



REPUBLIC OF KENYA



KENYA LAW
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**Muna v Ouko & another (Environment and Land Case E445 of 2024)
[2025] KEELC 6501 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E445 OF 2024
CA OCHIENG, J
OCTOBER 1, 2025**

BETWEEN

REBECCA MUMBI MUNA PLAINTIFF

AND

ROSELYN DOLA OUKO 1ST DEFENDANT

AARON TAFARI OUKO 2ND DEFENDANT

RULING

1. What is before Court for determination are two applications. On 4th March 2025, this Court directed that both applications would be heard jointly. In the Plaintiff's Notice of Motion dated the 28th October 2024, she seeks the following Orders:
 - a. Spent.
 - b. Pending the hearing and determination of this suit, this honourable court be pleased to grant orders of temporary injunction restraining the Respondents /Defendants by themselves or by their servants or agents or employees and/or representatives or any other persons acting under their instructions or their interests from threatening, harassing and evicting the Applicant/ Plaintiff and other dwellers on all that land known as LR Number 3589/49.
 - c. Pending the hearing and determination of this suit, this Honourable court be pleased to grant orders of temporary injunction restraining the Respondents /Defendants by themselves or by their servants or agents or employees and/or representatives or any other persons acting under their instructions or their interests from transferring, charging, advertising, trespassing, encroaching, entering, accessing, interfering, damaging, disposing, occupying, alienating or otherwise dealing in any other manner with all that land known as LR Number 3589/49.



- d. This Honourable court be pleased to make orders directing officer in charge of Station (OCS) at Karen Hardy Police Station to ensure compliance of the orders given.
 - e. Spent.
 - f. The costs of this application be provided for.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. She avers that she is the beneficial owner of LR Number 3589/49 (original number 2589/6/18), having inherited it from her late husband, Muna M.M Kasanga (deceased) pursuant to a Certificate of Confirmation of Grant with Will confirmed on 12th June, 2023. She asserts that her husband purchased the suit parcel from Dr. Hugh Skinner vide an agreement for sale dated 1st November 1972. Further, that Dr. Skinner had in turn purchased the said parcel from Jason Atinda Ouko (deceased) vide an agreement for sale dated 13th November, 1969. She claims that her late husband settled on the suit property in 1972 and dwelled therein until his demise in 2017. She confirms that she joined him on the parcel in 1980 when they got married and they established their matrimonial home thereon and have developed it over the years.
 3. She avers that Jason Ouko unfortunately died before he had excised the suit property from the mother title through subdivision and the Defendants who are his personal representatives transferred the suit property to their names on 10th December 2019, through dubious means since the succession cause over the late Jason Ouko's estate is yet to be concluded through confirmation. Further, upon obtaining the title, the Defendants began to threaten her and other persons settled on the suit land with eviction.
 4. The application is opposed by the Defendants vide the 2nd Defendant's replying affidavit. He avers that the Defendant concealed material facts by failing to disclose that this suit is res judicata due to the existence of ELC No. 1531 of 2007, between the same parties claiming under the same title. He points out that in the said suit, the Plaintiff's late husband's cause of action was that the late Jason Atinda Ouko entered into an agreement for the sale of the suit property with one Dr. Skinner who in turn sold him the suit property. He hence sought specific performance by way of counter-claim but he did not pursue it and his claim abated as per the court orders issued therein on 19th December 2022.
 5. He asserts that the Defendants are the registered proprietors of Land Reference No. 3589/49 (formerly L.R. No. 3589/6 I.R. No. 23229) thus Musa Muna Kasanga (deceased) could not bequeath it to the Plaintiff in his will. He claims that the said late Musa Muna Kasanga gained access to a portion of the parcel with the permission of the late Jason Atinda Ouko, owing to their personal friendship thus his occupation was limited to a semi-permanent structure on approximately half an acre.
 6. He admits that the Jason Atinda Ouko(deceased) executed a sale agreement with one Hugh Skinner and Ms. Evelyn Keenan and contends that the said transaction was terminated and no sale was concluded. He explains that after the death of Jason Atinda Ouko, his estate made several attempts to engage the late Musa Muna Kasanga to vacate the suit property but he unlawfully fenced off approximately five acres and informally subdivided it. Further, to protect its interest, the Estate of Jason Atinda Ouko filed ELC Case No. 1531 of 2007, seeking eviction orders and vacant possession.
 7. He avers that he notified other purported third-party purchasers under Musa Kasanga (deceased) including one Paul Murunga that the said late Musa Muna Kasanga had not lawfully purchased any property from the late Jason Atinda Ouko. He contends that he wrote several letters to both the late Musa Muna Kasanga and his advocates on record at the time, Beatrice Kariuki Advocates, informing them that having gone through the estate's documents, there was never an agreement for sale between the late Kasanga and the late Ouko.



