



**Ochukuna & 5 others v Omunyin & 2 others (Environment & Land Case E022 of 2024) [2025] KEELC 329 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 329 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E022 OF 2024  
BN OLAO, J  
FEBRUARY 5, 2025**

**BETWEEN**

**REGINA IDIONYI OCHUKUNA ..... 1<sup>ST</sup> PLAINTIFF  
GEOFREY ONYIKO OPIYO ..... 2<sup>ND</sup> PLAINTIFF  
DOMNIC OPIYO ORONI ..... 3<sup>RD</sup> PLAINTIFF  
SAMUEL EKAKIT OPIYO ..... 4<sup>TH</sup> PLAINTIFF  
FREDRICK NEKESA OPIYO ..... 5<sup>TH</sup> PLAINTIFF  
PHILIP OPIYO ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**ANGELINE AMODING OMUNYIN ..... 1<sup>ST</sup> DEFENDANT  
MOSES OPUYA MAPESA ..... 2<sup>ND</sup> DEFENDANT  
JOHN ETYANG EKAKIT ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The land parcel No Bukhayo/Kisoko/2630 (the suit land) was the subject of a previous litigation in this very Court. That was Busia ELC Case No 158 of 2017 in which Angelin Amodin Omuyin and Simon Fave Chemwanda the Plaintiffs while John Etyang Ekakiti, Moses Opuyo Mapesa, Paustine Sereni, Elisha Omoko Obonyo, Patrick Okwaro Omukaga, Rose Obari Wanyama And Ann Auma Wanyama were the Defendants.
2. That case was heard by Omollo J who, having heard the parties, delivered her judgment on 17<sup>th</sup> November 2022 in favour of the Plaintiffs in the following terms:



- a. An order be and is hereby issued that the Defendants jointly and severally shall surrender 9½ acres out of L.R No Bukhayo/Kisoko/2630 to the Plaintiffs.
- b. The Defendants shall surrender vacant possession for the 9½ acres within 90 days from the date of delivery of this judgment. In default, eviction shall issue.
- c. Costs of the suit awarded to the Plaintiffs.

It is not clear if any appeal was preferred against that judgment or if the Defendants vacated the suit land as directed or were subsequently evicted therefrom.

3. What is clear is that vide a plaint dated 11<sup>th</sup> September 2024 and filed herein on 12<sup>th</sup> September 2024, Regina Idionyi Ochukuna, Geoffrey Onyiko Opiyo, Dominic Opiyo Oroni, Samuel Ekakit Opiyo, Fredrick Nekesa Opiyo and Philip Opiyo (the 1<sup>st</sup> to 6<sup>th</sup> Defendants respectively) moved to this Court and impleaded Angelin Amoding Omuyuni, Moses Opuya Mapesa And John Etyang Ekakit (the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively) seeking judgment against them as follows with respect to the suit land;
  - a. A declaration that the parcel of land No Bukhayo/Kisoko/2630 was registered in the name of Omuyin Ekakit and Sebastiano Ekakit to hold it in trust for their own benefit (or their heirs) and for the benefit of their siblings or the Plaintiffs herein and for the benefit of the children of the late Dominic Oroni (or his heirs).
  - b. A declaration that any change of registration of land No Bukhayo/Kisoko/2630 to the families of Omuyin Ekakit and Sebastiano Ekakit (both deceased) and living out the family of the late Dominic Oroni is irregular and unlawful.
  - c. A declaration that the partition of the land parcel No Bukhayo/Kisoko/2630 into two portions and not three portions in regard the family of Omuyin Ekakit, Sebastiano Ekakit and Dominic Oroni (all deceased) is irregular and/or unlawful).
  - d. A declaration that any tinkering with the parcel of land No Bukhayo/Kisoko/2630 by the Defendants and the change of registration of ownership in the name of the Defendants is irregular and/or unlawful and therefore null and void ab initio.
  - e. That this Court determines the trust in favour of the Plaintiffs and heirs of the Estate of the late DOMNIC ORONI (or their heirs).
  - f. Costs of the suit.

