



**Ollang' v Chimba (Environment and Land Case Civil Suit  
E022 of 2024) [2025] KEELC 5008 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5008 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E022 OF 2024**

**SO OKONG'O, J**

**JULY 3, 2025**

**BETWEEN**

**ANNE ADHIAMBO OLLANG' ..... PLAINTIFF**

**AND**

**ASMAN OMARI CHIMBA ..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant through an Originating Summons dated 11<sup>th</sup> October 2024, seeking a declaration that she had acquired all that parcel of land known as Title No. Kisumu/Kogony/7050 measuring 0.07Ha. (hereinafter referred to as “the suit property”) by adverse possession. The plaintiff amended the Originating Summons on 21<sup>st</sup> February 2025. The plaintiff averred that she had occupied and had been in possession of the suit property, which was a portion of Title No. Kisumu/Kogony/1394 since 1998. The plaintiff averred that the respondent’s proprietary interest in the suit property had been extinguished by operation of law and that the respondent was holding the property in trust for the plaintiff.
2. The defendant filed a statement of defence dated 8<sup>th</sup> March 2025. The defendant admitted that he was the registered owner of the suit property, having been registered as such on 31<sup>st</sup> May 2021. The defendant denied that the plaintiff had been residing on the said parcel since 1998. The defendant denied that he was registered as owner of the suit property fraudulently and without following the due process. The defendant averred that the issues raised in this suit touching on Title No. Kisumu/Konya/1394 and the suit property were res judicata, the same having been directly and substantially in issue in Kisumu ELCC No. 76 of 2015, Asman Chimba Omari v. John Ouma Gumba & 3 others, a suit which was heard and a judgment delivered on 25<sup>th</sup> April 2024. The defendant averred that the suit property, which was the basis of the suit, did not exist, in that its illegal and irregular creation was cancelled through the said judgment of 25<sup>th</sup> April 2024.



3. The defendant averred that the plaintiff applied for an order of stay of execution of the judgment in Kisumu ELCC No. 76 of 2015, *Asman Chimba Omari v. John Ouma Gumba & 3 others* (hereinafter referred to as “the previous suit”) which order was granted on 26<sup>th</sup> September 2024 on condition that the plaintiff deposits a sum of Kshs. 200,000/- as security. The defendant averred that instead of complying with the said condition, the plaintiff rushed to this court for another order, which was issued on 14<sup>th</sup> October 2024, 2 weeks after the order of stay of execution was issued.
4. The defendant averred that the plaintiff did not disclose to the court that she had obtained a title deed in respect of the suit property on 15<sup>th</sup> January 2020 and that the same was revoked on 31<sup>st</sup> May 2021 and the defendant issued with the title deed in respect of the suit property. The defendant averred that public policy demands that litigation must come to an end. The defendant urged the court to strike out or dismiss the suit with costs.
5. The defendant filed a Notice of Preliminary Objection to the suit dated 24<sup>th</sup> January 2025 in which the defendant contended that the suit was res judicata in that the issues raised in the suit touching on Title No. Kisumu/Konya/1394 and the suit property had been directly and substantially in issue in Kisumu ELCC No. 76 of 2015, *Asman Chimba Omari v. John Ouma Gumba & 3 others*, (the previous suit) which was heard and a judgment delivered on 25<sup>th</sup> April 2024. The defendant contended further that the suit property did not exist. The defendant contended that the illegal and irregular creation of the suit property was cancelled through the said judgment of 25<sup>th</sup> April 2024 in the previous suit. The defendant contended further that the plaintiff, having sought and obtained leave to appeal against the judgment in the previous suit, the suit was sub-judice. The defendant filed an affidavit sworn on 26<sup>th</sup> February 2025 in support of the Preliminary Objection, to which he attached, among others, a copy of the judgment in the previous suit.
6. The defendant’s Preliminary Objection was heard on 3<sup>rd</sup> March 2025. I have considered the defendant’s Notice of Preliminary Objection together with the submissions by the advocates for the parties. The defendant raised three issues on his preliminary objection. The first was the issue of res judicata. The second was the non-existence of the suit property and the final issue was sub-judice. I will consider the issue of non-existence of the suit property first before going to the issue of res judicata and finally sub-judice if necessary. In my view, these are all points of law. In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others* (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors* (1969) EA 696.

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’

7. In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process



of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

8. It is common ground that the plaintiff and the defendant herein were parties to the previous suit and that the suit property among others was a subject of the suit. It is also common ground that the court in the previous suit delivered its judgment on 25<sup>th</sup> April 2024. The final orders of the court were as follows:

35. For the foregoing reasons, I find that the Plaintiff has proved his case on a balance of probabilities and enter judgement in his favour for;

- i. A declaration that the sub-division of land parcel No. Kisumu Kigony(sic) /1394 into land parcel No. Kisumu/Kigony(sic)/7046, 7047, 7048, 7049 and 7050 and their subsequent transfer and registration in the names of the Defendant and other 3<sup>rd</sup> parties was fraudulent.
- ii. An order for the cancellation of the sub-division of land parcel No. Kisumu/ Kigony(sic)/1394 into land parcel number Kisumu/ Kigony(sic) /7046, 7047, 7048, 7049 and 7050 and cancellation of the transfer and registration into the name of the Defendant the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- iii. An order for rectification of the register and the map in respect of the suit land by reinstating land parcel No. Kisumu/Kigony(sic)/1394 in the name of the Plaintiff on the basis of the transfer documents earlier signed by the defendant.
- iv. An order directing Defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties to surrender back to the District Land Registrar, Kisumu within 30 days hereof, title deeds in respect to land parcel No. Kisumu/ Kigony(sic)/ 7046, 7047, 7048, 7049 and 7050 in their possession for cancellation.
- v. An order of permanent injunction restraining the Defendant and the interested parties either by themselves or through their agents, employees, servants or any other person deriving authority from them, from claiming, entering, using, cultivating, occupying, alienating, transferring or disposing off the same to third parties or in any other way or manner interfering with the Plaintiff's possession of the suit land.
- vi. Costs of the suit.

