



**Kusimba (Suing on Her Behalf and Behalf of the Estate of Nehemia Kusimba Omeri) v
Okula (Sued on Behalf of the Estate of Isaac Clement Okula Omeri) (Environmental and Land
Originating Summons E033 of 2024) [2025] KEELC 6581 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E033 OF 2024
BN OLAO, J
SEPTEMBER 30, 2025**

BETWEEN

**HELIDAH NAROCHO KUSIMBA (SUING ON HER BEHALF AND BEHALF OF
THE ESTATE OF NEHEMIA KUSIMBA OMERI) APPLICANT**

AND

**REBECCA KANANA OKULA (SUED ON BEHALF OF THE ESTATE OF ISAAC
CLEMENT OKULA OMERI) RESPONDENT**

RULING

1. Helidah Narocho Kusimba (the Plaintiff herein and suing on her behalf and also on behalf of the Estate of Nehemia Kusimba Omeri) moved to this Court vide her un-dated Originating Summons in which she impleaded Rebecca Kanana Okula (the Defendant herein and sued on behalf of the Estate of Isaac Clement Okula). It is the Plaintiff's case that she has acquired the land parcel No South Teso/angoromo/5390 (the suit land) by way of adverse possession having occupied it openly, peacefully and un-interrupted for a period of 12 years. It is also the Plaintiff's case that the Estate of Isaac Clement Okula holds the suit land in trust for the Estate of Nehemia Kusimba Omeri. The gist of the Plaintiff's claim is not necessary for purposes of this ruling. Suffice it to state that although the un-dated Originating Summons was filed on 19th August 2024, the Defendant is yet to file any response thereto as at the time of this ruling.
2. The following documents are annexed to the said Originating Summons:
 - 1: Copy of Limited Grant and Ad Litem issued to the Plaintiff in respect to the Estate of Nehemia Kusimba Omeri in Busia Chief Magistrate Court Succession Cause No 8 of 2020.
 - 2: Copy of the Register for the land parcel No South Teso/angoromo/5390 in the name of the Defendant.



- 3: Copy of the certificate of death for Nehemia Kusimba Omeri.
- 4: Copy of Summons for revocation of Grant filed in Busia Chief Magistrate's Succession Cause No 173 of 2016.
- 5: Copy of plaint filed in Busia CHief Magistrate's Court Elc Case No 126 of 2018 between Rebecca Sanana Okulu -v- Moses Ajala Okusimba & Helda Narocho Okusima with regard to the ownership of the land parcel No South Teso/angoromo/5390.
- 6: Photographs of buildings.
- 7: Copy of Surveyor's Report Filed In Busia Chief Magistrate's Court Elc Case No 126 of 2018. The Defendant's response to the Originating Summons was to file a Notice of Preliminary Objection raising the issue that this suit is res judicata because of the following two cases:
 - 1: Busia Chief Magistrate's Court Succession Cause No 173 Of 2016.
 - 2: Busia Chief Magistrate's Court Elc Case No 126 Of 2018.

Copy of the pleadings and orders issued in the above two cases were also filed together with the Notice of Preliminary Objection.

3. When the Preliminary Objection was placed before me, I directed that it be canvassed by way of written submissions.
4. The submissions were filed by Edaki Instructed By The Firm Of Edaki & Company Advocates acting jointly with Ms Nabulindo instructed by the firm of D. K. Nabulindo & Company Advocates for the Plaintiff while Mr Jumba instructed by the firm of Balongo & Company Advocates filed submissions on behalf of the Defendant.
5. I have considered the Preliminary Objection, the annexures thereto as well as the submissions by counsel.
6. Before I proceed further, I must determine whether what the Defendant has raised falls within the ambit of a proper Preliminary Objection which has been defined by Law Ja In The Locus Classicus Case Of Mukisa Biscut Manufacturing Company Ltd -v- West End Distributors 1969 E.A 696 and which is the path that Courts have continued to follow to be i.e.;

“... a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a Preliminary point, may dispose of the suit. Examples are an Objection to the jurisdiction of the Court or a plea of limitation of a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Sir Charles Newbold P added thus:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a purer point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

See also the cases of Nitin Properties Ltd -v- Singh Kalsi & Another 1995 eKLR and also the case of Hassan Ali Joho & Another -v- Suleiman Said Shabal & 2 Others Sck Petition No 10 of 2013 [2014 eKLR] wherein the principles set out in the case of Muksa Biscuit Manufacturing Company Ltd -v- West End Distributors Ltd (supra) have been pellucidly re-affirmed.



