



Wephukulu (Suing on Behalf of the Estate of Isaiah Masaba Khauka) v Khauka (Environment & Land Case E020 of 2024) [2025] KEELC 4235 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E020 OF 2024**

EC CHERONO, J

MAY 29, 2025

BETWEEN

JAMIN WEPHUKULU (SUING ON BEHALF OF THE ESTATE OF ISAIAH MASABA KHAUKA) PLAINTIFF

AND

ELIUD WEPHUKULU KHAUKA DEFENDANT

RULING

1. The application before me is the Notice of Motion dated 22/01/2025 brought under Sections 3,3A,7,63 (1) &80 of the *Civil Procedure Act* and Order 40 Rule 1, 2 3 & 4 of the Civil Procedure Rules, 2010 seeking orders that the plaintiff's suit be struck out with costs for being res judicata and statute barred.
2. The application is based on seven (7) grounds which appear on the face of the said application supported by the affidavit of the Defendant/Applicant sworn on 22/01/2025.
3. The Defendant/Applicant deposed that he is a brother to Isaiah Masaba Khauka-dcd and that prior to the Adjudication period in the 1960's, they were each given their respective shares of land by their late father where they settled and co-existed peacefully. He stated that during Land Adjudication, he was registered as owner of L.R No. Bokoli/Chwele/250 while his brother was registered as owner of L.R No. Bokoli/Chwele/253. That his late brother sold his share to one Kaptain Watesi and moved to Uganda. That L.R No. Bokoli/Chwele/253 was later sub-divided into L.R No. Bokoli/Chwele/1091 and 1092 wherein he purchased L.R No. Bokoli/Chwele/1092 and obtained his title in 1969. That in the year 2005, the plaintiff claimed that he holds L.R No. Bokoli/Chwele/1092 in trust.
4. That he was sued before the Chwele Land Disputes Tribunal in case no. 9 of 2005 and after hearing the parties, they later gave an award which award was adopted vide Bungoma CM LDT No. 21 of 2005. He stated that an application was made in the High Court and the said award and adoption were quashed/



set aside. Thereafter, an appeal was filed which terminated in his favour with an order cancelling the titles and reverting to his name. That he filed for eviction vide Bungoma ELC 169 of 2013 and the plaintiffs filed a counter-claim filed which was subsequently allowed and his claim dismissed. That he later appealed to the Court of Appeal and his appeal was also disallowed. He argued that the issues in this suit have since been settled. He averred that he closed his title over 15 years ago and that this suit is time barred.

5. By way of a response, the plaintiff filed a replying affidavit sworn on 25/02/2025 where he deposed that the subject land in this case is LR Bokoli/Chwele/250 which is distinct from the other parcels of land litigated previously. He stated that the other suits could not have addressed the ownership of the subject land which he averred is ancestral land and has been fraudulently held by the defendant herein. He argued that this suit is not time barred as the same is based on a claim for customary trust which is exempted from the limitation of action. He urged the court to dismiss the application.
6. When the application came for directions, the parties agreed that the same be canvassed by way of written submissions. The Defendant through the firm of J.W. Sichangi & Company Advocates filed submissions dated 26/03/2024 in support of the application while the plaintiff through the Firm of M/S J.O. Makali & Co. Advocates filed submissions dated 11/04/2025.
7. I have considered the instant application and the supporting affidavit, the replying affidavit as well as the rival submissions. The issue for determination in this application is whether the same is merited. The grounds upon which the application is premised on is that the suit herein is Res Judicata and statute barred pursuant to Section 7 of the Limitations of Actions Act.
8. I will begin by considering whether this suit is res judicata. The applicable law for determining whether or not a matter is res-judicata is set out under Section 7 of the *Civil Procedure Act*. The Supreme Court in Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked i.e;
 - “(a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
9. Halsbury’s Law of England, Fourth Edition (2001 Reissue) Volume 16(2) at paragraph 966 states that there must be a final judgment for the defence of res judicata to stand. It is states as follows:-

“When the word “final” is so used with reference to a judgment, it does not mean a judgment which is not open to appeal, but merely a judgment which is “final” as opposed to “interim” ...The proceedings must have resulted in a final judgment or decree; a pending action without judgment creates no estoppel”
10. The Defendant brought out the existence of the following cases; Chwele Land Disputes Tribunal Case No. 9 of 2005 adopted in Bungoma CM LTD No.21 of 2005, Bungoma High Court Misc. Application No. 192 of 2005, Eldoret Court of Appeal case no. 47 of 2009, Bungoma ELC No. 169 of 2013, Court of Appeal at Kisumu being Appeal No. 84 of 2018 and Bungoma ELC E002 of 2023.



11. I have carefully considered the impugned judgments and rulings annexed by both parties. It is evident from the record that the subject matter in Chwele Land Disputes Tribunal Case No. 9 of 2005, which was subsequently adopted in Bungoma CM Land Tribunal Case No. 21 of 2005, as well as in Eldoret Court of Appeal Case No. 47 of 2009, Bungoma HC Misc. Civil Case No. 395 of 2005, and Bungoma HC Misc. Civil Case No. 192 of 2005, was Title No. Bokoli/Chwele/1092. The principal parties to those proceedings were Zebedayo Korosia and the defendant herein.
12. Upon review, it is apparent that both the subject matter and the parties in the aforementioned proceedings differ materially from those in the present suit. The current dispute concerns a different parcel of land and involves different parties, save for the defendant. Accordingly, I find that the previous proceedings referred by the Defendant do not relate to the same cause of action or meet the threshold required under Section 7 of the *Civil Procedure Act* to invoke the doctrine of res judicata.
13. As for Bungoma ELCLC No. E002 of 2023 the parties were Jamin Wepukulu, Zebedayo Matias Korogosi, Abraham Mabonga, Fred Wanyama Korosia and Saulo Khaemba Wepukulu vs. Eliud Wepukulu Khauka and the subject matter was title no. Bokoli/Chwele/250 and the resultant subdivisions. It is noteworthy that the subject matter in the present suit is similar to that raised in Bungoma ELCLC No. E002 of 2023. However, upon reviewing the attached ruling, I note that the earlier suit was struck out for want of locus standi.
14. This brings me to the question whether that suit which was struck out can be deemed to have been determined on finality. It is my considered view that the striking out of a suit does not amount to a determination on merits. Rather, it is a procedural technicality which does not preclude a party from filing a fresh suit, provided that such action is not barred by statute or other written law. Moreover, the issues in the struck-out suit were not definitively adjudicated by the court. Accordingly, I find that the doctrine of res judicata does not apply to the present case.
15. It has also been argued by the Defendant that this suit is statute barred under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The Defendant contends that the Plaintiffs seek to enforce rights over land that they claim belonged to their deceased father but which was registered in the Defendant's name in the year 1965 and whose title was closed in 2001 which is over 12 years. I have however looked at the plaint which is the substantive suit and note that the plaintiff alleges that the Defendant acquired title over the suit land fraudulently and unprocedurally and that the subject land is held by the Defendant in trust. Having considered the pleadings, I am of the view that the question of limitation cannot be conclusively determined at this stage without a full evaluation of the facts.
16. Accordingly, I decline to strike out the suit and direct that the matter proceeds to hearing on merits. The costs of the application shall be in the cause.
17. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Okaka H/B for Mr. Sichangi for the Applicant.

M/S Nekesa H/B for M/S Masengeli for the Respondent.



Bett C/A.

