



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 55 OF 2019 (O.S)

CHARLES OYANGE..... 1ST APPLICANT

PAUL ONYANGO2ND APPLICANT

VICTOR WILLIAMS.....3RD APPLICANT

VERSUS

OWUOR WAKENGA.....1ST RESPONDENT

RISPAR OMOLO ORENGE.....2ND RESPONDENT

NALICHANDRA DEVCHAND DODHIA.....3RD RESPONDENT

TUSHAR JEVERCAD DODHIA.....4TH RESPONDENT

RULING

The matter for determination is the **Notice of Motion** dated **21st June 2021**, brought by the 3rd and 4th Respondents (*hereinafter referred to as the applicants*) seeking for orders that the Honourable court be pleased to strike out this suit with costs. The application is against Charles Oyange, Paul Onyango and Victor Williams (*hereinafter referred to as the respondents*). The application is supported by the Affidavit of **Nalichandra Devchand Dodhia** who deposed that the dispute about the ownership and occupation of the suit property KISUMU/DAGO/288 has been litigated before this Court and judgment rendered for eviction of the Applicants and that the dwelling structures talked about by the Applicant were put up by one Evans Onyango, the reason why they came to court to seek redress through Kisumu Civil Suit No. 247 of 2013 wherein vide a judgment dated 24th day of October 2019, the trial Judge ordered the said Evans Onyango, his agents and or servants to give vacant possession of the suit property within 30 days.

According to the applicant, the 1st and 3rd Respondents herein are related to Evans Onyango both as his nephews and that the 2nd Applicant is his brother and therefore the averments that they have never been aware of their claim of ownership of the suit land parcel is false and or made in bad faith and coined to mislead this court to hear this matter afresh in the hope that it will arrive at a different decision.

That the Respondents herein are the same stated strangers who have occupied the semi- permanent structures constructed by one Evans Onyango who refused to vacate the suit land despite orders of the court.

That the dispute about the ownership of the suit land has been litigated in this court and decision made has not been appealed against or varied and therefore the current suit is res judicata and amount to an abuse of the court process. That he has been advised by his Advocate on record that the Respondents being all the persons claiming interests on the suit parcel, their claim or interest was being defended by the said Evans Onyango and they cannot purport to be entitled to the suit parcel and therefore the same should be struck out with costs.

Charles Oyange, the 1st Respondents in this suit filed a Replying Affidavit on behalf of the 2nd and 3rd Respondents on 30th July 2021 who deposed and stated that the said Application is misconceived, an afterthought and an abuse of the court process. That they filed this suit on 9th December 2019 seeking to be declared adverse possessors with respect to the land parcel Kisumu/Dago/288 having resided therein their entire lives and constructed dwelling structures. That after a few months of filing this suit, the Area Chief notified them that the Respondents intend to evict them from the suit parcel of land thus prompting them to file an application seeking for injunctive relief. That the Respondent's response to the said Application placed them on the suit parcel of land as pleaded.

That this Honourable court after considering the pleadings of the parties concluded that they have a prima facie case and granted them interim injunctive orders pending hearing and determination of this suit. That they were neither parties nor were they aware of the existence of suit no. Kisumu ELC No. 247 of 2013 as alleged. That they only knew about the above-mentioned suit after being served with the

Respondents' Replying Affidavit.

That the fact that this suit has been filed after conclusion of the said suit does not on any way amount to an abuse of the court process as alleged because in the present suit, they are seeking to be declared as adverse possessors of the suit parcel of land which the title documents and the said decision confirms that it belongs to the Respondents.

That they have been advised by their Advocates that this Honourable Court deems their occupation to be adverse, then by virtue of the said occupation, they will have developed registerable interests on the suit parcel of land therefore, the Respondents title to the suit land will have been extinguished after 12 years of their possession/ occupation and now they remain registered only as their trustees. That before striking out a suit, this Honourable Court ought to consider all facts of the case and determine whether triable issues have been established.

That the present suit raises a reasonable cause of action which has a legal backing hence if the same is summarily dismissed, they stand to be unjustly removed from the seat of justice and unlawfully evicted from their only known home since birth. That in the circumstances, they do believe that the present application is not merited hence it is in the interest of justice that this application be dismissed with costs.

Nalichandra Devchand Dodhia filed a further Affidavit where he is aware that at the time of filing the KISUMU ELC CASE NO. 247 OF 2013, the suit property had been trespassed by **EVANS ONYANGO** and his agents and or servants who had put up the dwelling structures that the Respondents are talking about and that is why there was an order for vacant possession as per the judgment and it is therefore not true that the Respondents were also in occupation.

