



**Owala & another v Odhiambo (Environment & Land Case  
21 of 2021) [2023] KEELC 20684 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 21 OF 2021**

**AY KOROSS, J  
OCTOBER 12, 2023**

**BETWEEN**

**GEORGE OMONDI OWALA ..... 1<sup>ST</sup> PLAINTIFF**

**ROBERT OWALA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GEORGE A ODHIAMBO ..... DEFENDANT**

**RULING**

**Background of this case**

1. In an originating summons ('OS') dated 15/04/2021, the plaintiffs who are children of Charles O. Ondiri ('deceased') instituted suit against the defendant. From the record, the 1<sup>st</sup> defendant is the co-administrator of the estate of the deceased together with his mother Rose Anyango Owala.
2. The subject matter in dispute is land parcel No East Gem/Nyamninia/736 ('suit property') which was the subject matter in Kisumu HCCC 197 of 1992 ('former suit') between the defendant herein as the plaintiff and the deceased as a defendant together with one Jotham O. Ondiri.
3. The defendant was successful in the former suit. In a judgment rendered by Mwera J on 18/10/2006, the court ordered the eviction of the deceased and his co-defendant from the suit property.
4. From the record, the defendant's efforts to evict the deceased, his servants, agents and children including the plaintiffs herein have not been successful. The defendant has been frustrated and unable to enjoy the fruits of his judgment. Despite eviction orders, it appears the deceased's descendants including the plaintiffs are adamant from vacating the suit property.



5. In rendering a ruling dated 10/09/2020 in the former suit on an application filed by the defendant herein where he had sought to evict the deceased's cohorts and children from the suit property, Ochieng J (as he then was) issued the following orders: -

“Accordingly, the respondents are ordered to immediately vacate the suit premises. In the event that they or their agents, servants, children or any other relative should not have moved out of the suit premises within 7 days, ...the plaintiff may move the court for the twin orders for (a) eviction; and (b) committal to civil jail, for being in contempt of court.” Emphasis added.

6. The 1<sup>st</sup> plaintiff herein and his co-administrator sought leave to appeal out of time against this ruling to the Court of Appeal. In a ruling rendered by Asike- Makhandia JA on 9/07/2021 in Kisumu CoA Civil Application No E056 of 2021, the learned judge disallowed the application and tore into the character of the legal representatives of the deceased and affirmed litigation must come to an end when he stated: -

“The applicants are in my view not truthful. They have filed this application upon realizing that they come to the end of the rode (*sic*) and are yet to vacate the suit property.”

7. While this matter was pending determination in the Court of Appeal and hell bent not to vacate the suit property, the plaintiffs filed the instant suit in which they claim one half of the suit property by adverse possession. They did not disclose that the matter had been determined or that there were pending warrants of arrest in the former suit against the 1<sup>st</sup> plaintiff herein and his co-administrator.

8. Shortly thereafter, the plaintiffs' advocate, Mr. Sala filed an application dated 8/10/2023 in which he sought to amend the OS on grounds that it had inadvertent defects and typographical errors. By consent, the application was compromised.

9. However, instead of amending the OS and contrary to the provisions of Order 8 Rule 7 of the Civil Procedure Rules, a fresh OS dated 19/01/2022 was filed in which new parties were made plaintiffs. On 10/5/2022, in the presence of the plaintiffs' counsel but in the absence of the defendant's counsel, the court expunged the offending OS from the court record.

10. As it were, the only subsisting OS is the one dated 15/04/2021. It appears the defendant was not aware of the developments concerning the fate of the offending OS when he filed the instant motion dated 6/03/2023 that is the subject for determination when he joined the plaintiffs in the offending OS as parties to the motion. It was paramount I laid the background of this suit since the facts in both suits are pertinent in determining the motion.

### **Defendant's case**

11. The defendant's notice of motion dated 6/03/2023 that was moved pursuant to the provisions of Sections 1A, 1B, 3A, 6 and 7 of the [Civil Procedure Act](#) sought the following reliefs from this court: -

- a. The amended OS dated 19/01/2022 that culminated to the present suit ELC case No 21 of 2021 (OS) and subsequent pleadings be struck out and or be dismissed in entirety.
- b. The entire suit ELC case No 21 of 2021 (OS) be struck and or dismissed.
- c. The honorable court be pleased to thereafter to close the file herein ELC case No 21 of 2021 (OS).



d. Costs of the application be in the cause.

