



REPUBLIC OF KENYA



KENYA LAW
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**Opetu & another v Komwonyo & another (Environment & Land Case
E011 of 2021) [2025] KEELC 3769 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E011 OF 2021**

BN OLAO, J

MAY 14, 2025

BETWEEN

WILLIAM LAWRENCE OPETU 1ST APPLICANT

**ERNEST OYINGO OGOLA (SUING AS PERSONAL REPRESENTATIVE OF
FRANCIS OGOLA OWADE) 2ND APPLICANT**

AND

FREDY MESHACK OPONDO KOMWONYO 1ST RESPONDENT

LAWRENCE MUSIBI MAKANDA 2ND RESPONDENT

RULING

1. By a ruling delivered on 8th June 2022 Omollo J made the following order at paragraphs *10* and *11* pursuant to a Notice of Motion dated 7th December 2021 filed by the Plaintiffs and seeking injunctive orders restraining the Defendants from the land parcel No Marach/Elukhari/2245:

10: “It appears that both parties herein are claiming they are in occupation of the same parcel of land. It is important to preserve the suit property in its current state. The only way this can be achieved is by issuing an order of injunction which I give specific to barring the Respondents from erecting any new structures or building on the land, not to cut down any trees or plant any boundaries until this suit is heard and determined.

11: The winning party shall get the costs of the application at the conclusion of the case.”

The hearing of the suit has since commenced and on 30th January 2025, the Plaintiffs testified before the trial was adjourned as I was engaged in a meeting to discuss the Judiciary Dialogue Day which was due on 31st January 2025. The hearing was set for 14th July 2025.

2. Meanwhile, I now have for my determination the Plaintiff’s Notice of Motion dated 4th March 2025 in which they seek the following orders:



1. Spent.
2. Spent.
3. Pending the hearing and determination of the suit, the Defendants, their relatives, agents and employees be restrained from entering into the suit land parcels No Marach/Elukhari/2244 and 2245 to cultivate and work on them after this suit has been brought interfering with the smooth and quiet possession of the Applicants/Plaintiffs in the suit land until the suit is determined.
4. Costs of this application be provided for.
5. Any other order be made as the Honourable Court deems just and expedient.

The gist of the application which, is supported by the affidavit of William Lawrence Opetu the 1st Plaintiff and premised on the provisions of Order 40 Rule 3 Civil Procedure Rules and Section 3 of the Civil Procedure Rules is that the Defendants have since 3rd March 2025 entered the land parcels No Marach/Elukhari/2244 and 2245 and ploughed it thus interfering with the Plaintiffs' quiet possession thereof and with the intention of destroying the Plaintiffs' developments thereon. That the Defendants slashed down trees and branches and the Plaintiffs need the assistance of this Court. Annexed to the Motion is a photograph showing a ploughed parcel of land.

3. The 1st Plaintiff also field a further affidavit dated 26th March 2025 without leave but I nonetheless allowed it on record. It is essentially a rehash of what is contained in his supporting affidavit but he goes further to narrate what has so far transpired during the plenary trial.
4. The Motion is opposed and the Respondents have filed separate replying affidavits both dated 21st March 2025.
5. In his replying affidavit, the 1st Respondent has deponed, inter alia, that he is the proprietor of the land parcel No Marach/Elukhari/2244 which he has occupied since 1995 when he purchased it. He denied having invaded the said land to plough it adding that he and the 2nd Respondent have done so since 1995. That when the Applicants testified, they infact admitted that they do not occupy the said land.
6. On his part, the 2nd Respondent averred, inter alia, that the Applicants are indirectly attempting to once again raise the same issues which were the subject of the ruling delivered on 8th June 2022. That he is the registered proprietor of the land parcel No Marach/Elukhari/2245 which he has been in exclusive possession thereof from the late 1980s to date and also plants crops thereon including trees. That when the Applicants testified, they said they do not reside on the land parcel No Marach/Elukhari/2245 but rather, they occupy the land parcel No Marach/Elukhari/2241, 2242 and 2243. That when his two daughters died, they were buried on the land parcel No Marach/Elukhari/2245. That he and the 1st Respondent have strictly abided by the ruling of Omollo J dated 8th June 2022 restraining them from cutting down trees or erecting new structures or buildings on the land parcel No Marach/Elukhari/2245 and the Applicants are therefore blatantly lying to this Court.
7. The Motion has been canvassed by way of written submissions. These have been filed both by the Applicants acting in person and by Mr Mwebi instructed by the firm of C. M. Mwebi Advocate for the 1st Respondent and Mr Mogi instructed by the firm of Manwari & Company Advocates for the 2nd Respondent.
8. I have considered the application, the rival affidavits and the submissions filed.