He deposes that the Respondents only came to the suit property and resided in the same structures put by Evans Onyango who was their relative and this happened after the determination by the court that the suit property belonged to them and that is why their suit is filed after their judgment and only when they were threatened with eviction and therefore it is not true that they have been staying on the suit parcel in their entire lives.

He reiterates that annexure "C0-3" attached confirms the averment that the Respondents are relatives of the Evans Onyango and they came and occupied the structures put up by the said Evans after the court had determined that the said suit property belong to the Respondents and therefore, they cannot claim adverse possession over the said suit property that the court has determined.

That in response to paragraph 8, in granting orders of injunction the learned judge noted that the case should be heard and determined within 12 months from 30th September 2020. However, the Respondents have never been ready to have this matter concluded since they know very well that the court had already made a determination on the matter and therefore this application should be allowed and the suit struck out with costs. That the Ruling of the court granting temporary injunction does not bar the court from striking out the suit this suit based on the provisions of the law where the suit is based already on determined right and an abuse of court process.

The Respondents having come to the suit property through **Evans Onyango** who is their relative knew very well about the KISUMU ELC SUIT NO.247 OF 2013 but they have decided to frustrate him from executing he court judgment.

The Respondents only came into the suit land through Evans Onyango who is their relative and that was when the suit against the said Evans was in court and therefore there is no way they could have acquired the land parcel by adverse possession.

The court has powers to determine a suit in a summary manner when it involves a matter which had already been determined. That the Respondents herein cannot claim to be unaware of the KISUMU ELC NO. 247 OF 2013 when in the Affidavit by the said **EVANS ONYANGO** sworn on July 2012 seeking to set aside exparte judgment which had been entered in favour of the Respondent herein when the case was first filed in the lower court in the year 2011 against **EVANS ONYANGO** who had put up a permanent structure stated that the land belongs to his mother who bought it from one Wakenga who is the 1st Respondent in the originating summons and that the summons was served upon one Mr. Oyange who is his brother and the 1st respondent in the application.

The Application was canvassed by way of written submissions the 3rd and 4th applicants submitted that the Respondents are litigating through their relative Evans Onyango with regard to the same suit property. That they may not have been the same parties but the law is to the effect that even when they were litigating under a party in that suit, they are barred from instituting another suit. The case that was previously filed at the Chief Magistrates Court Civil Case No. 484 of 2011 between the Applicants in this Application and the said Evans Onyango with regard to the suit land parcel and it is in this case that was later transferred to the Land and Environment Court and became ELC Case No. 247 of 2013.

The Applicants relied on the case of **Accredo AG & 3 Others v Steffano Uccelli & Another (2019) eKLR, Malindi Court of Appeal No.43 of 2018** where the learned Judge held as follows:

"Expounding further on the essence of the doctrine this Court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

The Applicants stated in their Submissions that there should be an end to litigation with regard to the suit property and this will protect Respondents in this case from repetitive litigation over the suit property. If the suit filed by the Respondents before this court succeeds, it will bring inconsistency in terms of the judgment of the concurrent courts. The Respondents are the same people but they have come back to court through a different course of action with regard to the same matter.

The applicant placed reliance in the case of Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That 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."

*It is the Applicants Submissions that even if the Respondents are different parties, there are identical facts and the same evidence and therefore the Doctrine of res judicata applies and relied in the case of **Rono Limited vs Caltex Oil (Kenya) Limited, Nairobi Civil Case No. 1388 of 1992** where Justice Havelock stated as follows:*

"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".

Various Courts have issued rulings premised on the provisions of **Section 7**, including **North West Water Ltd v Binnie & Partners [1990]3 ALL E.R.547** at 556, where Lord Drake, J held *inter alia*:

"Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties (emphasis added) arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, that the issue to be re-litigated."

The Applicants further submitted that should the court allow this matter to proceed then it would have allowed the Respondents to subject the Applicants to double jeopardy and condemning them to actions which amount to infringement of their right to access justice as guaranteed under Article 48 of the Constitution, the right to equal to equal protection of the law as provided for under Article 27 (1) of the Constitution and the right to fair hearing as guaranteed under Article 50.

It is the Applicants Submission that the present suit contravenes the right of Applicants protected by Article 159 92) (b) of the Constitution which requires that justice shall not be delayed and therefore this Application should be allowed by striking out this suit with costs.

The Respondents filed their Submissions on 5th October 2021 and raised the following issues for determination:

a) Whether this suit is res judicata to Kisumu ELC No. 247 of 2013.