12. The motion was premised on the grounds enumerated on its face and on the affidavit in support which was sworn on 6/03/2023 by the defendant George A. Odhiambo.
13. Some of the averments he made are contained in the background of this ruling and I need not restate them. In summary, it was his case the present suit was *res judicata*, *sub judice*, an abuse of court process and a disregard of the rule of law. The former suit which was over the suit property was alive and pending committal proceedings for disobedience of court orders. There was an existing judgment in the former suit and litigation must come to an end.

#### Plaintiffs' case

14. The motion was strenuously opposed by a replying affidavit deponed on 12/05/2023 by one Edward Oduor. It appears the deponent who had been made a plaintiff in the OS dated 19/01/2022 was not privy this OS had been expunged. In other words, he was a stranger to the proceedings since by Order 9 Rules (1) and (2) of the [Civil Procedure Rules](#), he was neither a party nor an agent of the plaintiffs.
15. The persons who had given him authority to swear the affidavit were all strangers to these proceedings. This affidavit is hereby expunged for being incompetently on record.

#### Parties' submissions

16. From the record, the defendant's counsel, Mr. Odinga did not file any submissions. While the plaintiffs' advocates, Mr. Sala, filed his written submissions dated 6/06/2023 in which counsel identified 3 issues for determination; (a) whether the suit was *res judicata* (b) whether the matter was *sub judice* and (c) whether the OS was properly amended.
17. On the 1<sup>st</sup> issue, counsel submitted the doctrine of *res judicata* was anchored in Section 7 of the [Civil Procedure Act](#). Counsel argued the suit was not *res judicata* since there was no suit that existed between the parties and if at all one existed, the parties were different and further, none of the parties in the previous suit acted as the representatives of the plaintiffs.
18. Counsel contended, the previous suit was on the entire parcel of land while the current one was on a portion of it and the claims were different. Counsel relied on the case of [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR where the apex court stated: -

“[317] The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on “issue estoppel”, to bar the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes...

[319] There are conditions to the application of the doctrine of *res judicata*:



- (i) the issue in the first suit must have been decided by a competent Court;
- (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
- (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and another v The Attorney General and others*, [2005] 1 EA 83, 89.”

19. On the 2<sup>nd</sup> issue, counsel submitted *sub judice* was founded in Section 6 of the [Civil Procedure Act](#) and contended that since the parties in the two suits were different, subject matter different and the court was competent, the suit was not *sub judice*. Counsel relied on the case of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR where the apex court held: -

“(67) The term ‘*sub judice*’ is defined in [Black’s Law Dictionary](#) 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the *sub judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter... A party that seeks to invoke the doctrine of *res sub judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

20. On the last issue, counsel submitted the OS was properly amended by consent of the parties.

### **Analysis and determination**

21. Having read and considered the pleadings and plaintiffs’ written submissions, I shall be guided by the well cited provisions of law and precedents cited by the plaintiffs’ counsel. In my view, the two issues for determination are (a) whether the suit was *res judicata* and if the answer to (a) is in the negative, whether the suit was *sub judice*.

#### **I. Whether the suit was *res judicata***

22. 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.

23. Section 3A of the [Civil Procedure Act](#) bestows power upon this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

24. Section 7 of the [Civil Procedure Act](#) provides hereunder: -

‘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.’

25. For the doctrine of *res judicata* to suffice, it must be on a previous suit in which the matter was in issue, the parties were the same or litigating under the same title, a competent court heard the matter in issue and the issue had been raised once again in a fresh suit.
26. The essence of the doctrine is that it bars a party from relitigating matters already determined on facts by a competent court. It brings litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits that have already been determined by a competent court. See [\*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others\*](#) (*supra*).
27. It stops wastage of time and resources in an endless round of litigation at the behest of litigants hoping, by a multiplicity of suits, to obtain at last, outcomes favourable to themselves. The intent of the doctrine was aptly summarized by the Supreme Court of Kenya in [\*John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others\*](#) [2021] eKLR as follows: -

‘It is primarily founded on the following three maxims:

- (1) *nemo debet bis vexari pro una et eadem causa*: No man should be vexed twice for the same cause.
- (2) *interest publicae ut sit finis litium*: it is in the interest of the State that there should be an end to a litigation; and
- (3) *res judicata pro veritate occipitur*: a judicial decision must be accepted as correct.’

