



**Ajwang' v Eyale (Sued as Administratrix of the Estate of Barasa Wanzala Opata) & another (Enviromental and Land Originating Summons E009 of 2025) [2025] KEELC 6603 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6603 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2025**  
**A NYUKURI, J**  
**SEPTEMBER 24, 2025**

**BETWEEN**

**PETER WANGA AJWANG' ..... APPLICANT**

**AND**

**EVERLYNE NIGHT EYALE (SUED AS ADMINISTRATRIX OF THE ESTATE OF BARASA WANZALA OPATA) ..... 1<sup>ST</sup> RESPONDENT**

**EVERLYNE NIGHT EYALE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion application dated 11<sup>th</sup> March 2025 filed by the applicant seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the Originating Summons herein, the respondent, her servants, agents and any others, including those claiming through her, be and are hereby restrained from entering and demolishing the houses, subdividing and or in any other manner dealing with LR North Wanga/Khalaba/1320.
  - d. Spent
  - e. The Officer Commanding Bulimbo Police Station to see to the enforcement of the orders of the court herein.
  - f. The costs of this application be in the suit.



2. The application is anchored on the supporting affidavit of the applicant sworn on 11<sup>th</sup> March 2025. The applicant's case is that in the suit herein, he claims parcel No. North Wanga/ Khalaba/1320 (suit property) under the doctrine of adverse possession. That the suit property was the subject matter in Mumias SPM ELC 32 of 2018 where together with his brother, they had been sued by the respondent for the recovery of the suit property which had been transferred to their father Sylvester Khachina. That in the said suit, parties entered a consent dated 16<sup>th</sup> May 2023 wherein the applicant's registration of the suit property was cancelled and the suit property reverted to the original owner Barasa Wanzala Oyata. That the consent also provided that the applicant shall remain on the property for 10 months; which consent was complied with. That in accordance with the terms of the consent that parties ought to comply with the law regarding property of a deceased person, the applicant instituted this suit.
3. The applicant further averred that he was to remain on the property and reorganize himself by pursuing the deceased's estate for a claim of adverse possession. That he filed an Originating Summons in Mumias being PMC ELC 30 of 2024 but that the same was struck out for want of jurisdiction, prompting him to file the current suit. That the lower court allowed an application for the applicant to be evicted from the suit property.
4. According to the applicant, the respondent's title was extinguished under the doctrine of adverse possession and she holds title in trust for him. That if an injunction is not granted, he will be rendered homeless. He attached the plaint in Kakamega HCC No. 119 of 2013 which later became Mumias ELC No. 32 of 2018; consent dated 26<sup>th</sup> May 2023; rulings dated 25<sup>th</sup> February 2025 and title deed for the suit property.
5. The application was opposed. Everlyne Night Eyale the respondent filed a replying affidavit dated 27<sup>th</sup> March 2025. She stated that she was the plaintiff in Mumias ELC Case No. 32 of 2018 where the applicant herein was the 2<sup>nd</sup> defendant. That she sought cancellation of the applicant's title on the basis of fraud as the same was based on a consent obtained on 7<sup>th</sup> November 1995 and that the applicant's father died on 1<sup>st</sup> October 1997. That the suit property was not part of the deceased's estate when they conducted succession proceedings. That despite the suit property not belonging to the applicant's father, he laid a claim on it, and occupied it by force and that that was the reason she sought cancellation of title and vacant possession.
6. Further that a consent order was made dated 16<sup>th</sup> May 2023 reverting the suit property to the original owner and that through Succession Cause No. 391 of 2011, the suit property was awarded to her. That the applicant consented to cancellation of title and vacating the suit property. That the consent settled the dispute and the applicant could not file a fresh suit. That this suit is *res judicata* as the question of ownership was determined. That the land reverted to the owner on 16<sup>th</sup> May 2023 and therefore the applicant has no right to claim adverse possession. That the fact that the suit property was irregularly transferred to the applicant's father is conceded to by the applicant. That a claim for vacant possession filed in 2025 cannot supersede the respondent's claim for vacant possession. That the applicant must comply with the consent order. That he has issued a three months eviction notice in line with section 152 of the [Land Act](#). That litigation must come to an end.
7. Besides the replying affidavit, the respondent also filed a preliminary objection on the suit, dated 19<sup>th</sup> March 2025. She stated that this suit is *res judicata*, in view of the decision in Mumias ELC Case No. 32 of 2018. That the applicant is estopped from filing a fresh suit in view of the consent dated 26<sup>th</sup> May 2023 and that the issue of adverse possession cannot arise after determination of a suit filed in 2013 and determined in 2023.