7. The Defendant's Preliminary Objection raises the issue that the Plaintiffs suit is res judicata. The principle of res judicata is provided for in Section 7 of the [Civil Procedure Act](#) which 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.”

Res judicata can be pleaded by way of estoppel to protect parties from endless litigation. In the case of Independent Electoral & Boundaries Commission -v- Maina Kiai & 5 Othes 2017 eKLR, the Supreme Court while considering the elements of res judicata stated that before it can be properly invoked and up-held in a suit, the following must be proved:

- a. The matter in issue was directly and substantially in issue in a former suit.
- b. The 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 suit was heard and finally determined.
- e. The Court which heard and determined the former suit was competent to try and determine the issue raised.

In the case of William Koross -v- Hezekiah Kiptoo Komen & 4 Others 2015 eKLR, the Court of Appeal stated thus:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must keep the fruits of his success and the unsuccessful one must learn to let go.”

The Court then went on to affirm the words of Y. V. Chandrachud in the Indian Supreme Court case of LAL Chand -v- Radha Kishan Air 1977 SC 789 where the Judge said:

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be harassed by a multiplicity of proceedings involving determination of the same issue.”

See also an elucidation of the principle in the cases of Karia -v- A.g 2005 I E.a 83, Kamunye & Others -v- Pioneer General Assurance Society Ltd 1971 E.a 263 And John Florence Marinime Services Ltd & Another -v- Cabinet Secretary For Transport Infrastructure & Others Ca. Civil Appeal No 42 of 2014 [2015 eKLR]. I shall be guided by the relevant legal provision and the above precedents in determining this Preliminary Objection.

8. The Defendant has cited two cases as the basis of her Preliminary Objection. These are Busia Chief Magistrate's Court Succession Cause No 173 Of 2016 And Busia Chief Magistrate's Court Elc Case No 136 of 2018. I shall consider them in that sequence to see if they can support the Defendant's claim that this case is res judicata.



1. Busia Chief Magistrate's Court Succession Cause No 173 Of 2016

9. From the documents filed, it is clear that this succession cause was in respect of a confirmed Grant issued jointly to the Plaintiff and the Defendant in respect to the suit land but which was sneaked into the Lands Registry and used to transfer the suit land to the late Isaac Clement Okula Omeri and later to the Defendant yet it was trust property. That grant was revoked by the Chief Magistrate Hon Lucy Ambasi vide an order issued on 9th March 2021. An earlier grant which had been issued to the Defendant was reinstated. The Defendant has not filed a copy of the subsequent Grant. That notwithstanding, it is clear that whereas the suit land was the subject of this succession cause in the Chief Magistrate's Court, that Court did not, and could not determine any dispute relating to adverse possession or trust which are the issues that call for determination in this Court. That was not the duty of a Probate Court which the Chief Magistrate's Court in Busia Succession Cause NO 173 of 2016 was exercising. The Duty of a Probate Court is to distribute the Estate of the deceased among the beneficiaries. That is why Rule 41(3) of the Probate and Administration Rules is couched in the following terms:

- (3) "Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."

The proceedings and any orders issued in Busia Chief Magistrate's Court Succession Cause NO 173 of 2016 cannot therefore be invoked in support of the Preliminary Objection that this suit is res judicata.

10. In his submissions, counsel for the Defendant has cited my own judgment in the case of Regina Idionyi Ochukuna & 5 Others -v- Angeline Amoding Omunyin & 2 Others Busia ELC Case No E022 of 2024 in support of his proposition that this suit is res judicata Busia Chief Magistrate's Court Succession Cause NO 173 of 2016. Counsel has gone on to cite page 13 of my judgment in that case in which the issue was whether the case was res judicata Busia ELC Case NO 158 of 2017. In that paragraph, I had stated as follows:

"The thread that runs through the pleadings in this case is that the parties herein and in Busia ELC case NO 158 of 2017 are all related and claim ownership of the suit land on the basis of customary trust. Therefore, although some of the parties in this case were not parties in the earlier case being Busia ELC Case NO 158 of 2017, the Plaintiffs herein are clearly in privity with the 2nd and 3rd Defendants who were parties in Busia ELC case NO 158 of 2017 while the Defendant was a party in both cases. Their dispute in both cases hinges on the ownership of the suit land."

