



REPUBLIC OF KENYA



KENYA LAW
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**Okado v Abudo & 3 others (Environment & Land Case
E016 of 2022) [2025] KEELC 3517 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E016 OF 2022**

**BN OLAO, J
MAY 5, 2025**

BETWEEN

BENSON MBWEDE OKADO PLAINTIFF

AND

KARIM OJIAMBO ABUDO 1ST DEFENDANT

DOROTHY SIKADA OGOMBO 2ND DEFENDANT

ELIZABETH WASIKE OGOMBO 3RD DEFENDANT

PAULINE OKUKU 4TH DEFENDANT

RULING

1. Benson Mbwede Okado(the Plaintiff) filed this suit on 13th October 2022 seeking against Karim Ojiambo Abudo, Dorothy Sikada Ogombo, EElizabeth Akumu Wasike and Pauline Okuku (the 1st, 2nd, 3rd and 4th Defendants respectively) judgment as follows with respect to the land parcels No Bunyala/Bulemia/2426 and 2228:
 - a. Cancellation of the tiles in respect to the land parcels No Bunyala/Bulemia/2426 and 2228.
 - b. An order for the transfer of the said two parcels of land to the rightful owners.
 - c. An order for specific performance against the 1st Defendant.
 - d. An order for the eviction against the 2nd and 3rd Defendants and all permanent and semi-permanent structures built on the land parcels No Bunyala/Bulemia/2426 and 2228 be demolished under the supervision of the Officer Commanding Police Division (OCPD) Busia County.
 - e. An order for compensation for the loss and additional costs incurred since then be issued.



- f. Costs of this suit.
- g. Any other relief this Honourable Court may deem fit to grant.

It is the Plaintiff's case that he is a bona fide heir and beneficiary to the land parcel No Bunyala/Bulemia/358 left behind by his late father and held in trust by the 1st Defendant on behalf of the beneficiaries. However, the 2nd and 3rd Defendants have been occupying it on ground that they purchased it from the 1st Defendant. That for a long time, he has been persuading the 1st Defendant as trustee to share the land with him but to no avail. That in 1991, he lodged a complaint with the District Officer Budalangi and also the District Commissioner Budalangi as well as the District Lands Tribunal. It is the Plaintiff's case that the 2nd and 3rd Defendants have doctored documents with respect to the land parcels No Bunyala/Bulemia/2426 and 2228 and sub-dividing the land fraudulently.

- 2. The 2nd Defendant filed an amended defence dated 19th June 2023 in which she has described the suit as incompetent, defective, res judicata and statute barred and sought to have it struck out. Further, that the subject matter of this suit was also the subject matter in Busia ELC Case No36 of 2018 in which the Plaintiff herein was a witness for the Plaintiff in that suit.
- 3. The 1st and 3rd Defendants have not filed any defence.
- 4. The 4th Defendant filed a defence dated 28th March 2023 in which she denied all the allegations against her and added further that this suit is res judicata as there exists a similar suit between the parties over the same subject matter being Busia ELC Case No15 of 2016 and Busia ELC Case No92 of 2018 and a Preliminary Objection would be raised.
- 5. The 2nd Defendant has now moved to Court vide her Notice of Motion dated 19th June 2023 and which is the subject of this ruling. The same is premised under the provisions of Order 2 Rule 15(1) (a) and 2 of the Civil Procedure Rules and Section 7 of the Limitation of Actions Act. The 2nd Defendant seeks the following orders:
 - 1. The suit against the 2nd and 3rd Defendants be struck out as it is res judicata.
 - 2. The suit does not disclose a cause of action against the 2nd and 3rd Defendants.
 - 3. The suit is time barred by statute.
 - 4. The Plaintiff to pay costs of this suit and the application.

The application is supported by the affidavit of the 2nd Defendant in which she has deposed, inter alia, that the Plaintiff is seeking the cancellation of the titles to the land parcels No Bunyala/Bulemia/2426 and 2228 and also the eviction of the 2nd and 3rd Defendants from the said parcels of land yet those issues were conclusively heard and determined by this Honourable Court in Busia ELC Case No36 of 2018. Further, this suit is statutorily time barred. That the 1st Defendant who is a brother to the Plaintiff was also a witness for the Plaintiff in that case where the same issues which are being raised in this case were determined.

