



**Omony v Aywak (Enviromental and Land Originating Summons
E001 of 2022) [2023] KEELC 21204 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2022
BN OLAO, J
NOVEMBER 2, 2023**

BETWEEN

JOSEPH MAJIMBO OMONYO APPLICANT

AND

MICHAEL RADIDO AYWAK RESPONDENT

RULING

1. Joseph Majimbo Omony (the Applicant herein) moved to this Court vide his Originating Summons dated 20th January 2022 in which he sought against Michael Radido Aywak (the Respondent herein) the main remedy that he has acquired by way of adverse possession the land parcels no Bunyaa/Mudembi/3199 and 3200 (the suit land) having occupied the same since 1962. It is clear from paragraph 11 of his affidavit dated 20th January 2022 in support of his Originating Summons that indeed the suit land is a resultant sub-division of the original land parcel no Bunyala/Mudembi/2928. In that paragraph, the Applicant averred as follows:

11: “That later the Respondent herein in the year 2010 sub-divided LR no Bunyala/Mudembi/2928 into LR no Bunyala/Mudembi/3198, 3199 and 3200.”

2. The Respondent is yet to file his reply to the Originating Summons. Instead, he has filed a Notice of Preliminary Objection dated 11th October 2022 the subject of this ruling, and in which he has raised one ground which is:

1: “That the suit offends the provision of Section 7 of the *Civil Procedure Act* Cap 21.”

He therefore seeks that the Applicant’s Originating Summons be struck out.

3. When the Preliminary Objection was placed before me on 3rd October 2023, I directed that it be canvassed by way of written submissions.



4. Submissions were subsequently filed both by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Respondent and by Ms Nabulindo instructed by the firm of D. K. Nabulindo & Company Advocates for the Applicant.
5. I have considered the Preliminary Objection, the annexures thereto as well as the submissions by counsel.
6. Annexed to the Preliminary Objection is a copy of a judgment delivered on 15th May 2019 by Kaniaru J in Busia ELC Case no 8 of 2011 (OS). That case involved one William Oduory Makangah as Plaintiff and Michael Radido Aywak as the Defendant. The dispute therein involved the ownership of the land parcel no Bunyala/Mudembi/2688 which had been sub-divided to create the land parcels no Bunyala/Mudembi/2927 and 2928. Of significance to this ruling is that the Applicant herein was the 2nd Interested Party in that suit and he was claiming “an ancestral entitlement” to the land parcel no Bunyala/Mudembi/2688 against the Defendant in that case as per his statement of claims dated 26th August 2016. He was also claiming the land parcel no Bunyala/Mudembi/2928 by way of adverse possession against the Defendant in that case. This is how Kaniaru J captured the claim of the Applicant (as 2nd Interested Party) in that case at paragraph 8 of the said judgment:

8: “The 2nd Interested Party adopted the Plaintiff’s claim. However, he also claims to be entitled to the Defendant’s portion of LR no Bunyala/Mudembi/2928 by way of adverse possession. He claims to have been in quiet possession of the said property for over 40 years which his grandmother Nerima Apondo allotted to him in 1972.”

7. Having heard the parties in that dispute, Kaniaru J delivered his judgment in which he found in favour of the Plaintiff. With regard to the 2nd Interested Party’s claim, the Judge dismissed it and stated in paragraph 22 thereof:

22: “I need to add that the claim of the 2nd Interested Party is not successful. He never proved it.”

It is in the light of that judgment that counsel for the Respondent has made the following submissions in paragraphs 2, 3 and 4 in support of the Preliminary Objection:

- 2: “It is our submission that the Plaintiff herein is seeking to be declared and be registered as the legal proprietor of parcels LR Bunyala/Mudembi/3199 and 3200.”
 - 3: “Your Lordship, the aforementioned land parcels emanated from the sub-division of LR Bunyala/Mudembi/2928 the parent title that was litigated upon in ELC no 8 of 2011 between the two parties herein.”
 - 4: “The Plaintiff herein was enjoined in the suit claiming adverse possession of the aforementioned title against the Defendant herein.”
8. I need to pause at this stage and point out that although the Applicant herein is referred to as Joseph Majimbo Omony in the Originating Summons, he has also been referred to as Joseph Majimbo Omondi both in the Notice of Preliminary Objection dated 11th October 2022, his submissions as well as in Busia ELC Case no 8 of 2011 (OS). I have no doubt that all those names refer to one and the same person as I did not hear any evidence to suggest otherwise.



9. In response to those submissions, counsel for the Applicant took the view that the parties and subject matter in Busia ELC case no 8 of 2011 (OS) and in this case are different. Counsel has submitted thus:

“Your Lordship, the subject matter and parties in this case is not the same with in ELC no 8 of 2011. In ELC no 8 of 2011, the Plaintiff was William Oduory Mukhangah While The Defendant Was Michael Radido Aywak. One Joseph Majimbo Omondi and George Obiya Nambubi were enjoined in the said suit as Interested Parties. The suit property in the said case was Bunyala/Mudembi/2927 and 2928.”

Counsel then goes on to add that the subject matter in this case is land parcels no Bunyala/Mudembi/3199 and 3200 and so the two suits are very distinct. Counsel urges this Court, therefore, citing the authority of *D.T. Dobie & Co. Kenya Ltd v Joseph Mbaria Muchina & another* 1980 KLR not to strike out this suit but rather, to save it because *res-judicata* does not apply.

10. The general principle on *res-judicata* is captured in Section 7 of the *Civil Procedure Act* as follows:

“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.”

The Supreme Court had occasion to interrogate the principle of *res-judicata* in the case of *John Florence Maritime Services Ltd & another v Cabinet Secretary For Transport & Infrastructure & Others* 2021 eKLR, where it said:

1. For *res-judicata* to be invoked in a civil matter the following elements had to be demonstrated:
 - a. There is a former judgment or order which was final;
 - b. The judgment or order was on merit;
 - c. The judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.

11. In the case of *E. T. v Attorney General & another* 2012 eKLR the Court stated thus:

“The Courts must always be vigilant to guard against 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 a new cause of action which has been resolved by a Court of competent jurisdiction.”

In *Omondi v National Bank of Kenya Ltd & Others* 2001 E.A. 177 Nairobi H.C.C.C no 958 of 2001 [2001 eKLR], Ringera J (as he then was) addressed the issue as follows:

“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.”



The Judge went on to cite Kuloba J in the case of *Mwangi Njagu v Mesback Mbogo Wambugu & Esther Mumbi* H.C.C.C. no 2340 of 1991 (un-reported) where the Judge said:

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see what use the doctrine of *res-judicata* plays.”

12. It has been stated, through judicial precedents, that the reason behind the doctrine of *res-judicata* is to bring an end to litigation. Parties should be protected from facing repetitive litigation over the same subject matter.
13. Guided by all the above, it is common knowledge that the Applicant herein was also an Interested Party in Busia ELC Case no 8 of 2011 (OS). He sought an order that he was entitled to a portion of the land parcel no Bunyayla/Mudembi/2928 by way of adverse possession. It is common ground that the suit land herein is a resultant sub-division of the land parcel no Bunyala/Mudembi/2928 and this suit is against the same Michael Radido Aywa who was the Defendant in the previous litigation. No matter which way one looks at it, this suit cannot, unfortunately, escape the guillotine of *res-judicata*. Looked at differently, it is clear that if the Applicant had obtained the orders which he sought as an Interested party in Busia ELC Case no 8 of 2011 (OS), he certainly would not be in this Court today. This is because of the simple reason that the land he now seeks in these pleadings is really the same land he sought in the previous suit. It must also be remembered that adverse possession is a fact to be observed upon the land itself. It is not to be seen in a title – *Maweu v Liu Ranching & Farming Co-operative Society* 1985 eKLR.
14. Counsel for the Applicant has, in her submissions, cited Madan J.A (as he then was) in *D.T. Dobie & Co. 1 Kenya Ltd v Joseph Mbaria Muchina & another* (*supra*) where the Judge, after considering several English decisions on striking out pleadings, said:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”

The above is of course the principle in striking out pleadings. However, in this case, the Court is not dealing with a case with “a mere semblance of a cause of action” or which “can be injected with real life”. Here, we are dealing with a case which was statute barred from its inception. It is caught up by the provisions of Section 7 of the *Civil Procedure Act*.

15. The up-shot of all the above is that the Respondent’s Preliminary Objection dated 11th October 2022 is up-held. The Originating Summons dated 20th January 2022 and filed on the same day is clearly *res-judicata*. It is accordingly struck out with costs.

BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 2ND DAY OF NOVEMBER 2023 AS WAS ADVISED TO THE PARTIES.



BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

