



Joachim Owitch (Suing as Legal Representative of the Estate of Adikinyi Owich) v Ogutu & another (Land Case E015 of 2025) [2025] KEELC 3762 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
LAND CASE E015 OF 2025**

BN OLAO, J

MAY 14, 2025

BETWEEN

BONVENTURE JOACHIM OWITCH (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ADIKINYI OWICH) PLAINTIFF

AND

JOHN AOLA OGUTU 1ST DEFENDANT

WILLIAM OLUOCH OGUTU (JOINTLY SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF OGUTU NG'ONDO OORI) 2ND DEFENDANT

RULING

1. Bonventure Joachim Owitch (the Plaintiff herein and suing as the Legal Representative of the Estate of Adikinyi Owich) filed this suit against John Aola Ogutu and William Oluoch Ogutu (the Defendants herein and both sued as the Legal Representative of the Estate of Ogutu Ng'ondo Oori) seeking the following remedies:
 - a. An order declaring the Plaintiff and the Estate of Adikinyi Owich have acquired title to a portion of land measuring 3.93 Hectares from land parcel No Marach/Bumala/1266 by adverse possession and customary and constructive trusts.
 - b. An order be issued directing the Defendants to subdivide land parcel No Marach/Bumala/1266 and create a portion thereof measuring 3.93 Hectares and comprising the homesteads of the dependants of Adikinyi Owich and to transfer the same to the Plaintiff and in default, the Deputy Registrar of this Court be empowered to sign all the necessary documents on behalf of the Defendants in order to give effect to the order herein.
 - c. Costs of the suit.
 - d. Any other relief.



2. The basis of the Plaintiff's claim is both on adverse possession and also a customary trust. It is the Plaintiff's case that his grandfather one Adikinyi Owich and the Defendants' father one Ogutu Ongondo Oori were the joint registered proprietors of the land parcel No Marach/Bumala/147 which was later partitioned in 1985 to create the land parcels No Marach/Bumala/1021 registered in the name of Ogutu Ongondo , Marach/Bumala/1022 registered in the name of Adikinyi Owich and Marach/Bumala/1023 registered in the name of Opondo Odera. That by the time that sub-division was being done in 1980, Adikinyi Owich had died on 10th August 1980 while Opondo Odera had died on 21st July 1981. That the dependants of Adikinyi Owich were born and raised on the parcel No Marach/Bumala/1022 which they have occupied to date without being evicted by Ogutu Ongondo Oori his sons the Defendants herein. In September 2024, the Plaintiff became aware that Ogutu Ng'ondo had previously filed Kakamega High Court Case No 159 of 1983 against Nyamune Odera, Odera Opondo, Aluoch W/O Adikinyi & Ng'ondo Adikinyi which culminated in the combination of Adikinyi Owich's land parcel No Marach/Bumala/1022 with Ogutu Ongondo's land parcel No Marach/Bumala/1021 to create the land parcel No Marach/Bumala/1266 (the suit land) which is registered in the name of Ogutu Ng'ondo Oori.
3. The Plaintiff therefore claim that the Estate of Ogutu Ongondo Oori remains dispossessed of a portion of the suit land measuring 3.93 Hectares from 1971 to-date and have therefore acquired it by way of adverse possession. Further, that they are also entitled to the same portion of the suit land by way of customary and constructive trusts since the original land parcel No Marach/Bumala/147 from which the suit land was hived belonged to one extended family.
4. Concurrently with the plaint, the Plaintiff filed a Notice of Motion dated 2nd April 2025 seeking the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That an order of injunction do issue to restrain the Defendants/Respondents by their agents, servants or their family members or otherwise howsoever from sub-dividing, partitioning, processing, creating or registering new titles from or transferring and interfering with the ownership documents and the ground occupation of land parcel No Marach/Bumala/1266 pending the hearing and final determination of the suit.
 5. That costs of the application be provided for.
5. The application is anchored on the provisions of Sections 3A and 63(e) of the *Civil Procedure Act* as well as Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules. The application is premised on the grounds set out therein and is supported by the affidavit of the plaint.
6. The gravamen of the application is that the Plaintiff and the dependants descend from the Estate of Adikinyi Owich I who died on 10th August 1980 and left them in exclusive occupation and possession of the land parcel No Marach/Bumala/1022. Recently, they discovered that the said parcel of land was combined into a new parcel of land being the suit land which the Defendants have surveyed with a view of distributing among themselves to the total exclusion of the Plaintiff and his family. This will render the Plaintiff destitute yet he and the Defendants descend from one extended family and continue to reside on the original land parcel No Marach/Bumala/147 which was sub-divided following ex-parte Court proceeding.