- 6. The following documents are annexed to the Motion:
 - 1. Copy of the judgment delivered by OMOLLO J in Busia ELC Case No36 of 2018 on 19th October 2021.
 - 2. Amended plaint and statements filed in Busia ELC Case No36 of 2018 by the Plaintiff and 1st Defendant in that case where the 1st Defendant was witness for the Plaintiff in this case.



In opposition to the 2nd Defendant's Motion, the Plaintiff filed grounds of opposition in which he has stated that the Preliminary Objection raised does not qualify as a true Preliminary Objection and the issues in this suit have not been raised in any other Court. That this suit should be heard and determined by way of viva voce evidence as the Defendants stand to suffer no prejudice. The argument that the suit is statute barred is vague and ambiguous and this Preliminary Objection is scandalous, frivolous and vexatious. The same should be dismissed.

7. The Motion has been canvassed by way of written submissions. The same have been filed by MR J. V. JUMA instructed by the firm of J. V. Juma & Company Advocates for the 2nd Defendant and by MR MWAMBI instructed by the firm of Jaden Jonathan & Mwambi Advocates for the Plaintiff.
8. I have considered the application, the supporting affidavit and annexures thereto, the grounds of opposition and the submissions by counsel.
9. Although the application is premised under the provisions of Order 2 Rule 15 of the *Civil Procedure Rules*, which provides for the striking out of pleadings for disclosing no reasonable cause of action or for being scandalous, frivolous, vexatious or an abuse of the process of this Court, it is clear even from the submissions by counsel that what has been raised is a Preliminary Objection on res judicata and Limitation. Indeed in his submissions, counsel for the Plaintiff has commenced thus:

“Your Honour

Vide an application dated 19th June 2023, the 2nd Defendant raised a Preliminary Objection on the following grounds:

- i. The suit against the 2nd Defendant is Res judicata.
- ii. The suit does not disclose the cause of action against the 2nd Defendant.
- iii. The suit is time barred.”

Those are the issues which I will consider in this ruling and although counsel for the Plaintiff has submitted that the issues raised “offends the confines of a Preliminary Objection,” there is no doubt that the issues of res judicata and Limitation are pure issues of law and therefore can properly be raised as a Preliminary Objection within the definition provided in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* 1969 E.A 696. Those are the issues which I shall now determine.

Res Judicata

10. This is provided for in 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 term res judicata has been defined in Black's Law Dictionary 10th Edition as:

“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.”

There is no dispute that the land parcel No Bunyala/Bulemia/2246 and which is among the subject matter in this suit was also the subject matter in Busia ELC Case No36 of 2018. In that case, the Plaintiff was Karim Ojiambo Abudo who is the 1st Defendant in this case while Dorothy Sikada Ogombo who is the 2nd Defendant in this case was the 1st Defendant together with Elizabeth Akumu Wasike where they had been sued as the legal representatives to the Estate of one Joseph Ogombo Bwire. In Busia ELC Case No36 of 2018, the Plaintiff who is the 1st Defendant herein sought the main remedy that the title to the land parcel No Bunyala/Bulemia/2426 be cancelled. That same remedy is among those sought in this case in which the other remedy is the cancellation of the title to the land parcel No Bunyala/Bulemia/2228. It is also clear from the pleadings in Busia ELC Case No36 of 2018 that the land parcels No Bunyala/Bulemia/2426 and 2228 were both resultant sub-division of the land parcel No Bunyala/Bulemia/358. It is also clear from the pleadings herein that the Plaintiff and the 1st Defendant are brothers. When the 1st Defendant filed Busia ELC Case No36 of 2018 where he was the Plaintiff he recorded an undated statement where he pleaded in paragraph 10 thus:

10: “That if L.R Bunyala/Bulemia/2228 is registered in the name of Joseph OgomboBWIRE then he was holding trust (sic) for myself and that of my brother Benson Mbwede Okado.”

In the same BUSIA ELC Case No36 of 2018, the Plaintiff therein and who is the 1st Defendant herein record a statement of facts dated 3rd May 2018 and in paragraph 2 thereof, he has stated that:

2: “In August 1977, the late Joseph Ogombo Bwire approached the Plaintiff with a view to purchasing part of L.R Bunyala/Bulemia/358 but he did not sell as the land was yet to be shared between him and his brother Benson M. Okado first before he could sell to him.”