8. In a rejoinder, the applicant filed supplementary affidavit dated 21<sup>st</sup> April 2025. He stated that no fraud was committed by his father as the consent stated that the transfer was by mistake. That by stating that the law regarding property of a deceased would apply, parties were allowed to pursue their competing interests. That when the consent gave the applicant 10 months to remain on the suit property, nothing suggested that he should vacate the same. That the claim for adverse possession is not *res judicata*. That the terms of the consent will become plain after this case is heard as this court will be in a position to interpret the consent. That he was not served with notice to vacate.
9. Parties filed submissions in regard to the application. On record are the applicant's submissions dated 21<sup>st</sup> April 2025 and the respondents' submissions dated 4<sup>th</sup> April 2025; both of which this court has duly considered.

### **Analysis and Determination**

10. The court has carefully considered the application, the response thereto as well as submissions and authorities cited. In my considered view, the issues that arise for this court's determination are: -
  - a. Whether this suit is *res judicata* in view of the consent judgment in Mumias CM ELC Case No. E032 of 2018
  - b. Whether the applicant has met the conditions for grant of temporary injunction.
11. The doctrine of *res judicata* is provided for 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.

Explanation.—The expression “former suit” means a suit which has been decided before the suit in (1)— question whether or not it was instituted before it.

Explanation.—For the purposes of this section, the competence of a court shall be determined (2)— irrespective of any provision as to right of appeal from the decision of that court.

Explanation.—The matter above referred to must in the former suit have been alleged by one party (3)— and either denied or admitted, expressly or impliedly, by the other.

Explanation.—A matter which might and ought to have been made ground of defence or attack (4)— in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation.—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the (5)— purposes of this section, be deemed to have been refused.

Explanation.—Where persons litigate bona fide in respect of a public right or of a private right claimed (6)— 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.
12. Therefore, the doctrine of *res judicata* bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has already determined such suit or issue on merit and with finality.
13. Essentially, the elements of *res judicata* are as follows;



- a. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.
  - b. There is a judgment or order in a former suit which is final.
  - c. The judgment or order in the former suit was on merit.
  - d. The judgment or order was rendered by a competent court with jurisdiction.
14. In the case of the *Independent Electrical and Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal stated the purpose of the doctrine of *res judicata* as follows;

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* this rest in the public interest for swift, sure and certain justice.

15. A bar of *res judicata* applies in circumstances where a party who ought to have raised an issue in a former suit failed to do so, either by mistake or negligence or otherwise, hence he or she cannot file a fresh suit on an issue which he or she failed to raise in the former suit. In the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 KLR (Civ) (6 August 2021) Judgment, the Supreme Court of Kenya cited with approval the reasoning in the case of *Hinderson v. Henderson* [1843] 3 Hare 100 at page 115, where it was held as follows;

“Where a given matter becomes the subject 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 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 cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....”

16. In the instant case, it is not disputed that the former suit being Mumias SPM ELC No. 32 of 2018 (Formerly Kakamega HCC No. 119 of 2013) was in regard to the suit property and the issues were whether the registration of the suit property in the name of the applicant’s father was lawful and whether his title ought to be cancelled and revert to the former owner and vacant possession granted to the respondent herein. In the determination of that suit, a consent dated 26<sup>th</sup> May 2023 was recorded allowing cancellation of title and granting the applicant 10 months to remain on the suit property. That being the case, it is clear that parties, and the subject matter in the former suit are the same as those in the current suit.



17. The issues of ownership of the suit property and whether the applicant's registration thereof was lawful were determined with finality in that case. The applicant has not convinced this court why he failed to ensure that his claim of adverse possession was addressed in the former suit, which suit had in fact been initially filed in the High court. Adverse possession is a question of ownership which ought to have been determined alongside the questions raised by the respondent which were also on ownership. The law frowns on litigation in instalments, which the applicant herein is trying to do. For these reasons, it is clear to me that this suit is an attempt by the applicant to get a second bite at the cherry. His argument that this court should interpret the consent filed in Mumias MCELC No. E032 of 2018 is misplaced as that consent was not recorded before this court.
18. By recording the consent of 23<sup>rd</sup> May 2023 without the applicant raising his alleged claim of adverse possession and now filing a fresh claim for adverse possession is not only *res judicata*, but also an abuse of the court process. Court's time is precious, and all issues in regard to a specific subject matter ought to be determined together. It is upon parties in a dispute to ensure that all their claims on one subject matter are addressed when the subject matter is being litigated upon, otherwise, there will be no end to litigation.
19. In the premises, I find and hold that this suit is *res judicata* and I hereby dismiss the same with costs to the defendant.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2025**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Angima for the applicant

Mr. Mukoya for the respondent

Court Assistant: Delphine

