



**Oriaro v Otieno & another (Sued as the legal representatives of Michael Onyango Adit - Eceased)  
(Environment & Land Case 1 of 2021) [2023] KEELC 687 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 1 OF 2021  
AY KOROSS, J  
FEBRUARY 9, 2023  
ORIGINALLY KISUMU O.S. E006 OF 2021**

**BETWEEN**

**GEORGE ABIERO ORIARO ..... PLAINTIFF**

**AND**

**WILLIAM ODUOR OKELO ..... 1<sup>ST</sup> DEFENDANT**

**GODFREY ONYANGO OTIENO ..... 2<sup>ND</sup> DEFENDANT**

**SUED AS THE LEGAL REPRESENTATIVES OF MICHAEL ONYANGO ADIT -  
EECEASED**

**JUDGMENT**

1. The subject of this ruling is a notice of preliminary objection by the defendants dated October 25, 2022 on grounds the suit was res judicata and should be struck out with costs.
2. The plaintiff's originating summons against the defendants dated February 26, 2021 sought declaratory orders that the defendants' proprietary interests over Siaya/Obambo/2135 (suit property) had extinguished and a declaration that the plaintiff had acquired title thereof by way of adverse possession.
3. From the plaintiff's pleadings, the salient facts appertaining to a previous suit were inter alia, the suit property was a subdivision of Siaya/Obambo/136; it was previously registered in the name of his father John Oriaro Ukumu/Okumu, on completion of adjudication, a case was filed by Buong Opondo being Kisumu RMCC No 24 of 1972 against his father and he did not have copies of these proceedings.
4. On November 7, 2022, directions were taken and parties were to canvass the preliminary objection by way of written submissions. The defendants filed written submissions dated November 23, 2022.



Despite being given an opportunity to respond to the allegations made by the defendants, the plaintiff failed to file his submissions.

5. In agreement with the plaintiff, Mr Agina, counsel for the defendants submitted that it was undisputed there was a dispute that had been heard and determined between the parties' ancestors. In Land Civil Case No 6 of 1970 which was between Asadha Oriaro (the plaintiff's grandfather) and Buong Opondo (1<sup>st</sup> defendant's grandfather), judgment was entered for Buong Opondo. An appeal against this decision by Asadha Oriaro in Kisumu HC Civil Appeal No 5 of 1971 was dismissed. Another suit between the said grandparents being Kisumu RMCC 20 of 1970 was dismissed with costs. There was also Kisumu RMCC No 24 of 1972 which was between Buong Opondo against John Oriaro Ukumu/Okumu (plaintiff's father). Another suit known as 202 of 1992 held that the particular suit res judicata. In all these suits, Buong Opondo was held to be the sole owner of Siaya/Obambo/136.
6. Counsel submitted the issues raised by the plaintiff in the current suit relate directly and substantially to the same subject matter and issues that were dealt with in former suits or should have been raised in those former suits.
7. Counsel identified three issues for determination: (i) whether the plaintiff's claim was res judicata, (ii) whether the plaintiff's claim for adverse possession was valid in law and (iii) whether the plaintiff had proved, met and fulfilled all requirements for him to be declared an adverse possessor.
8. On the 1<sup>st</sup> issue, counsel contended that the doctrine of res judicata was provided for within the provisions of section 7 of the [Civil Procedure Act](#). He relied on the persuasive case of [CK Bett Traders Limited & 2 others v Kennedy Mwangi & another \[2021\] eKLR](#) which stated that;

'The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppels. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.'
9. Counsel also relied on the Court of Appeal decision of [Independent and Electoral Boundaries Commission v Maina Kiai & 5 Others \(2017\) eKLR](#) where the court delineated the criteria for determining if a suit was res judicata as follows;

' Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms: a) The suit or issue was directly and substantially in issue in the former suit. b) The former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'
10. On the 2<sup>nd</sup> and 3<sup>rd</sup> issues, counsel contended the plaintiff encroached on the suit property in 2018 and a demand notice was issued to him on March 3, 2019 and therefore his claim for adverse possession was not ripe.
11. I will now proceed to deal with my analysis and determination. Sections 1A and 1B of the [Civil Procedure Act](#) and section 3(1) of the [Environment and Land Court Act](#) bid this court to facilitate the



overriding objective of the Civil Procedure Act and the Environment Land Court Act by enabling the just, expeditious, proportionate and affordable resolution of civil disputes. Section 3 of the latter Act stipulates as follows;

‘3. Overriding objective

- (1) The principal objective of this Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.
- (2) The court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).
- (3) The parties and their duly authorized representatives, as the case may be, shall assist the court to further the overriding objective and participate in the proceedings of the court.’

12. The doctrine of *res judicata* is provided for under section 7 of the Civil Procedure Act 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.’

13. Section 7 of the Civil Procedure Act is expounded by giving 6 elucidations that govern the said doctrine and one such description is explanation no 4 which states as follows:

‘Any matter which might and ought to have been made a ground of defence and attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.’

14. Jurisdiction is a matter of law which this court can raise suo moto as it goes to the authority of the court. The Court of Appeal in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR expressed itself as follows on the process of moving the court when *res judicata* was imminent in a suit;

‘The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process’[emphasis added].

15. It is trite law that jurisdiction is everything and without which the court must down its tool. In the celebrated case of Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited [1989] KLR the Court of Appeal held inter alia that:-

‘A question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forth with on the evidence before the court.’ [Emphasis added].

16. Having laid down the legal basis of the doctrine of *res judicata*, I will now establish whether the preliminary objection raised a pure point of law. The law on what constitutes a preliminary objection



was settled in the celebrated case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd 1969 EA 696* where the court defined a preliminary objection as follows;

' 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 the exercise of judicial discretion.'

17. On the issue of a preliminary objection, the apex court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others [2015] eKLR* expressed itself as follows:

' Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.'

18. Considering that a preliminary objection should not be founded on factual information which stand to be tested by rules of evidence, I find the manner in which the defendants have attached judgments and rulings of previous cases that were determined between the parties' ancestors to their written submissions as improper; submissions are arguments and not evidence.

19. It would have been prudent if counsel had moved the court appropriately by filing a formal application and armed with an affidavit in support, the defendants would have had an opportunity to avail all previous pleadings that were between the parties or their predecessors.

20. It is my considered view that apart from Kisumu RMCC No 24 of 1972 between Buong Opondo against John Oriaro Okumu, the other alleged cases raised facts that have to be tried and tested and they do not fall within the paradigm of a preliminary objection.

21. I have singled out Kisumu RMCC No 24 of 1972 that was between Buong Opondo against John Oriaro Okumu because from the evidence before this court, it is not in dispute that such a suit existed; it was on Siaya/Obambo/136 of which the suit property was a subdivision of and it was between Buong Opondo (1<sup>st</sup> defendants' grandfather) and John Oriaro Okumu/Ukumu (the plaintiff's father). Though the plaintiff asserted he was unfamiliar with the determination of the suit, the defendants were silent on whether it had been heard and determined on merits. At this point, I am unable to determine if Kisumu RMCC No 24 of 1972 determined with finality the issues between the parties' predecessors and for that reason I am unable to uphold the preliminary objection.

22. Having set down the background of the suit and considering the principles set out in section 7 of the *Civil Procedure Act* and further elaborated in the case of Independent and Electoral Boundaries Commission v Maina Kiai & 5 Others (Supra), I am reluctant at this point to deem this suit as res judicata. This will have to abide the outcome of the main suit.

23. For the reasons stated above, I find that the notice of preliminary objection not merited and hereby dismiss it. Each party shall bear their respective costs.

24. It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**09/02/2023**

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



In the Presence of:

Mr. Ariho for the plaintiff

M/s. Adhiambo for 1<sup>st</sup> & 2<sup>nd</sup> defendants

Court assistant: Ishmael Orwa