Orders accordingly.”

9. It is common ground that the plaintiff obtained a stay of execution of the said judgment pending appeal and that the stay was granted conditionally. It is also common ground that the plaintiff did not comply with the condition of the stay, as a consequence of which the stay stood discharged. The effect of that is that the judgment delivered in the previous suit on 25<sup>th</sup> April 2024 has neither been stayed, varied, nor set aside. In the said judgment, the court expressly cancelled the subdivision of Title No. Kisumu/Kogony/1394 into Title Nos. Kisumu/ Kogony/ 7046, 7047, 7048, 7049 and 7050. The court did not stop there but, ordered further that the register and the map in respect of Title No. Kisumu/Kogony/1394 be reinstated. Given those orders which have not been stayed, I agree with the defendant the parcel of land Title No. Kisumu/Kogony 7050 which is the subject of the plaintiff's adverse possession claim does not exist, its title having been cancelled by the court. The plaintiff's suit is therefore brought in respect of a non-existent parcel of land. The suit is a non-starter and is a candidate for striking out. I am of the view however that the court should aim at sustaining suits rather than



striking them out. I am of the view that the plaintiff's suit is not beyond resuscitation. The suit can be saved through amendment. In *D. T. Dobie & Company (K) Ltd. v. Joseph Mbaria Muchina & Another* (1982) KLR1, Madan J. A. stated as follows regarding the exercise of the power to strike out pleadings:

No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

10. In *Philip Chemwolo & Another v. Augustine Kubende* (1982 – 88) 1 KAR 1036, Apaloo, J.A stated as follows:

...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the right of the parties and not for the purpose of imposing discipline.”

11. On the issue of res judicata, res judicata is provided for in Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya which provides that:

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”

12. In Black's Law Dictionary 10<sup>th</sup> Edition “res judicata” is defined as:

An issue that has been definitely settled by judicial decision...the three essentials are

- (1) an earlier decision on the issue,
- (2) a final Judgment on the merits and
- (3) the involvement of same parties, or parties in privity with the original parties...”

13. In *Christopher Kenyariri v. Salama Beach* [2017] eKLR, the court stated as follows on res judicata:

...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit;
- b) Former suit between same parties or parties under whom they or any of them claim;
- c) Those parties are litigating under the same title;
- d) The issue was heard and finally determined; and
- e) The court was competent to try the subsequent suit in which the issue is raised.”



14. In *E.T v. Attorney General & Another* [2012] eKLR the court stated that:

The Courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

15. In *Omondi v. National Bank of Kenya Limited and Others* [2001] EA 177 the Court stated that:

Parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”

16. The plaintiff has contended that the issue of adverse possession, which is the subject of the present suit, was not raised in the previous suit, and the court did not pronounce itself on it. The plaintiff has contended that for that reason, this suit is not res judicata. As the court stated in *Omondi v. National Bank of Kenya Limited and Others*(supra), it is not open to the parties to litigate in instalments. A party must put forward its whole case or defence as the case may be. The plaintiff was a party to the previous suit in which the suit property was in dispute. If the plaintiff had an adverse possession claim in respect of the suit property, in normal cases, the same should have been raised as a defence and a counterclaim based thereon should have been mounted against the defendant herein who was the plaintiff in the previous suit. What I need to determine is whether the Plaintiff would have raised her adverse possession claim in the previous suit. The answer, in my view, is negative. Not for the reason advanced by the plaintiff that she could only bring an adverse possession claim by way of an Originating Summons, but for the reason that when the defendant brought the previous suit, the suit property was registered in the name of the plaintiff. The plaintiff could not claim land registered in her name by adverse possession. It was after the plaintiff’s title was cancelled and Title No. Kisumu/Kogony/1394 reinstated and restored in the name of the defendant that the plaintiff could claim the portion thereof which she claims to have occupied since 1998 by adverse possession. It is therefore my finding that the plaintiff’s suit is not res judicata.

17. On the issue of sub-judice, the plaintiff has stated that she has not filed an appeal against the judgment in the previous suit. Leave to appeal and a notice of appeal, in my view, do not amount to an appeal to the Court of Appeal for the purposes of the principle of sub-judice. For a matter to be said to be sub-judice on account of the existence of an appeal to the Court of Appeal, there must be an actual appeal which has been filed and is pending. I therefore overrule the defendant’s objection to the suit based on sub-judice.

18. The upshot of the foregoing is that the defendant’s Notice of Preliminary Objection dated 24<sup>th</sup> January 2025 has merit only to the extent that the suit has been brought in respect of a parcel of land whose title has been cancelled. I am of the view however that the suit can be saved by granting the plaintiff leave to further amend her originating summons to claim the portion of the land which she is occupying within the larger land parcel owned by the defendant. I therefore decline to strike out the plaintiff’s suit. I hereby grant the plaintiff leave to further amend her Originating Summons within 14 days from the date hereof. The defendant shall be at liberty to amend his response to the Originating Summons within 14 days from the date of service. Pending the filing by the parties of the new pleadings, the status quo relating to the use and occupation of the portion of Title No. Kisumu/ Kogony/1394 where the plaintiff resides, shall be maintained. If the plaintiff fails to further amend the Originating Summons



within the prescribed period, the suit shall stand struck out with costs to the defendant. The costs of the application shall be in the cause.

**DELIVERED AND SIGNED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Obiero for the Plaintiff

Mr. Kojo for the Defendant

Mr. A.Lore-Court Assistant

