978 KLR 69. However, what was before the Court in Webuye Senior Resident Magistrate’s Court Civil Case No 337 of 2006 (Counsel has wrongly referred to it as case No 226 of 2006) was a plaint by the 2nd defendant herein seeking Judgment against the plaintiff herein and another with respect to the ownership of the suit land. That is very clear from the Judgment delivered on July 13, 2012. If what was before the Subordinate Court was an application for injunction, then the Court would have delivered a ruling. Perhaps Counsel was misled by the fact that the Court issued an order for injunction. It is perfectly in order for a Court, after hearing witnesses in a case, to deliver a Judgment granting a party any orders sought including an injunction. Orders of injunction are not only issued at an interlocutory stage.

- [37] Given all the above, it is clear to me that the plaintiff’s suit against the defendants is *res – judicata* and is for striking out.
- [38] Other than being *res – judicata*, it is also clear that the plaintiff’s suit is statute barred. Although in his statement at paragraph 6 the plaintiff states that he discovered the fraud in 2004, when he was cross – examined by MS Nanzushi during the plenary hearing on March 10, 2020, he said: -

“I have alleged fraud on the part of the 3rd defendant. In 1991, I was on the land cultivating it. I am not aware that the 3rd defendant got it’s title in 1991. So I came to Court. In 1991 is when I discovered that the 1st defendant had tricked me.”

If, by his own admission he discovered that he had been tricked in 1991, then by the time he filed this suit on September 28, 2016, his claim had been caught up by the provisions of Section 7 of the Limitation of Actions Act which provides that an action to recover land may not be brought after the end of 12 years from the date on which the right of actions accrued. Limitation is an issue of law and which goes to the jurisdiction of the Court and can be raised *suo moto*.

2: 1st Defendant’s Counter – Claim Against the 2nd Defendant.

- [39] In response to the plaintiff’s claim, the 1st defendant filed a defence and Counter – Claim dated December 5, 2016 in which he sought the dismissal of the plaintiff’s suit. His Counter – Claim was however addressed towards the 2nd defendant and not the plaintiff. In paragraph 17 of his Counter – claim, he pleaded that: -

17 “The 1st defendant’s claim therefore against the 2nd defendant is for nullification of registration of title in respect of land parcel number in the names of the 2nd defendant.”



[40] The 1st defendant then goes on in paragraph 18(a) to seek the following order against the 2nd defendant:

18(a) “Nullification of registration of title in respect of land parcel number Bungoma/Kabuyefwe/587 in the names of the 2nd defendant and the same to revert to the 1st defendant and be registered in the 1st defendant’s name.”

It is instructive to note that the 2nd defendant has not filed any suit against 1st defendant. The 2nd defendant has only filed a Counter – Claim against the plaintiff seeking, *inter alia*, his eviction from the suit land. Therefore, as between the 1st and 2nd defendants, there is no relationship of plaintiff and defendant which could give rise to a Counter – Claim. A Counter – Claim, was defined by the Court of appeal in the case of *County Government of Kilifi v Mombasa Cement Ltd* 2017 eKLR Citing *Halsbeury’s Laws Of England* 4th Edition Vol 42 as follows: -

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross – claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of Counter – Claim.”
Emphasis mine.

Order 7 Rule 3 of the *Civil Procedure Rules* is couched in the following terms: -

“A defendant in a suit may set – off or set – up by way of Counter – Claim against the claims of the plaintiff, any right or claim, whether such set – off or Counter – Claim sound in damages or not and whether it is for a liquidated or unliquidated amount, and such set – off or Counter – Claim shall have the same effect as a cross – suit so as to enable the Court pronounce a final Judgment in the same suit, both on the original and on the cross – claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the Court such set – off or Counter – Claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

It must be remembered that a Counter – Claim is essentially a cross – suit. It allows a defendant to seek any remedy against the plaintiff in respect of any cause of action so that the issues raised by both parties can be canvassed in the same suit rather than in separate suits. This saves the parties both time and expenses as well as ensuring that judicial resources are expended in a manner that is efficient and expedient. In the circumstance of this case, the 2nd defendant has not filed any suit against the 1st defendant with respect of the suit land. The 1st defendant cannot therefore claim to have a Counter – Claim against the 2nd defendant. If the 1st defendant wishes to pursue any claim against the 2nd defendant with respect to the suit land, he can only do so in a separate suit.

[41] The 1st defendant’s Counter – Claim against the 2nd defendant is therefore incompetent, vexatious and an abuse of the process of this Court. And although the 2nd defendant did not file any response to the 1st defendant’s Counter – Claim, this is a matter which this Court can invoke its powers under Section 3A of the *Civil Procedure Act* and make any orders to prevent the abuse of its process and for the ends of justice.

[42] The 1st defendant’s Counter – Claim against the 2nd defendant must therefore be struck out.



3: 2nd Defendant's Counter Claim Against the Plaintiff.

[43] The 2nd defendant's Counter – Claim must also suffer the same fate as the plaintiff's suit and be struck out for being *res – judicata*. In the said Counter – Claim, the 2nd defendant seeks Judgment against the plaintiff in the following terms: -

1. Vacant possession of the suit land.
2. Eviction of the plaintiff from the suit land.
3. In the alternative, an order of permanent injunction restraining the plaintiff from interfering with the suit land.

As is now clear from the Judgment in Webuye Senior Resident Magistrate's Court Civil Case No 337 of 2006, the trial Court granted the 2nd defendant (as plaintiff) the main prayer which she sought and that was an order of injunction restraining the plaintiff herein and who was the 2nd defendant in that case, restraining him from interfering with the suit land. The fact that the plaintiff has now sought additional remedies including declaratory reliefs and an order compelling the 2nd defendant to transfer the suit land to him does not defeat the fact that his claim is *res – judicata*. What the 2nd defendant ought to have done, and it is not clear if she did, was to execute the Judgment delivered in her favour on July 13, 2012 in Webuye Senior Resident Magistrate's Court Civil Case No 337 of 2006. It is however not too late for her to do so because Section 4(4) of the *Limitation of Actions Act* gives her 12 years from July 3, 2012 to do so. She therefore still has some 2 years to have that Judgment executed. That is the only route available to her. However, her Counter – Claim is equally *res – judicata* and must be struck out.

4: Costs

[44] On the issue of costs, they follow the event. None of the parties herein has succeeded in their claims. The order that commends itself to me on the issue of costs is for each party to meet their own costs.

[45] Ultimately therefore and having considered the parties' respective claims with regard to the ownership of the land parcel No Bungoma/ Kabuyefwe/587, I make the following disposal orders: -

1. The plaintiff's suit against the defendants is struck out for being *res – judicata*.
2. The 1st defendant's Counter – Claim against the 2nd defendant is incompetent, vexatious, frivolous and an abuse of the process of this Court. It is also struck out.
3. The 2nd defendant's Counter – Claim is also *res – judicata*. It is equally struck out. She should pursue her claim by executing the Judgment in Webuye Senior Resident Magistrate's Court Civil Case No 337 of 2006.
4. Each party shall meet their own costs.

BOAZ N. OLAO.

J U D G E

29TH SEPTEMBER 2022.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THIS 29TH DAY OF SEPTEMBER 2022.

BOAZ N. OLAO.



J U D G E

29TH SEPTEMBER 2022.