As already stated above, the land parcel No Bunyala/Bulemia/358 was the original land parcel from which the land parcels No Bunyala/Bulemia/2426 and 2228 were hived. Busia ELC Case No36 of 2018 was heard by Omollo J who dismissed the suit vide a judgment delivered on 19th October 2021 and no appeal appears to have been filed against the judgment. That suit, as is clear from the pleadings, was filed by the 1st Defendant as against the 2nd and 3rd Defendants sued as legal representatives of the Estate of Joseph Ogombo Bwire. The Plaintiff in this case was not a party in Busia ELC Case No36 of 2018 but as is now clear from the statements filed by the Plaintiff in that case, he was clearly pursuing the same claim which the Plaintiff in this case is now pursuing. The two are brothers and explanation No 6 of Section 7 of the *Civil Procedure Act* reads:

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 person so litigating.”

It is also pleaded in paragraph 10 of the plaint in Busia ELC Case No36 of 2018 thus:

10: “In 2016, the Plaintiff and his brother Benson Mbwede Okado filed a suit in Court Busia ELC No15 of 2016 which was withdrawn without being prosecuted for lack of locus standi.”

Whichever way one looks at it, it becomes obvious that Busia ELC Case No36 of 2018 was filed to pursue the same claim which the Plaintiff herein is now pursuing. With respect to the claim against 2nd and the 3rd Defendants who are the joint Administrators to the Estate of Joseph Ogombo Bwire pursuant to orders issued in BUSIA CM’S Succession Cause No 315 of 2017, this suit is clearly res-



judicata. That principle was captured by the Court of Appeal in the case of *William Koross v Hezekiah Kiptoo Komen & Others* 2015 eKLR as follows:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and unsuccessful one must let go.”

With regard to the 2nd and 3rd Defendants, it is obvious that this suit is res judicata.

Limitation

11. The second limb of the Preliminary Objection is that this suit is statute barred. Section 7 of the [*Limitation of Actions Act*](#) provides that:

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.”

The Green Card to the land parcel No Bunyala/Bulemia/2426 shows that it was created on 2nd January 1985. The Green Card to the land parcel No Bunyala/Bulemia/2228 was not availed but since it was also hived from the original land parcel No Bunyala/Bulemia/358, this Court is satisfied that it was also created at the same time. The Plaintiff knew about the creation of the land parcels No Bunyala/Bulemia/2246 and 2228 as far back as 1991. In paragraph 8 of his plaint, he has pleaded thus:

8: “The Plaintiff contents that his efforts to seek formal assistance started in the year 1991 when he complained of encroachment of their land by the 2nd and 3rd Defendants to the District Officer Budalangi Division who in return requested from the Land Registrar Busia for documents but nothing was forthcoming.”

It is therefore clear from the above that with due diligence, the Plaintiff could have known about the existence of the titles to the land parcels No Bunyala/Bulemia/2246 and 2228 as far back as 1985. And by his own admission, the Plaintiff was already seeking assistance from the District Officer Budalangi and the Land Registrar Busia over the sub-division of the original land parcel No Bunyala/Bulemia/358 and the creation of the above parcels by 1991. This suit was filed on 13th October 2022 some thirty (30) years later. Clearly, this suit is statutorily time barred by virtue of the provisions of Section 7 of the [*Limitation of Actions Act*](#) cited above. This Court must therefore down it's tools in this matter.

12. Ultimately therefore and having considered the 2nd Defendant's Notice of Motion dated 19th June 2023 and which is basically a Preliminary Objection, I issue the following orders:

1. The Plaintiff's suit as against the 2nd and 3rd Defendants is res judicata.
2. The Plaintiff's suit as against all the Defendants is statute barred.
3. The Plaintiff's suit is accordingly struck out.
4. The Plaintiff shall meet the costs of the 2nd and 4th Defendants who are the only ones who had filed their defences.

BOAZ N. OLAO

JUDGE



5TH MAY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 5TH DAY OF MAY 2025 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

5TH MAY 2025