The basis of the Plaintiff's claim, in brief, is that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff together with the 3<sup>rd</sup> Defendant are children of the late Dominic Oroni who, prior to his death, was the owner of the suit land the same having been bequeathed to him by his father-in-law. That Dominic Oroni passed away before the adjudication process and his brother Sebastiano Ekakit inherited his (Dominic's) wife Dolofina Nekesa and was therefore entrusted with the suit land having abandoned his own land in Asinge sub-location. That during the land adjudication process, Sebastiano Ekakit and his brother Omuyin Ekakit were registered as proprietors of the suit land to hold it in trust for themselves and the children of Dominic Oroni who include the Plaintiffs.

4. That in 2017, Anjelin Amoding Omuyin who is the daughter of the late Omuyin Ekakit filed Busia ELC Case No 158 of 2017 and claimed that the suit land be shared out between the children of Omuyin Ekakit and Sebastiano Ekakit only and left out the children of Dominic Oroni who were not catered for yet Omuyin Ekakit, Sebastiano Ekakit and Dominic Oroni were all buried on the suit land which the children of Dominic Oroni occupy. The families of Omuyin Ekakit And Sebastiano Ekakit



are now unjustly partitioning the suit land and excluding the family of Dominic Oroni who was the eldest. The particulars of trust are pleaded in paragraph 19 (i) to (v). For the purposes of this ruling, I need not rehash them.

5. Simultaneously with the plaint, the Plaintiffs filed a Notice of Motion of even date in which he sought an order of temporary injunction to restrain the Defendants whether by themselves, their employees, agents, servants and or legal representatives from alienating, selling, evicting or interfering with the land parcels occupied by the Plaintiffs pending the hearing of this suit.
6. The basis of the Motion is that both the Plaintiffs and the Defendants are beneficial owners of the suit land by virtue of a customary trust and the same is registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. However the Defendants have trespassed onto the shares of the Plaintiffs on the suit land and are uprooting the boundaries and cutting down food crops and threatening to evict the Plaintiffs which is likely to cause a breach of the peace.
7. The application is supported by the affidavit of the 1<sup>st</sup> Plaintiff which is basically a rehash of the plaint herein. Annexed to the said affidavit are several photographs of a parcel of land with persons thereon.
8. The Motion is opposed and the 1<sup>st</sup> Defendant filed a replying affidavit dated 27<sup>th</sup> September 2024 and a further replying affidavit dated 3<sup>rd</sup> October 2024. In both affidavits, it is deponed that this suit is res judicata and an abuse of the Court process as per the annexed Judgment in Busia ELC Case No 158 of 2017 a copy of which is annexed. In the affidavit dated 27<sup>th</sup> September 2024, she has deponed that the 1<sup>st</sup> Plaintiff is a sister to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were parties in BUSIA ELC No 158 of 2017 (it is erroneously referred to as Busia ELC Case No 153 of 2017) while the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are children to the 3<sup>rd</sup> Defendant. In the further affidavit dated 3<sup>rd</sup> October 2024, the 1<sup>st</sup> Defendant has also deposed that this suit is res judicata and an abuse of the Court process in view of the annexed copy of Busia ELC Case No 158 of 2017 (again erroneously referred to as Busia ELC Case No 153 of 2017) a copy of which is annexed. The 1<sup>st</sup> Defendant further adds that the 1<sup>st</sup> Plaintiff is the sister to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in Busia ELC Case No 158 of 2017 while the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are children to the 2<sup>nd</sup> Defendant.
9. The Defendants also filed a Notice of Preliminary Objection dated 27<sup>th</sup> September 2024. They raised the following issues:
  1. The cause of action herein is res judicata by dint of the proceedings and judgement in ELC Case No 153 of 2017 (should be 158 of 2017).
  2. The suit is utter abuse of the due process of the Court.