The Respondents submitted that the documents relied upon by the Applicants do not show that the Respondents had knowledge of the existence of the previous suit. The Applicants have not demonstrated that the Respondents are relatives of Evans Onyango. The Affidavit does not make reference to any of the Respondents in this matter and the Applicants have not demonstrated to this court that the Respondents moved to the suit property with the authority and consent of Evans Onyango as alleged.

The Respondents relied in the case of **Anna Namae Masibo v Bernard Wasilwa Wepukhulu , Margaret Onyanchi Maloba & 3 Others(Co-Respondents) (2021) eKLR** where Justice B.N. Olao stated as follows:

"A matter cannot be deemed to be res judicata when the Applicant in the said suit was not a party in the previously decided suit and that none of the parties in the previous suit were privy. The Trial Court further stated that nothing in the previous in proceedings in Bungoma LEC No.143 of 2014 suggests that any of the parties therein was litigating over a right that was common to the Applicant."

The Respondents submitted that Section 7 of the Civil Procedure Act does not bar the filing of the present suit since parties were not litigating under the same title.

b) Whether this suit should be struck out.

The Respondents submitted that the principles guiding striking out of pleadings and a suit were settled in the case of **DT Dobie & Company(K) Limited vs Muchina (1982) KLR 1** where the court stated as follows:

“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.”

It is the Respondents submissions that the Applicants have applied to this court to strike out the Applicants case on ground of *res judicata* and an abuse of the court process yet the present suit does not amount an abuse of the court process because in the present suit, the Respondents have applied to be adverse possessors of the suit property. The Respondents submitted that the Applicants’ Application is not merited and it should be dismissed with costs to the Applicants.

This court has analyzed the fact and law relevant to this case and finds that Section 7 of the Civil Procedure Act provides for the principle of *res judicata* 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.’

It is the Applicants case that this Honourable Court delivered a judgment determining the issue of ownership of the suit property in ELC NO. 247 OF 2013 and all the Respondents in the present suit were parties to the suit. This court has keenly looked at the Judgment delivered in ELC CASE NO. 247 OF 2013 where the 3rd and 4th Applicants herein filed a suit against **Evans Onyango**. The 3rd and 4th Applicants in the previous suit alleged that they bought the suit property from the 2nd Applicant in this originating summons who had taken a loan and decided to sell the land to enable her offset her loan with KCB bank. The 3rd and 4th Applicants sought for orders of injunction restraining the Defendants and his agents from interfering with the suit land, for eviction and general damages for trespass against Evans Onyango where the court granted the orders sought in the Plaint. **In the case of Bernard Mugo Ndegwa v James Githae & 2 Others (2010) eKLR.** At paragraph 36, where the judge observed that:

- a) That the matter in issue is identical in both suits;
- b) The parties in the suit are substantially the same;
- c) There is concurrence of jurisdiction of the court;
- d) The subject matter is the same; AND
- e) That there is a final determination as far as the previous decision is concerned.”

It is clear that that the matter in issue in the previous suit was ownership while in the present suit the matter in issue is still ownership by adverse possession. Although the 3rd and 4th Respondents in the present suit allege that parties are the same, in ELC CASE NO. 247 OF 2013 the matter was between the 3rd and 4th Respondents and one Evans Onyango who is not a party to the present suit. However, the Respondents in this application were on the suit property with the permission of Evans Onyango and therefore he was litigating on their behalf in KISUMU ELC NO 247 OF 2013. There is concurrence of jurisdiction of the two matters as they have been filed in this court and the subject matter being East Kisumu /Dago/288 the suit property herein is the same.

In the case of **E.T vs Attorney General & Another where Hon. Justice Majanja** stated that:

“The courts must 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 the court in another way and in a form a new cause of action which has been resolved by court of competent jurisdiction.”

This court has looked at the pleadings and evidence filed by the parties and from Green Card, it is clear that the Respondents have lived in the suit property for more than 12 years by virtue of them being relatives of one Evans Onyango. After the 3rd and 4th Applicants sought for eviction orders from this Honourable court in ELC CASE NO. 247 OF 2013, the Respondents herein opted to file this present suit seeking to be declared adverse possessors of the suit property. In previous suit, Evans Onyango did not file a Counterclaim to show that he owns the property or he acquired the property legally.

It is also clear that from the Green Card, Evans Onyango is not related to any of the registered owners in the Green Card and Respondents herein have not demonstrated how Evans Onyango took possession of the suit property and put up structures where the Respondents have been living for over 12 years. In the upshot, this court finds that the Application dated 21st June 2021 has merit and the same is allowed thus this suit is struck out with costs to the 3rd & 4th Respondents in the Originating Summons.

DATED AT KISUMU THIS 17TH DAY OF DECEMBER 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE