



Omuse ((Suing as the legal representative of the Estate of Lazaro Ikolong)) v Ogema ((Sued as the administrator of the Estate of Etaru Ogema Joseph)) (Environment & Land Case E052 of 2021) [2022] KEELC 15643 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E052 OF 2021
BN OLAO, J
DECEMBER 19, 2022**

BETWEEN

**VERONICA TATA OMUSE PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LAZARO IKOLONG)**

AND

**WENSLAUS ETARU OGEMA DEFENDANT
(SUED AS THE ADMINISTRATOR OF THE ESTATE OF ETARU OGEMA JOSEPH)**

RULING

1. If Veronica Tata Omuse (the Plaintiff herein) was asked to describe the doctrine of res judicata in one word, she would probably define it as an 'Ogre'. And she should be excused for describing res judicata in such terms because the doctrine has now, and I have immense sympathy for the plaintiff, brought this sad family dispute to an end. This Court's sympathy is evoked by the fact that the plaintiff, now aged over 75 years, had hoped that land parcel No South Teso/apokor would, to use her own words, be 'her burial site and graveyard.' It is unlikely that she will ever want to hear anyone mention the word 'res judicata' again.
2. The Plaintiff, suing as the legal representative of the Estate of her late father Lazaro Ikolong, filed this suit on December 2, 2021 against Wenslaus Etaru Ogema (the Defendant herein and also sued as the legal representative of the Estate of his late father Etaru Ogema Joseph) seeking against him judgment in the following terms with respect to the land parcel No South Teso/apokor/1215 (the suit land):
 - a. A declaration that the land parcel No South Teso/apokor/1215 measuring 10.09 Hectares formed part of the ancestral block of a land for the family of Lazaro Ikolong through Omarana



Alusi which part of the said land Omarana had given to his in-laws (Lazaro Ikolong and Etaru Ogema) through their daughter named Juliana Tata for their settlement and habitation.

- b. A declaration that the land parcel No South Teso/apokor/1215 measuring 10.09 Hectares constituted one ancestral land and family land for the family of Juliana Tata and Lazaro Ikolong but which was registered in the name of Etaru Ogema Joseph owing to the absence and incapacitation of the late Lazaro Ikolong at the time of land adjudication and registration.
 - c. A declaration that the defendant and his late father Etaru Ogema Joseph successively held the land and continued to hold title to the land parcel No South Teso/apokor/1215 measuring 10.09 Hectares as created from the original No LR 30 to hold in trust for the late Lazaro Ikolong and his wife Juliana Tata as represented by the Plaintiff.
 - d. A declaration that the Plaintiff and his late father has now acquired title to the said land by virtue of adverse possession.
3. The basis of the Plaintiff's case is that she is the Administrator and daughter of Lazaro Ikolong (hereinafter Ikolong) who died in 2001 and Juliana Tata Ikolong (hereinafter Tata) who died in 2019. That the Defendant is the son to Etaru Ogema Joseph (hereinafter Ogema) who, prior to his demise in Eastern Uganda in 1977, was the registered proprietor of the suit land. It is the Plaintiff's case that Ikolong And Ogema were brothers who migrated from Uganda and settled in Amukura in Kenya where Ikolong met and married the daughter to one Omaran of the Teso tribe in 1944. That Omaran gifted Ikolong the suit land to settle and bring up his family. Ikolong then invited his brother Ogema who also settled on the suit land. During the land adjudication period, Ikolong was away hospitalised in Uganda and so the suit land was registered in the name of Ogema to hold in trust for his brother. The two subsequently shared the suit land but Ogema disposed off his portion and migrated to Uganda. Ikolong, his wife and the Plaintiff's siblings continued living on the suit land where they were buried. The Plaintiff pleads, therefore, that the Defendant's father Ogema held the suit land in trust for Ikolong particulars whereof have been set out in paragraph 20(I) – (XII) of the plaint thus giving rise to this suit.
4. Simultaneously with the plaint, the Plaintiff filed a Notice of Motion premised under Article 40 of the [Constitution](#), Section 3A and 73 of the [Civil Procedure Act](#) and Order 40 Rules 1, 2, 3 and 4 of the [Civil Procedure Rules](#) seeking the following orders:
1. Spent
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 3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant either by himself, his agents, servants and/or personal representatives from interfering with the peaceful occupation and utilization of the land parcel No South Teso/apokor/1215 and/or by denying the plaintiff and his agents access to the said parcel of land vide eviction notice in ELC NO 43 OF 2015.
 4. That the costs be provided for.
5. The application is predicated on the grounds set out therein and is also supported by the plaintiff's affidavit dated December 1, 2021.
6. The gravamen of the application is that the Plaintiff, who is aged over 70 years and sickly, is the beneficial owner of the suit land which she occupies by virtue of a customary trust yet the defendant intends to evict her therefrom and has served her with a notice. That the plaintiff will suffer prejudice since it is her only home where she firms for her livelihood during these difficult times. That the suit land is ancestral land and her eviction which is imminent on December 8, 2021 (now past) arises from



the judgment in ELC Case No 43 Of 2015 Between Wenslaus Ogema Etaru -v- Juliana Tata Ikolong And Getruda Ilungat Ikolong in which she was not a party.

7. Annexed to the application are the following documents:
 1. Limited Grant of Letters of Administration issued to the plaintiff on September 9, 2021 in respect to the Estate of Ikolong Vide Busia Cm Succession Cause No E66 Of 2021.
 2. Grant of Letters of Administration Intestate issued to the defendant on August 5, 2021 in respect to the Estate of Ogema Vide Busia Cm Succession Cause No E75 Of 2020.
 3. Decree issued on July 8, 2019 in Busia Elc Case No 43 Of 2015 – Wenslaus Ogema Etaru -v- Juliana Tata Ikolong.
 4. Certificate of Official Search in respect of land parcel No South Teso/apokor/1215 In The Name Of Ogema.
8. The application is opposed and the defendant filed the following grounds of opposition:
 1. The application has no merit and is an abuse of the court process.
 2. The orders of eviction in Busia Elc Case No 43 Of 2015 have never been set aside, varied, reviewed or appealed against.
 3. In the circumstances, the orders in Busia Elc Case No 43 Of 2015 are still in force.
 4. This suit is res judicata in view of Busia Elc Case No 43 Of 2015.
 5. This application is a waste of judicial time.
9. When the application was placed before Omollo J on February 17, 2022, the judge directed that it be canvassed by way of written submissions. It was however not until October 6, 2022 that the same were filed by which time Omollo J had been transferred and so it fell upon me to craft the ruling.
10. I have considered the application, annexures, the grounds of opposition and the submissions filed by Mr Omeri Instructed By The Firm Of Omeri & Associates Advocates For The Plaintiff And By Mr Fwaya Instructed By The Firm Of Gabriel Fwaya Advocates for the defendants.
11. Among the grounds of opposition raised by the defendant is that this suit is res judicata Busia Elc Case No 43 Of 2015 Which Involved The Defendant Herein As The Plaintiff While Juliana Tatal Ikolong (the Mother To The Plaintiff Herein) Was The Defendant. The Decree In Busia Elc Case No 43 Of 2015 Which Was Heard By AK Kaniaru J Was Issued On July 8, 2019. It Shows That Having Heard The Parties Therein, AK Kaniaru J Found In Favour Of Wenslaus Ogema Etaru (as Plaintiff) Against Juliana Tata Ikolong (as defendant) in a suit that also involved this suit land. A decree followed in the following terms:

' It Is Hereby Decreed/ordered:

1. That an order of eviction be and is hereby issued against the defendant, her family, children. Servants and any other person claiming on her behalf from land parcel LR Teso/apokor/1215. Thereafter a permanent injunction be and is hereby issued against them.
2. That the defendants counter-claim fails and is hereby dismissed.



3. That if the defendant, her family, children, servants or any other person claiming on her behalf fails to vacate from the land parcel LR Teso/apokor/1215, eviction notice of three months to issue against them, if they do not vacate within the period, then eviction should be carried out.
 4. That each party to bear their own costs.'
12. It is therefore clear from the decree in Busia Elc Case No 43 Of 2015 and which has been annexed to the plaintiff's application, that the suit land was also the subject of litigation in Busia Elc Case No 43 Of 2015 Involving Wenslaus Ogema Etaru (who I have no doubt is the same person referred to as Wenslaus Etaru Ogema The Defendant Herein) And Juliana Tata Ikolong (the wife to IKOLONG and the mother of the plaintiff herein as is clear from her own pleadings).
 13. Res judicata is a complete bar to any proceedings. Once it is pleaded and proved, it brings to an end any subsequent pleadings in respect to the same subject matter and the parties and those acting under them.
 14. Res judicata 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.'
 15. It is clear therefore that before the doctrine of res judicata can be successfully invoked, the party raising it must prove the following:-
 1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.
 2. The former suit must have been between the same parties or parties under whom they or any of them claim.
 3. The parties must have litigated under the same titles.
 4. The court which decided the former suit must have been a competent court.
 5. The former suit must have been heard and finally decided by that court.
 16. In the case of *Independent Electoral & Boundaries Commission -v- Maina Kiai & Others 2017 eKLR*, the Court of Appeal captured the rationale of the doctrine of res judicata in the following terms:

' The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues that have already been determined by a competent court. It is designed as a pragmatic and common – sense protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundation of res judicata thus rests in the public interest for swift suit and certain justice.'
 17. The plank of the defendant's grounds of opposition to this suit is that it is res judicata in view of Busia Elc Case No 43 OF 2015 and therefore an abuse of the process of this court and also a waste of judicial



time. In his submissions, however, counsel for the plaintiff has not made any reference to this plea of res judicata and has been contented with addressing the issue as to whether or not the plaintiff has met the threshold for the grant of an order of injunction. However, since a plea of res judicata is a complete bar to a suit and goes to the jurisdiction of this court to determine this suit, I must consider it as a first point of call.

18. As already stated earlier, the suit land herein was also the subject of litigation in Busia Elc Case No 43 Of 2015 in which the plaintiff was the defendant herein while the defendant was TATA (the mother to the plaintiff herein).
19. That case was heard, considered and a judgment was delivered by Kaniaru J on June 27, 2019 who directed, inter alia and as already captured in the decree above, that TATA and her family, children, servants and any other person claiming through her be evicted from the suit land. TATA'S own counter-claim in which she sought an order that she was entitled to the suit land by way of a customary trust in her favour was dismissed. No appeal was filed against that judgment.
20. In this case, the plaintiff who is Tata's daughter is still pursuing the same suit land by virtue of a customary trust as pleaded in paragraph 20 of the plaint. And for good measure, she has also pleaded entitlement to the suit land by way of adverse possession as is clear from paragraph 27 (c) and (d) of her plaint. There is no doubt from the pleadings herein that the plaintiff is seeking orders that she is entitled to the suit land because it was ancestral land to which her parents Ikolong And Tata were entitled to by virtue of customary trust. That is clear from the prayers sought herein. However, since her own mother Tata Litigated Over The Suit Land With The Defendant In Busia Elc Case No 43 Of 2015, she cannot surmount the hurdle of res judicata. She was of course not a party in Busia Elc Case No 43 Of 2015 but as is now clear from the judgment therein and her pleadings in this case, she is pursuing the same claim which her mother placed for determination vide her counter-claim in that case. Res judicata affects parties and their privies. In the case of *Lotta -v- Tanaka & Others 2003 2 EA 556*, the Court of Appeal of Tanzania addressed that issue as follows:

' The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.'

21. Further explanation No 6 of Section 7 of the [Civil Procedure Act](#) is couched in the following terms:
 - (6) 'Where parties litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the persons so litigating.'
22. There is no doubt that the court presided over by Kaniaru J was a competent court which delivered a final judgment in a dispute involving the plaintiff's mother Tata and the defendant herein over the same suit land. And in that judgment, Kaniaru J specifically ordered that Tata 'her family children, servants and any other person claiming on her behalf' be evicted from the suit land as is clear from the decree therein. That judgment having not been set aside on appeal, it binds, the plaintiff herein and indeed her family and those claiming the suit land under Ikolong and Tata. The plaintiff has pleaded in paragraph 24 of her plaint that she is 'over 75 years of age and calls the suit land as her burial site and graveyard.' That is a plea that evokes considerable sympathy from this court. Unfortunately any hopes that the plaintiff may have had of pursuing this claim were dashed the moment a judgment was delivered in Busia Elc Case No 43 Of 2015. And any door that may have remained open was slammed when no appeal was mounted against that judgment. That is the sad predicament in which the plaintiff



finds herself. I notice that in his judgment in Busia Elc Case No 43 Of 2015, Kaniaru J also described this case as 'a delicate family matter'. Indeed it is a delicate and sad situation in view of the reality that the plaintiff is faced with imminent eviction from the suit land at such an advanced age. My hope is that notwithstanding the judgment in Busia Elc Case No 43 OF 2015 and this ruling, the parties herein will still find time and room in their hearts to agree and co-exist on the suit land bearing in mind that they are a family.

23. The up-shot of all the above is that this suit is res judicata Busia Elc Case No 43 Of 2015 and must be struck out and with it, the Notice of Motion dated December 1, 2021.
24. Even assuming that I am wrong on the issue of res judicata, the ownership of the suit land having been conclusively decided vide the judgment in Busia ELC Case No 43 of 2015, the plaintiff cannot possibly have any prima facie case left with respect to her claim over the suit land. Yet a party seeking an order of temporary injunction must first establish the existence of a prima facie case with a probability of success – *Giela -v- Cassman Brown & Co Ltd 1973 EA 358*.
25. On the issue of costs, the parties are family. Each shall meet their own costs.
26. I therefore make the following orders:
 1. This suit is res judicata Busia ELC Case No 43 OF 2015. It is accordingly struck out and with it, the Notice of Motion dated December 1, 2021.
 2. The parties being family, each shall meet their own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF DECEMBER 2022.

BOAZ N. OLAO

JUDGE

Mr. Omeri for the Plaintiff present

Mr. Juma for Mr. Fwaya for the defendant present

Anyasi/Ajwang' – Court Assistants present