The 2<sup>nd</sup> Defendant filed a replying affidavit dated 7<sup>th</sup> October 2024 in which he deposed, inter alia, that the Plaintiffs are children of Dominic Oroni who was his uncle and was also the brother to Sebastian Ekakit and Omunyin Ekakit all of who are now deceased. That the suit land was originally known as parcel No L.R Bukhayo/kisoko/784 and was owned by the late Dominic Oroni who had welcomed his siblings Sebastian Ekakit and Omunyin Ekakit to settle thereon. As at the time of the land adjudication, Dominic Oroni had died and his siblings divided the suit land among themselves yet it was held in trust. The 1<sup>st</sup> Defendant is now destroying the original boundaries of the suit land and is intent on dispossessing the Plaintiffs of their share.
10. The record shows that only the 2<sup>nd</sup> Defendant filed a defence and also a counter-claim to the plaint. He has pleaded in paragraphs 2 and 3 of the defence that he admits paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9



of the plaint to the extent that the same are an elaboration of the history of the ownership of the suit land. In paragraph 9 of the defence and counter-claim, he has pleaded thus:

9: “Contents of paragraph 19 of the plaint and the particulars pleaded thereto are admitted by the Plaintiff”.

Paragraph 19 of the plaint had particularized the elements of trust on the part of the Defendants with respect to the suit land.

11. The 2<sup>nd</sup> Defendant has in his counter-claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendant pleaded that the registration of the original land parcel No Bukhayo/Kisoko/784 in the name of Sebastiano Ekakit and Omunyin Ekakit was erroneous and did not reflect that it was to be done in trust for the benefit of the three (3) families and its sub-division to create the suit land was done fraudulently and did not reflect that it should have been registered in trust. The 2<sup>nd</sup> Defendant therefore sought the following declarations and orders in his counter-claim:

1: “A declaration that the land parcel No Bukhayo/Kisoko/784 and consequently land parcel No Bukhayo/Kisoko/784 and consequently Bukhayo/Kisoko/2630 was and still is customary land and was held by the proprietors thereto in trust for all the beneficiaries entitled therein.”

2: A declaration that the entries on the Land Register in reference to land parcel No Bukhayo/Kisoko/784 and Bukhayo/Kisoko/2630 were entered irregularly and ought to be cancelled.

3: A permanent injunction against the 1<sup>st</sup> Defendant in the counter-claim restraining her whether by herself or her employees, agents and/or legal representatives from alienating, selling, evicting and interfering with the counter-claimant’s portion of land parcel No Bukhayo/Kisoko/2630.

4: An order for the re-registration of the suit land in the interest of the three families in accordance with the boundaries that were established by the original owners and as they still exist on the ground.

5: Costs of the suit.

6: Any other order that the Honourable Court shall deem just to grant.”

When the Notice of Motion was placed before me on 16<sup>th</sup> September 2024, I granted the Plaintiffs the order of temporary injunction pending the interparte hearing of the Motion which was then scheduled for mention on 8<sup>th</sup> October 2024.

12. However, on 8<sup>th</sup> October 2024, the Court was informed that not all the parties had filed submissions on the Motion as directed. They sought more time. However, as there was already a Preliminary Objection filed by the Defendants and dated 27<sup>th</sup> September 2024, it was agreed that it be canvassed by way of written submissions to be exchanged on or before 24<sup>th</sup> October 2024. This ruling is therefore in respect to the Preliminary Objection dated 27<sup>th</sup> September 2024 and filed by the Defendants.

13. For purposes of completeness, I shall cite the Preliminary Objection again. There are only two issues raised therein. These are:

1. The cause herein is res judicata by dint of the proceedings and judgment in Busia ELC Case No 153 of 2017 (read 158 of 2017).

2. The suit herein is utter abuse of the due process of the Court.



If a suit is res judicata, then it follows that it is also an abuse of the process of the Court. I shall therefore interrogate the plea of res judicata because if I up-hold it, then it will be superfluous to consider the issue of abuse of the due process of Court.

## Res-judicata

14. This is provided for in Section 7 of the [Civil Procedure Act](#) in the following terms:

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.”

Res judicata is a matter of law and is therefore a proper issue which can be raised as a Preliminary Objection as was held in the case of *Mukisa Biscuits Manufacturing Company Ltd -v- West End Distributors LTD* 1969 E.A 696 where Sir Charles Newbold P defined it as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.”

It is clear that for res judicata to be sustained, the party pleading it must prove the following:

1. That the issue in dispute in the former suit is directly and substantially in dispute in subsequent suit.
2. That the former suit was between the same parties or those under whom they claim litigating under the same title.
3. The former suit must have been heard and finally decided.
4. The Court or Tribunal which heard and determined the former suit must have been competent to do so.