7. The following documents are annexed to the Motion:
 1. Copy of the Certificate of death for one Adikinyi Owich.
 2. Copy of a letter dated 24th September 2024 from the office of the Chief Bujumba location addressed “To whom it may concern” in the Estate of the late Adikinyi Owich.
 3. Copy of Grant of Letters of Administration Ad Litem issued to the Plaintiff in respect to the Estate of Adikinyi Owich.
 4. Green Cards for the land parcels No Marach/Bumala/147, 1021, 1022, 1023 and 1266.
 5. Citation to accept or refuse the Grant of Letters of Administration intestate filed by Alfred Odera Opondo and the Plaintiff citing John Aola Ogutu in respect to the Estate of Ogutu Ng’ondo Oori.
8. The application is opposed and John Aola Ogutu the 1st Defendant has filed a replying affidavit dated 30th April 2025 in which he has deposed, inter alia, that there exists a Decree issued in Kakamega High Court Appeal No 159 of 1983 which has been in existence for a period exceeding 40 years. That the same has never been set aside and no urgency exists.
9. The following documents are annexed to the replying affidavit:
 1. Copy of the Decree issued on 3rd July 1988 in Kakamega High Court Civil Case No159 of 1983 Ogutu Ng’ondo v Nyamune Odera, Odera Opondo, Aluoch W/O Adikinyi & Ngondo Adikinyi.
 2. Copy of an order issued in Kakamega High Court Civil Case No159 of 1983 on 30th September 1991 by J.L.A. Osimo J.
 3. Copy of transfer of the land parcel No Marach/Bumala/147 by Ogutu Ng’ondo, Adikinyi Ngowo and Opondo Oderato Ogutu Ng’ondo.
 4. Copy of letter dated 12th January 2009 by Manwari & Company Advocates and addressed to B. I. Otieno Advocates Ref: Land parcel No Marach/Bumala/1260.
10. When the application was placed before me on 3rd April 2025, I directed that it be canvassed by way of written submissions.
11. Those submissions were subsequently filed by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Plaintiff and by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Defendants.
12. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
13. Although the Defendants did not specifically plead that this suit is res judicata Kakamega High Court Civil Case No159 of 1983, the 1st Defendant deposed in paragraphs 3, 4, 5, 6 and 7 of his replying affidavit dated 30th April 2025 as follows:
 - 3: “That there existed a suit KAK H.C. Appeal (see annexed proceedings and decree marked JAO-1)”.
 - 4: “That the decree was implemented and the land reverted to Ogutu Ngodo as per order (see annexed register marked JAO-2).”



- 5: “That the execution office (sic) of the Court signed on behalf of the parties (see annexed transfer form marked JAO-3).”
- 6: “That the decree has been (sic) existence and in the knowledge of the Applicant for a period exceeding 40 years hence no urgency exists.”
- 7: “That moreover the decree and order is still in force and has never been sought to be set aside.”
14. The previous suit is actually Kakamega High Court Civil Case No 159 of 1983 (not Kakamega High Court Appeal No159 of 1983 as deposed above). A reading of the above averments in paragraphs 3 to 7 of the 1st Defendant’s replying affidavit is basically a plea that his suit is res judicata Kakamega High Court Civil Case No159 of 1983 in which the Decree and Order issued on 30th September 1991 have been annexed. If indeed this suit is res judicata, then this Court must down it’s tools. This is because Section 7 of the Civil Procedure Rules which provides for the doctrine of res judicata reads:

“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.”

For res judicata to be invoked in a civil matter, the following elements must be proved:

- 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 second action identical parties, subject matter and cause of action.

See *Uhuru Highway Developers v Central Bank Of Kenya & Others* 1999 and also the case of *Nicholas Njeru v Attorney General & Others C.a. Civil Appeal No 110 Of 2011* [2013 eKLR]. The Civil Procedure Rule under Section 7 Explanation 6 provides that:

“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.”

There is no doubt that the suit land was also the subject matter in a previous suit being Kakamega High Court Civil Case No159 of 1983. Vide a consent order dated 30th September 1991, J.L.A. Osiemo recorded as follows:

“By consent as contained – the Land Registrar’s letter dated 10.9.91.

By consent sub-division of land parcel Title No Marach/Bumala/147 into new number 1021, 1022 and 1023 be nullified.

2. A combination form in respect of Nos 1021, 1022 and 1023 be executed.
3. A combined land parcel No Marach/Bumala/1266 be registered in the name of Ogutu Ongondo .



The Deputy Registrar to execute the relevant documents to effect the orders.

J.L.A. Osiemo

Judge.”

That suit involved Ogutu Ongondo as the Plaintiff against Nyamune Odera, Odera Opondo, Aluoch W/O Adikinyi and Ngono Adikinyi as the Defendants. In a Decree issued on 3rd July 1988, the Plaintiff in that suit was declared to be the owner of the land parcel No Marach/Bumala/147 which, as is now clear from the subsequent consent order issued on 30th September 1991, was sub-divided into land parcels No Marach/Bumala/1021, 1022 and 1023 which were later combined to create the suit land.

15. There is nothing to suggest that any appeal was filed against the Decree issued on 3rd July 1988 or the subsequent consent order issued on 30th September 1991. There is no doubt, therefore that the suit land was the subject of a previous suit being Kakamega High Court Civil Case No 159 of 1983 which was determined by a competent Court and a final decree was issued against which there was no appeal was filed.

16. The next issue is whether Kakamega High Court Civil Case No 159 of 1983 involved the parties herein or those acting under them. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & Others 2017 eKLR, the Supreme Court while considering what amounts to res judicata stated that the former suit must have been between the same parties or parties under whom they act i.e. their privies. That is clear from Explanation No 6 of Section 7 of the [Civil Procedure Act](#) which I have already cited above. The Defendants herein have been sued as the Legal Representatives of Ogutu Ng’ondo Oori. There is no doubt that the Ogutu Ongondo Oori whose Estate the Defendants herein represent is the same Ogutu Ongondo who was the Plaintiff in Kakamega High Court Civil Case No 159 of 1983. I say so because, in paragraph 11 of the plaint herein, the Plaintiff has pleaded as follows:

11: “The Plaintiff states that in the same month of September 2024, he came to learn of Ogutu Ongondo having previously filed Kakamega H.C.C.C. NO 159 of 1983 against Nyamune Odera, Odera Opondo, Aluoch W/o Adikinyi & Ngondo Adikinyi and had caused the Nambale District Officer and his elders award to be adopted as judgment of Kakamega High Court which culminated in the combination of Adikinyi Owich’s land parcel No Marach/Bumala/1022 together with Ogutu Ng’ondo’s land parcel No Marach/Bumala/1021 to form the combination title of Marach/Bumala/1266 registered in the sole name of Ogutu Ng’ondo Oori.”

Clearly, therefore, the Defendants have been sued in this suit in respect of the same interest in the suit land where a competent Court in Kakamega High Court Civil Case No 159 of 1983 had already issued a Decree in favour of Ogutu Ongondo Oori over 30 years ago.

17. And as far as the Plaintiff is concerned, he has filed this case, as already pointed out at the beginning of this ruling and which is also clear from the citation in this case, as the Legal Representative of the Estate of Adikinyi Owich. The said Adikinyi Owich was not a party in Kakamega High Court Civil Case No 159 of 1983. However, the 3rd Defendant in that case was Aluoch W/O Adikinyi. And as is clear from the submissions by Mr Wanyama counsel for the Plaintiff:

“The Plaintiff/Applicant has explained that his grandfather, Adikinyi Owich and the Defendants’ father Ogutu Ongondo belonged to one extended family and originally occupied the parent land parcel No Marach/Bumala/147 which underwent a series of transactions as explained above to become Marach/Bumala/1266.”



It is not in doubt, therefore, that the Plaintiff in this case is pursuing the same interest in the suit land which his extended family represented by Aluoch W/O Adikinyi ought to have pursued in Kakamega High Court Civil Case No 159 of 1983 in which the suit land was also the subject matter. As was held in the case of Henderson v Henderson 1843-60 ALL E.R 378, and which has been affirmed in this country:

“... where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, 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. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Any claim to the suit land by the family of Adikinyi could have been pursued as a counter-claim in Kakamega High Court Civil Case No 159 of 1983. Failure to do so does not defeat the doctrine of res judicata from being invoked in this case. It is clear from the available material that this suit is in fact res judicata. It is for striking out.

18. On the issue of costs, it is also clear from the pleadings that the parties herein are part of one extended family. Indeed that is why the Plaintiff have sought the alternative remedy that the Defendants hold the suit land in trust for the dependants of Adikinyi Owich. In the circumstances, the prudent order to make is that the parties shall bear their own costs.
19. Ultimately therefore and having considered all the evidence herein, I make the following disposal orders:
 1. This suit is res judicata and is hereby struck out and with it, the Notice of Motion dated 2nd April 2025.
 2. The parties shall meet their own costs.

BOAZ N. OLAO

JUDGE

14TH MAY 2025

Ruling dated, signed and delivered by way of electronic mail on this 14th day of May 2025 with notice to the parties.

BOAZ N. OLAO

JUDGE

14TH MAY 2025