8. He confirms that the Defendants issued an Eviction Notice dated 15th July, 2024 to Rebecca Muna Kasanga and to any third parties, or assignees claiming ownership of the suit parcel under her or her late husband but despite the notice, the Plaintiff, her assignees and third parties claiming ownership under her or the late Musa Muna Kasanga continue to illegally occupy the suit property thereby violating the Defendants' constitutional right to property under Article 40 of *the Constitution*. Further, that the Plaintiff's actions constitute trespass and are contrary to Sections 152A and 152B of the *Land Act*.
9. The Defendants also filed Grounds of Opposition contending that the Plaintiff's claim is legally defective as it is premised on an erroneous assumption that the suit property forms part of the estate of Muna M. M. Kasanga (Deceased), whereas no valid instrument of transfer or registration exists in his favour. Further, that the alleged agreements for Sale dated 13th November 1969 and 1st November 1972 relied on by the Plaintiff are legally unenforceable as the alleged vendor, Dr. Hugh Skinner, had no capacity to pass valid title, pursuant to the doctrine of *nemo dat quod non habet*. They also contend that the Plaintiff's claim is statute-barred under Section 7 of the *Limitation of Actions Act*, which provides that no action may be brought to recover land after twelve (12) years from the date the right of action accrued, as the Plaintiff did not take any step to register, claim, or assert ownership until the filing of this suit over fifty (50) years after the alleged sale.
10. In response to the Defendant's replying affidavit and Grounds of Opposition, the Plaintiff filed a further affidavit. She reiterates her averments in her affidavit in support of her application and avers that during the execution of the sale agreement of 1st November 1972 between her late husband and Dr. Skinner, Jason Atinda Ouko (deceased) was a witness thus being the registered owner of the suit property, he consented to its sale thus the doctrine of estoppel as an exception to the *nemo dat* principle applies.
11. She contends that if Mr. Jason Ouko had any opposition with her late husband's proprietorship, he ought to have filed a suit by 1st November, 1984, twelve (12) years from the date her late husband purchased the said parcel but since he did not, he became a trustee holding title to the suit property for her late husband. Further, that even by the time ELC 1531 of 2007 against her late husband was filed, his rights over the suit parcel had crystallized.
12. She insists that she was not aware of ELC 1531 of 2007 until recently and contends that this suit is not res judicata as the aforesaid case was never heard and determined to finality and that parties in the said suit and in the instant matter are different. She asserts that for the Defendants to lawfully evict her, from the suit parcel, they ought to have complied with Section 152 E of the *Land Act*.
13. In the Defendants' Notice of Motion application dated the 3rd March 2025, they seek the following Orders:
 - a. Spent.
 - b. That the Honorable Court be pleased to discharge the ex parte orders issued on 29th October, 2024. That the Plaint dated 29th October 2024 be struck out and Plaintiff's suit be dismissed with costs.
 - c. That this Honourable Court be pleased to grant an order restraining the Plaintiff her agents, employees, and/or servants from entering, remaining on, subdividing, fencing, or in any way interfering with the suit property.
 - d. That this Honourable Court be pleased to issue an order for eviction and vacant possession of Land Reference No. 3589/49 (formerly L.R. No. 3589/6 I.R. No. 23229), against the Plaintiff and any persons claiming directly or indirectly under her, agents, employees and servants.