The case of Regina Idionyi Ochukuna & 5 Others -v- Angeline Amoding Omunyin & 3 Others (supra), does not aid the Defendant. This is because, in that case, the issue of trust which was being raised had been also raised and determined by Omollo J in the case of Angelin Amodin Omuyin & Another -v- John Etyang Ekakiti & 7 Others in Busia ELC case NO 158 of 2017. In this case now before me, the issues of adverse possession and trust were not canvassed nor determined in Busia Chief Magistrate's Court Succession cause NO 173 of 2016 and neither could it have been raised nor canvassed as the Chief Magistrates Court was only sitting as a Probate Court and not as a Civil Court.



11. The citing of Busia Chief Magistrate’s Court Succession Cause NO 173 of 2016 to support the Defendant’s plea that this suit is res judicata does not therefore aid her. That plea cannot therefore be up-held. It is for dismissal.

2. Busia Chief Magistrate’s Court Elc Case No 126 of 2018

12. This case involved Rebecca Kanana Okula suing as the personal representative of the estate of Isaac Clement Okula Omeri as the Plaintiff against Moses Ajala Okusimba & Helda Narocho Okusima as the 1st and 2nd Defendants. The Plaintiff’s case was that whereas she had acquired the suit land by way of transmission, the Defendants were illegally collecting rent from the tenants occupying the premises thereon. The Plaintiff therefore sought an order permanently injuncting the Defendants and for them to render an account of the rent collected from those premises. The decree issued on 26th September 2024 shows that judgment was entered for the Plaintiff who is now the Defendant in this case.
13. Again, it is not in dispute that the parties herein litigated over the ownership of the suit land in Busia Chief Magistrate’s Court ELC case NO 126 of 2018. However, that dispute had nothing to do with the issue of trust or adverse possession which are the twin issues in this case. And whereas the issue of trust could have been pleaded and determined in that case, the issue of adverse possession could not have been heard and determined by the Chief Magistrates Court for want of jurisdiction. Explanation NO 4 of Section 7 of the *Civil Procedure Act* 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.”

Going by the above explanation, any issue which could have been raised in the former suit either as a claim or counter-claim ought to be raised otherwise it will be defeated by the plea of resjudicata. However, it is now well settled following the decision in the case of Pauline Chemuge Sugawala -v- Nairuko Ene Mutarawa Kirui & 3 Others C.a. Civil Appeal No E141 of 2022 [2024 KECA 1417 KLR], that the subordinate court cannot determine disputes on adverse possession. Therein, the Court of Appeal having considered Section 38 of the *Limitation of Actions Act* and the contrasting decisions as to whether or not the Magistrate’s Court have jurisdiction to determine claims to land by way of adverse possession stated as follows in paragraph 48:

“It is our view that, if it was intended that claims for adverse possession be determined by the Magistrate’s Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of Section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Court.”

It follows therefore that even if the Plaintiff in this case and who was the 2nd Defendant in Busia Chief Magistrates Court ELC case NO 126 of 2018 had pleaded adverse possession as her counter-claim, that Court would have been bereft of jurisdiction and any judgment delivered by that Court would have been an illegality having been arrived at by an incompetent Court. A judgment delivered by a Court without jurisdiction cannot be res-judicata. The bottom line, however, is that the Busia Chief Magistrates Court in Busia ELC case NO 126 of 2018 did not consider the issues of trust and adverse possession. The same were not pleaded and even if they had been, that Court would not have been competent to hear and determine the claim for adverse possession. Busia Chief Magistrate’s Court Civil Case NO 126 of 2018 cannot therefore be invoked to support the plea of resjudicata.



14. The up-shot of the above is that this Court makes the following disposal orders in respect to the Defendant's Preliminary Objection:

1. The Preliminary Objection is dismissed with costs.
2. As the Defendant is yet to file her response to the Originating Summons, she should do so within 14 days so that directions can be taken and the suit listed for hearing.

BOAZ N. OLAO

JUDGE

30TH SEPTEMBER 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER 2025.

BOAZ N. OLAO

JUDGE

30TH SEPTEMBER 2025

