



**Tuta & another v Ngoloma (Enviromental and Land Originating Summons E016 of 2024) [2025] KEELC 4162 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2024**

**AY KOROSS, J**

**JUNE 3, 2025**

**BETWEEN**

**JOSEPH KIOKO TUTA ..... 1<sup>ST</sup> PLAINTIFF**

**KYALO TUTA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TITUS WAMBUA NGOLOMA ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of the notice of motion dated 11/07/2024 filed by the plaintiffs, where they seek the following orders from this court: -
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. THAT an order of temporary injunction does issue restraining the defendant, his agents, servants and persons claiming under him or through him from entering upon, taking possession of, alienating, disposing, cultivating, occupying or in any other manner interfering with the plaintiffs' quiet enjoyment, occupation and use of land title no. Ndithini/Mananja Block 1/ 2X5 pending the hearing and determination of this suit.
  - e. Spent.
  - f. Spent.
  - g. THAT this Honourable Court be pleased to call for the file in respect of Kithimani ELC Case No. 19 of 2022 and does consolidate the said suit with the suit herein for purposes of hearing and determination.



- h. THAT the defendant does bear the costs of this motion.
2. The motion is supported by the grounds set out in the body thereof and the plaintiff's affidavit sworn on 29/08/2023.
  3. A summary of the grounds in support of the motion are that a) the plaintiffs' claim is on adverse possession b) the 1<sup>st</sup> plaintiff was on 13/06/2024 bonded to attend court to take plea in a criminal matter at Kithimani Law Courts c) the 1<sup>st</sup> plaintiff is likely to remain in custody until he satisfies the conditions of the bail/bond imposed by the court; and
  4. D) the 1<sup>st</sup> plaintiff was apprehensive that unless an order of injunction is granted, the defendant will take advantage of his absence to unlawfully eject the plaintiffs' families from land parcel no Ndithini/Mananja Block 1/ 2X5 ("suit premises") e) the defendant had previously, on 9/05/2022, attempted to forcefully retake possession of the suit premises but was repelled by the plaintiffs' neighbours and other members of the public f) If ejected from the suit premises, the plaintiffs who had lived in the suit premises for over 40 years will be rendered homeless.

#### **Defendant's case.**

5. The motion is opposed vide a replying affidavit sworn by the defendant on 19/10/2024. In brief, he avers that: a) the suit was an abuse of court process as the dispute between the parties was determined on 20/05/2020 in Machakos E.L.C No. 87 of 2012, b) the 1<sup>st</sup> plaintiff is charged with the offence of grievous harm, which is a criminal offence; and
6. C)The plaintiffs began their encroachment activities sometime in the year 2009 by arbitrarily engaging in unlawful sand scooping, which actions he challenged vide Machakos High Court Civil suit no. 150 of 2009, d) the outcome of Machakos ELC no. 87 of 2012 as consolidated with Machakos High Court Civil suit no. 150 of 2009 decreed he was the lawful owner of the suit premises.
7. E)On 17/07/2022, the office of Machakos County Survey issued a communication for the reinstatement of the boundary beacons in the suit premises, wherein the plaintiffs were invited in their capacity as the owners of the neighbouring parcel of land registration no. Ndithini/Mananja Block 1/284, but they deliberately refused to allow the survey exercise, f) this suit is intended to forestall Kithimani ELC Suit No. E019 of 2022 that seeks to recover the damages caused on the suit premises.

#### **Submissions.**

8. Unfortunately, this court did not benefit from the written submissions of the parties because, despite directions for counsels, Mr. Mbuvo and Mr. Igusia to file submissions, neither of them complied; hence, this matter was reserved for ruling today.

#### **Issues for determination, Analysis and Determination.**

9. Having considered the motion, its grounds and affidavits, two issues arise for determination by this court, which are: (a) whether the suit is res judicata and (b) whether the motion is merited. For good order, these 2 issues shall be handled separately.



### **a. Whether the suit is res judicata**

10. The doctrine of res judicata is stated in our Section 7 of the *Civil Procedure Act* (CPA) in the following terms: -

“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.”

11. As held in the Supreme Court of Kenya decision of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, the doctrine of res judicata is a fundamental principle of law that relates to the jurisdiction of the court and may be raised as a valid defence or even by the court's inherent power to prevent abuse of process.
12. In the circumstances of this case, the defendant raised it as a defence and availed the decision of this court in *Kyalo Tuta (Suing as the legal representative of the Estate of Wanza Tuta (Deceased) v Titus Wamba Ngoloma & 2 others* [2020] KEELC 2610 (KLR) (previous case) as proof of the existence of a previous case.
13. The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012, page 293 explained the purpose of the doctrine and its exceptions in the following words: -

“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

14. When the doctrine of res judicata arises in a suit, the court is called to scrutinize the decision and pleadings and record of that previous case that is claimed to have settled the issues in question, ascertain the issues determined in the previous case, and whether these are the same in the subsequent case, establish if the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.
15. As affirmed in the decision of *John Florence* (Supra), the tests as construed from Section 7 of the CPA are that (i) the matter in issue is identical in both suits; (ii) the parties in the suits are the same; (iii) sameness of the title or claim; (iv) concurrence of jurisdiction; and (v) finality of the previous case.
16. This court has had an opportunity to scrutinise the previous decision against the current suit and observed thus, firstly, in the previous suit, the 1<sup>st</sup> plaintiff herein, as the son of Wanza Tuta and the legal representative of her estate, sued the defendant. Looking at explanation 6 of Section 7 of the CPA, it shows that they had an interest in the suit premises and are deemed as persons litigating in the previous suit. Put another way, the parties are the same.
17. Secondly, in the 2 suits, the subject matter was the same, to wit, Ndithini/Mananja Block 1/2X5 (“suit premises”). Thirdly, both matters were/are before this court, which is a court clothed with jurisdiction. Fourthly, the previous case determined the issue of ownership with finality. Lastly, the pleadings in the previous case were not tendered to this court for it to fully appreciate the claims therein. Nevertheless, as observed in the previous case's judgment, fraud and illegality were raised, but not adverse possession.



18. However, as has been held in a line of court decisions including *Haro Yonda Juaje –v- Sadaka Dzeno Mbauro & Kenya Commercial Bank* (2014) eKLR, a claim of adverse possession and fraud and/or illegality cannot sit together in one suit, and that is why explanation 4 of Section 7 of the CPA makes allowance for certain grounds, defences and attacks to be mounted in one suit. In the circumstances of this case, where the issue of adverse possession could not be raised in the previous case, this court finds this suit is not *res judicata*.
19. It is worth pointing out that in light of these previous proceedings, the plaintiff has to grapple with the issue of when time started running for purposes of adverse possession.

#### **b. Whether the motion is merited**

20. Regarding the 1<sup>st</sup> limb of injunction, this court's invitation to intercede has been moved pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules (CPR), which empowers this court to grant an injunctive relief by stating as follows: -

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

21. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit, and the grant of interlocutory injunctions is not meant to occasion prejudice to any party.
22. The decision of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR reminds this court that its power in an application for interlocutory injunction is discretionary. Such discretion is judicial, and as is always been the case, judicial discretion has to be exercised based on the law and evidence.
23. The principles that guide this court in determining whether a temporary injunction ought to be issued were settled in the celebrated case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. It is trite law that an applicant has to meet the threshold of the 3 tests, which are *inter alia*, establish a *prima facie* case; demonstrate irreparable injury; and that the balance of convenience tilts in his favour.
24. These principles were restated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following manner: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and



(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

25. When determining an interlocutory application such as the one before this court, the court has to be careful and not prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002.
26. The 1<sup>st</sup> test to establish is whether the plaintiff has a prima facie case, and the definition of the term was defined by the Court of Appeal decision of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR, thus: -
- “In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
27. Typically, on the preponderance of probabilities, the onus is on the applicant to prove a prima facie case. In this case, the plaintiffs have not availed a copy of the title deed of the suit premises, proving that the defendant is the registered owner of the suit property, and in the premises, this court finds the plaintiffs have not met the 1<sup>st</sup> test. Having not met the 1<sup>st</sup> hurdle, it is therefore unnecessary to consider the other 2 tests.
28. Regarding the 2<sup>nd</sup> limb of the transfer of the suit in *Kithimani ELC Case No. 19 of 2022* to this court, Section 18 of the CPA confers power to this court to transfer suits either on the application of any of the parties or on its own motion.
29. Having considered this matter in light of the recent Court of Appeal decision of *Sugawara v Kiruti* (Sued in her capacity as the administratrix of the Estate of *Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo* and in her own Capacity) & 3 others [2024] KECA 1417 (KLR), which held that magistrates’ courts do not have jurisdiction to entertain claims of adverse possession, this court finds *Kithimani ELC Case No. 19 of 2022* should be transferred to this court for hearing and determination.
30. In the end and for the reasons and findings stated above, this court hereby issues the following orders: -
- a. That there be and is hereby issued an order withdrawing and transferring *Kithimani PM ELC No. 19 of 2022- Titus Wambua Ngoloma v Kyalo Tuta & Another* to this court for trial and final disposal.
  - b. The transferred file and this file shall both be mentioned together for further directions on consolidation.
  - c. Costs shall be in the cause.

It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 3<sup>RD</sup> DAY OF JUNE, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**



In the presence of;

Mr Mbugua for respondent

N/A for applicants

Ms Kanja- Court Assistant