Res judicata has been defined in Black’s Law Dictionary 10<sup>th</sup> Edition as:

“Latin, ‘a thing adjudicated’; An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”

The term has also been discussed in several precedents of the Superior Courts. In the case of [James Njuguna Chui -v- John Njugu Kimani C.a. Civil Appeal No 322 Of 2014](#) [2017 eKLR], the Court described the rationale of res judicata and said:

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to re-litigate or re-agitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging



over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, Courtesy of the repeat litigation.”

The same Court reiterated in the case of Ngugi -v- Kinyanjui & Others 1989 KLR 146 that Section 7 of the Civil Procedure Act is a bar and an injunction against the re-litigation of a matter already heard and finally determined by a competent forum.

15. Finally, in the case of John Florence Martime Services Ltd & Another -v- Cabinet Secretary For Transport & Infrastructure & Others 2015 eKLR, it was stated thus:

“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 Courts 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. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res Judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

There is no dispute that the suit land was also the subject of litigation in Busia ELC Case No 158 of 2017 in which a final Judgment was delivered by this Court differently constituted on 17<sup>th</sup> November 2022. At the commencement of this ruling, I have identified the parties who litigated in Busia ELC Case No 158 of 2017. Angelin Amoding Omunyin who was the Plaintiff in that case is now the 1<sup>st</sup> Defendant in this case. Moses Opuya Mapesa who was the 2<sup>nd</sup> Defendant in that case is also the 2<sup>nd</sup> Defendant in this case. John Etyang Ekakit who was the 1<sup>st</sup> Defendant in that case is now the 3<sup>rd</sup> Defendant in this case. It has been deposed, without rebuttal, by the 1<sup>st</sup> Defendant herein vide her further replying affidavit dated 3<sup>rd</sup> October 2024 that the 1<sup>st</sup> Plaintiff herein is a sister to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were parties in Busia ELC Case No 158 of 2017 while the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are the children of the 2<sup>nd</sup> Respondent. In her earlier replying affidavit dated 27<sup>th</sup> September 2024, the 1<sup>st</sup> Defendant had deposed that the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are children to the 3<sup>rd</sup> Defendant. Notwithstanding that contradiction in the replying affidavits of the 1<sup>st</sup> Defendant as to whether the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are children of the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants in Busia ELC Case No 158 of 2017, what is obvious is that all the parties herein and in Busia ELC Case No 158 of 2017 are members of the same family. Indeed in paragraph 23 of their pleadings, the Plaintiffs have pleaded that:

- 23: “The Plaintiffs content that the suit land is family land and was registered in the names of Omunyin Ekakit and Sebastiano Ekakit being the surviving brothers of the late Dominil Oroni to hold in trust for the entire family.”

And in paragraph 10 of his defence and counter-claim, the 2<sup>nd</sup> Defendant has pleaded that:

- 10: “Paragraphs 20, 21, 23 and 24 of the pleadings are admitted.”

The thread that runs through the pleadings in this case is that the parties herein and in Busia ELC Case No 158 of 2017 are all related and claim ownership of the suit land on the basis of a customary trust. Therefore, although some of the parties in this case were not parties in the earlier case being Busia ELC Case No 158 of 2017, the Plaintiffs herein are clearly in privity with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who



were parties in Busia ELC Case No 158 of 2017 while the 1<sup>st</sup> Defendant was a party in both cases. Their dispute in both cases hinges on the ownership of the suit land. Under Explanation NO 6 of Section 7 of the *Civil Procedure Act*, it is stated that:

“Explanation 6 – where persons 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 the purposes of this section, be deemed to claim under the persons so litigating.”

In his submissions, Mr Omeri counsel for the Plaintiffs has cited Explanations 3, 4 and 5 of the *Civil Procedure Act* and gone on to state the following in page 4:

“The orders granted in Busia ELC No 158 of 2017 are not directed to the Plaintiffs herein and therefore cannot be implemented against them. Wherein the Plaintiffs cannot be evicted from their land or their land taken away to satisfy the judgment without being granted an opportunity to be heard over the suit land. Litigation or proceedings against a family member like a brother cannot be assumed to be the other brother or relative as both may be claiming different interests (especially ancestral land) where they all possess and occupy on the same land in different capacities. In current circumstances, the 1<sup>st</sup> Defendant ought to have sued Plaintiffs or broaden her prayers in the former suit to cover the Plaintiffs herein as well.”

Counsel goes on to add that:

“Furthermore, the Plaintiffs also ride on an aspect/issue which was not dealt with in previous suit for the Court to give its decision with finality from litigation ... herein. The Plaintiffs suit is purely premised on an aspect of customary trust when (sic) are under immense threats of being rendered squatters despite that they were born on the suit land. The suit parcel is supposed to be divided in consideration of three families as already done on the ground and not two families where they have co-existed recently before some family members (like the 1<sup>st</sup> Defendant) becoming ... wherein to them, it is only land and money that matters now and not humanity.”

I note that part of the submissions were illegible. While those submissions may sound attractive and persuasive, they are however flawed in the face of the law and the available jurisprudence on the issue of res judicata. It matters not that the Plaintiffs herein are claiming under a customary trust which may not have been an issue in Busia ELC Case No 158 of 2017. In *Henderson -v- Henderson* 1843 3 HARE 100 [1843 67 ER 3131, a decision which has been affirmed by Courts in this country, Wigram V. C. is quoted thus:

“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.”

As is already now clear, the Plaintiffs herein are in privity, through family ties, with the Defendants who were parties in Busia ELC Case No 158 of 2017. The claim to the suit land by way of customary trust which they now wish to agitate in these proceedings ought to have been litigated in BUSIA ELC NO 158 of 2017 by way of a counter-claim. Res judicata is a complete bar and that claim to the suit land by way of a customary trust cannot now be re-litigated in this suit. That is the message from *Henderson -v- Henderson* (supra).



16. Explanation NO 4 of Section 7 of the *Civil Procedure Act* is also very clear and reads:

“Explanation - (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.”

That is basically what was stated in Henderson -v- Henderson (supra). The Plaintiffs’ suit is clearly res judicata.

17. The 2<sup>nd</sup> Defendant not only filed a defence against the Plaintiffs’ suit but he also filed a counter-claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. Order 7 Rule 3 of the Civil Procedure Rules allows a Defendant to file a set-off and counter-claim. It reads:

3: “A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to 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 counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof.”

It is clear from the above that a counter-claim can only be filed by a Defendant against the Plaintiff. A Defendant cannot file a counter-claim against a co-Defendant. A counter-claim is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as:

“A claim for relief asserted against an opposing party after an original claim has been made; es a Defendant’s claim in opposition to or as a set-off against the Plaintiff’s claim”. Emphasis mine.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants have not filed any suit against the 2<sup>nd</sup> Defendant. Therefore, in this suit, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants cannot be considered as “opposing” parties to the 2<sup>nd</sup> Defendant and no relief can be sought against them by the 2<sup>nd</sup> Defendant. If the 2<sup>nd</sup> Defendant has any claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants over the suit land, he is at liberty to file his own independent suit against them. His counter-claim is incompetent and is for striking out.

18. With regard to costs, the parties herein are family. The order that commends itself to make in the circumstances is that each party shall bear their own costs.

19. The up-shot of all the above is that having considered the Preliminary Objection dated 27<sup>th</sup> September 2024, this Court makes the following disposal orders:

1. The Plaintiffs’ suit is res judicata. It is accordingly struck out and with it the Notice of Motion dated 11<sup>th</sup> September 2024. All interlocutory orders issued pursuant to that Motion are vacated.
2. The 2<sup>nd</sup> Defendant’s counter-claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants is incompetent and is also struck out.
3. The parties being family shall each meet their own costs.

BOAZ N. OLAO



JUDGE

5<sup>TH</sup> FEBRUARY 2025

Ruling dated, signed and delivered on this 5<sup>th</sup> day of February 2025 with notice to the parties by way of electronic mail.

BOAZ N. OLAO

JUDGE

5<sup>TH</sup> FEBRUARY 2025