28. No w turning to this case, the stranger’s replying affidavit having been expunged from the record, the motion is unopposed. It must be noted submissions are arguments and not evidence and the plaintiffs’ submissions shall be treated as such.
29. I disagree with the plaintiffs’ counsel’s argument that just because the former suit sought an order on the entire suit property and the instant suit on one half of the suit property, it deemed the matter not being on the same issue. From the record, the suit property was and still is directly and substantially the subject matter in the two cases.
30. As to title, in the two suits it was the same; the former suit was on ownership of the suit property in which it ordered the deceased and his co- defendant to vacate the suit property within 90 days and ordered them not to cultivate or trespass on the suit property.
31. Despite the order, the deceased and his dependants including the plaintiffs disobeyed the court orders and have No w clothed themselves in the instant suit as adverse possessors and surprisingly, are seeking a portion of it.
32. Section 7 of the [\*Civil Procedure Act\*](#) was expounded by giving 6 elucidations that govern the doctrine of *res judicata* 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.’



33. Although the plaintiffs in the instant suit are claiming to be adverse possessors, the issues in the two suits were centered on the suit property; trespass by the deceased and his co- defendant and ownership by adverse possession. In both, the title are the same; the owner and occupiers of the suit property.
34. Although the respective claims were different, an application of explanation No 4 shows that unless under special circumstances, parties were required to bring forward their entire case in previous proceedings. In other words, the deceased should have put forth a counterclaim of adverse possession; which he did not. An entertainment of filing pleadings by instalments is an abuse of the court process. The case of *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal Number 62 of 1958 outlined the principles of adverse possession as: -
- ‘... the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.’
35. The former suit must have been between the same parties or parties under whom they claim and claiming under the same title. In both cases the defendant was the same.
36. Albeit the plaintiffs are different, the plaintiffs are the children of the deceased who was a co – defendant in the former suit. In fact, from the record, the 1<sup>st</sup> plaintiff is a legal representative of the estate of the deceased.
37. It is not lost to this court the plaintiffs in this case have by craft conjured new parties in this suit for purposes of circumventing *res judicata*. By explanation 6 of Section 7 of the *Civil Procedure Rules*, this cannot pass the test. The plaintiffs in both suits derived their claims through the deceased. This explanation 6 provides as follows: -
- “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 persons so litigating.”
38. The deceased having litigated in the former suit, his children and descendants were estopped from filing a subsequent suit since they derived their rights and interests through him.
39. It is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a superficial enhancement to his pleadings.
40. The former suit was determined by a court of competent jurisdiction. This court has taken note the jurisdiction of the court was never challenged and it finally determined the issues in dispute with finality.
41. In my mind, No doubt, having known the court would unearth their relationship with the deceased, the plaintiffs mischievously and incompetently sneaked in the OS dated 19/01/2022 which was expunged from the court record.
42. The plaintiffs well knowing their actions of frustrating the former judgment for close to 17 years had come to an end, were out to forestall and circumvent the execution process by filing the instant suit and have filed a myriad of applications in which they sought injunctive orders stopping their eviction from the suit property.



43. It was obvious they were determined by all means to abuse the court process. The plaintiffs' actions were despicable, appalling and wicked.
44. I am hoping the execution process in the former suit will be concluded so that the defendant who has been long saddled with litigation might find respite and enjoy the fruits of his judgment. I need not say more.
45. Utmost, I find the instant suit was *res judicata* and an abuse of the court process. It is trite law costs follow the event. I hereby issue the following disposal order: -
  - a. The plaintiffs' suit is hereby struck out with costs to the defendant.
46. Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 12TH DAY OF OCTOBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

