



**Ouma v Busia Sugar Industry Limited & another (Environmental and Land Originating Summons E011 of 2023) [2024] KEELC 13541 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13541 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023  
BN OLAO, J  
DECEMBER 5, 2024**

**BETWEEN**

**CLEMENTINA ACHOLA OUMA ..... PLAINTIFF**

**AND**

**BUSIA SUGAR INDUSTRY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WINFRED AWINO OSIDO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Clementina Achola Ouma (the Applicant herein) filed an Originating Summons dated 14<sup>th</sup> September 2023 against Busia Sugar Industry Ltd and Winfred Awino Osido (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively) seeking the main order that she has acquired by way of adverse possession the land parcel No Bukhayo/Ebusibwabo/933 measuring 1.62 Hectares (the suit land) and that the Respondents be perpetually barred from taking or using it.
2. The Respondents filed a Preliminary Objection dated 21<sup>st</sup> February 2024 in which they raised the following issues:
  1. This suit is Res judicata Busia CMC ELC No E64 of 2020.
  2. L.R No. Bukhayo/ebusibwabo/933 cannot be subject to limitation period the Applicant having sought to evict the Respondents vide BUSIA CMC ELC NO E64 of 2020.Other than that Preliminary Objection, the Respondents are yet to file any response to the Originating Summons. Directions are yet to be made on the same.
3. The Applicant has now approached the Court vide her Notice of Motion dated 9<sup>th</sup> October 2024 and premised under Order 40 Rule 1 and Order 53 Rule 3 of the Civil Procedure Rules. She seeks the following orders:



1. Spent.
  2. Spent.
  3. That a temporary order of injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, relatives, workers and/or servants from constructing developing, alienating, cultivating or doing any activities on L.R No Bukhayo/Ebusibwabo/933 pending the hearing and final determination of the main suit.
  4. That the Officer Commanding (OCS) Busia Police Station do assist in effecting this order.
  5. That the costs of this application be provided for.
4. The application which is the subject of this ruling together with the Preliminary Objection dated 21<sup>st</sup> February 2024, is founded on the grounds set out therein and supported by the Applicant's affidavit of even date.
  5. The gravamen of the application is that the Applicant has been in possession of the suit land to the exclusion of everyone else for a period of over 12 years and has never permitted the Respondents or their servants/agents to enter and undertake any activities thereon. The Respondents have however forcefully entered the suit land which her late husband informed her belonged to them and she has been tilling it from 1964 without any interruption. In 2023, the 1<sup>st</sup> Respondent started pouring murrum thereon claiming that it owned it. That action is not only wasting the suit land but is also interfering with the Applicant's use thereof. That the Respondents are trespassers on the suit land and her efforts to seek redress from them has been fruitless. The Respondents action is oppressive, unjust and done in bad faith hence this application.
  6. Annexed to the application are photographs of land. Although the Applicant has made reference to a copy of the Green Card as annexure COA-2, none was annexed. I have however looked at the Originating Summons filed on 5<sup>th</sup> October 2023 and annexed thereto is a copy of the Green Card which shows that indeed the suit land has been registered in the name of the 1<sup>st</sup> Respondent since September 2020.
  7. When the Applicant's Notice of Motion and the Respondents' Preliminary Objection were placed before me on 14<sup>th</sup> October 2024, I directed that they be canvassed by way of written submission to be filed on or before 5<sup>th</sup> November 2024. However, only counsel for the Applicant MR Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates has filed submissions. MR IPAPU counsel for the Respondents instructed by the firm of Ipapu P. Jackah & Company Advocates only filed the Preliminary Objection dated 21<sup>st</sup> February 2024. No other response nor submissions have been filed on behalf of the Respondents. That is not surprising because if this Court upholds the Preliminary Objection, then both the Originating Summons and the Notice of Motion will collapse. I shall therefore start by considering the Preliminary Objection.

#### **1. Preliminary Objection Dated 21<sup>st</sup> February 2024:**

8. A Preliminary Objection is a complete bar to any proceedings. It must therefore be determined as a first port of call whenever it is raised. As was held in the case of Mukisa Biscuit Manufacturing Co. Ltd -V- West End Distributors Ltd 1969 E.A 696, it must raise pure points of law. It cannot be raised if any facts have to be ascertained.



9. The issue of law raised by the Respondents is that this suit is res judicata Busia CMC ELC No E64 of 2020 in which the Applicant had sought to evict the Respondents from the land parcel No Bukhayo/Ebusibwabo/933 which is of course the suit land in these proceedings.
10. Res judicata is a point of law. It is provided for under 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.”