9. I need to point out to the parties that the land, as per the Green Card, is Marach/Elukhari/2244 and 2245. It is not Marachi/Elukhari/2244 and 2245. Parties to note.
10. At the commencement of this ruling, I did cite the previous ruling by Omollo J delivered on 8th June 2022 in respect to a previous similar application now before me. That ruling was clear that the Respondents were enjoined “from erecting any new structures or building on the land, not to cut down any trees or plant any boundaries until this suit is heard and determined.” The Respondents having denied erecting any structures or buildings on the suit land or cutting down trees and plants, the onus was on the Applicants to provide evidence of any new structures or building, trees or plants that have been cut or boundaries that have been put on the suit land. None has been availed in terms of photographs or any other documentary evidence. The only photograph availed is of a bare parcel of land which appears to have been ploughed. The ruling by Omollo J delivered on 8th June 2022 did not restrain the Respondents from ploughing on the land in dispute.
11. The Applicants by their Motion are seeking to restrain the Respondents by their relatives, agents and employees from entering the land parcels No Marach/Elukhari/2244 and 2245 to cultivate and work on it until this suit is heard and determined. In their earlier Motion dated 7th December 2021 and which gave rise to the ruling by Omollo J delivered on 8th June 2022, the Applicants had, apart from seeking orders restraining the 2nd Respondent from burying the remains of his daughter Emma Musibi on the land parcel No Marach/Elukhari/2245 they also sought an order restraining the 2nd Respondent from interfering with the said parcel of land until the suit is heard and determined. If, as they have now done, the Applicants also wanted to restrain the Respondent from cultivating or working thereon, nothing would have been easier than specifically pleading as much. Section 7 of the *Civil Procedure Act* provides that:

“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.”

Explanation No 4 of the above provision reads:

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

Explanation No 5 goes on to add that

“Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.”

The orders which the Applicants sought vide their earlier Motion dated 7th December 2021 were quite expansive and included enjoining the Respondents from “interfering with the smooth possession of the Plaintiff’s possession thereof”. OMOLLO J in her ruling decided to restrict her orders to what is contained in that ruling which is restraining “the Respondents from erecting any new structures or buildings on the land, not to cut down any trees or plant any boundaries until this suit is heard and determined.” In his replying affidavit dated 21st March 2025, the 2nd Respondent has deposed in paragraph 9 thus:



9: “By their application (the Notice of Motion dated the 4th day of March 2025), the Plaintiffs/ Applicants are also indirectly attempting to, once again, raise issues that were addressed by the Ruling that this Honourable Court delivered in this suit on the 8th day of June 2022.”

There is merit in that averment. This application is clearly res judicata in terms of the provisions of Section 7 of the *Civil Procedure Act*. In any event, even if this Court was to give him the benefit of doubt, if any, it is clear that the Applicants have not demonstrated that the Respondents have defied the orders contained in the ruling delivered by Omollo J on 8th June 2022.

12. The up-shot of all the above is that the Notice of Motion dated 4th March 2025 is devoid of merits. It is dismissed with costs.

BOAZ N. OLAO

JUDGE

14TH MAY 2025

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 14TH DAY OF MAY 2025.

Plaintiffs present in person

Mr Mogi for 2nd Respondent present and also holding brief for Mr. Mwebi for the 1st Respondent.

BOAZ N. OLAO

JUDGE

14TH MAY 2025