Having pleaded that this suit is res judicata, the onus was on the Respondents to place before this Court sufficient evidence to prove that allegation. And the easiest way of doing so was by availing to this Court the pleadings in Busia Chief Magistrate’s Court CMC ELC Case No E64 of 2020 as proof that the issues being raised herein have been the subject of litigation in another Court of competent jurisdiction and that the parties herein or their privies were also parties in that previous case. The Respondents having not availed any such evidence, and res judicata being a matter that goes to the jurisdiction of this Court and also bearing in mind that the case being cited was filed in the subordinate Court in this very building where I sit, I took it upon myself to call for the file No CMC ELC Case No E64 of 2020. I must however caution both those parties who plead res judicata, limitation or any other issue that goes to the jurisdiction of the Court that it is entirely their business to provide all the necessary evidence to enable the Court make an informed decision. Where as in this case, the issue being pleaded is res judicata, the party raising it should annexe the pleading and judgment or ruling in the previous case. It should not be the business of the trial Judge or Magistrate to go fishing in the registry looking for such evidence. I nonetheless called for the record in Busia CMC ELC Case No E64 of 2020 and found that it involved the same Plaintiff/Applicant herein and the 1<sup>st</sup> Respondent/Defendant but the subject matter was the land parcel No Bukhayo/Ebusibwabo/1237. That dispute was heard by Hon. P. A. Olengo (SPM) and in a judgment delivered on 14<sup>th</sup> August 2024 the Applicant’s suit seeking to injunct the 1<sup>st</sup> Respondent from the said land and to evict it therefrom was dismissed with costs. It follows therefore that the suit land herein was never the subject of any previous litigation by another Court. Certainly not between the parties herein. The plea of res judicata is not well taken. It is dismissed.

## **2. Notice of Motion Dated 9<sup>th</sup> October 2024**

11. By this application, the Applicant seeks the main remedy of temporary injunction restraining the Respondents whether by themselves, their agents, relatives, workers and/or servants from constructing, developing, alienating, cultivating or doing any other activities on the suit land pending the hearing and final determination of the main suit. The Applicant also seeks an order that the OCS Busia Police Station do assist in effecting the order of temporary injunction. The Respondents were content with filing their Preliminary Objection which I have already dismissed. They did not file any response to the application seeking a temporary injunction. The same is therefore un-opposed.
12. Given the above circumstances, it is clear that the prayer for temporary injunction is for allowing. However, with regard to the prayer that the OCS Busia Police Station be commanded to effect the order for temporary injunction, no evidence has been placed before me to suggest that any of the Respondents intends to disobey the order of injunction which will necessitate involving the Police



to ensure compliance thereof. I am also conscious of the words by Kwach JA in the case of Kamau Mucuha -v- The Ripples LTD 1993 KLR 35 [1990-1994 E.A. 388] where the Judge said:

“The only valid criticism of the order of the Judge as of now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the Police should be enlisted to secure compliance by the Applicant. The Police should never be involved in securing compliance with Court orders as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules.”

However, notwithstanding the above general guide by the superior Court, the duty of the Police includes maintaining law and order. Therefore, where there is evidence that there is a likelihood of law and order being compromised during the execution of a purely civil process, nothing stops a party from seeking an order directing the Police to oversee the process to ensure that law and order is maintained during the process. As I have already stated above, there is no evidence placed before this Court suggesting that either of the Respondents is likely to disobey the order of temporary injunction which this Court is minded to issue.

13. The up-shot of all the above is that this Court makes the following orders:

1. The Respondents' Preliminary Objection dated 21<sup>st</sup> February 2024 is hereby dismissed.
2. The Respondents whether by themselves, their agents, relatives, workers and/or servants are hereby restrained from constructing on, developing, alienating, cultivating or doing any other activities on the land parcel No Bukhayo/Ebusibwabo/933 pending the hearing and final determination of this suit.
3. Costs shall be in the cause.
4. The Applicant shall ensure that this suit is heard and determined within the next twelve (12) months from the date of delivery of this ruling otherwise the order of temporary injunction shall lapse unless otherwise extended by this Court.

**BOAZ N. OLAO**

**JUDGE**

**5<sup>TH</sup> DECEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 5<sup>TH</sup> DAY OF DECEMBER 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**5<sup>TH</sup> DECEMBER 2024**