- e. That this Honorable Court be pleased to issue an order to Allan Samuel Otieno t/a Nexttgen Auctioneers or any other Auctioneer instructed by the Defendant to conduct the eviction exercise and in satisfaction of the order (5) above.
 - f. That the Officer Commanding Station (OCS) Karen Plains Police Station be and is hereby directed to provide security to the Defendants and Allan Samuel Otieno t/a Nexttgen Auctioneers or any other Auctioneer instructed by the Defendant during the eviction exercise and to maintain law and order.
14. The application is premised on grounds on its face and on the 2nd Defendant's supporting affidavit whose averments are similar to those in his affidavit in opposition to the Plaintiff's application.
 15. In opposition, the Plaintiff filed a replying affidavit whose averments are similar to those contained in her affidavit and further affidavit in support of her application.
 16. In response to the Plaintiff's replying affidavit, the 2nd Defendant swore a further affidavit. He avers that the Plaintiff's contention that Section 152E of the Land Act was violated in issuing her with purported eviction notice is untrue as the Defendant's eviction Notice dated 15th July 2024 was duly served by Allan Samuel Otieno t/a Nextgen Auctioneers and that the requirement of publishing the notice applies where persons to be evicted are a large group.
 17. The two applications were canvassed by way of written submissions.

Submissions

18. The Plaintiff in her submissions urges the court to apply the reasoning of the court in the case of Michael Bett Siror v Jackson Koech [2019] eKLR and in Ogutu v Budaha (Environment and Land Appeal E008 OF 2023) [2025] KEELC 3086 (KLR) (2 April 2025) (Judgement) to find that this suit is not res judicata since ELC 1531 OF 2007 was never heard and determined to its finality. She contends that parties in the aforesaid suit and the current suit are different. She insists that this suit is not statute barred by dint of Section 7 of the Limitation of Actions Act. Further, that she has met the threshold for grant of an injunction having established a prima facie case owing to the fact that her husband purchased the suit parcels from Dr. Hugh Skinner vide a sale agreement which was witnessed by late Jason Ouko. She further submits that her husband took possession and has lived on the suit parcel for over fifty (50) years and it is fully developed thus she is likely to suffer irreparable damage if the reliefs sought are not granted.
19. She argues that the 2nd Defendant's failure to exhibit any written authority of defending the matter on behalf of the 1st Defendant offends Order 13 Rule (1) and (2) of the Civil Procedure Rules. She urges the court to refrain from evicting her and striking out her suit at this early stage as she has a good case. Further, that doing so will condemn the parties into uncertainty over the suit parcel as the dispute surrounding it, has lingered for over 30 years. To buttress her averments, she relied on the following decision: Kamau & Another v Nganga & Another (Environment and Land Appeal E019 OF 2022) [2024] KEELC 1060 (KLR) (29th February, 2024) among others.
20. On their part, the Defendants submit that since the Plaintiff was neither an executor nor personal representative of the estate of the late Muna M.M Kasanga, she has no locus to purport to bring a suit in such capacity. Further, that the substratum of this suit and ELC No. 1531 of 2007 are identical in that in the former suit, the late Musa Muna Kasanga sought enforcement of a purchaser's interest through specific performance based on an alleged chain of sale agreements between himself, Dr. Skinner, and Jason Atinda Ouko, while the Plaintiff herein claims under his estate and seeks a



declaration of ownership based on the same chain of sale agreements and Certificate of Confirmation of Grant against the legal representatives of the late Jason Atinda Ouko.

21. They further submit that Order 24 Rule 7(1) of the Civil Procedure Rules contemplates that an abated suit, once not revived within time, results in a final determination thus the instant suit is res judicata. They also submit that the Plaintiff has not established a prima facie case as her claim is baseless for want of evidence of registration, transfer, or possession of title in favour of her deceased husband. Further, the chain of claim she relies on shows that suit parcel was purchased from a person without any interest in the property and in contrast, they are the lawful registered proprietors pursuant to a certificate of lease in their favour.
22. They argue that since the nature of the Plaintiff's occupation and claim is neither rooted in contract nor conveyance, her claim of loss due to eviction is quantifiable. To this end, they cite the case of Janet Sambili v Kenya Airports Authority & 2 Others [2023] KEELC 11264 (KLR). Further, that the balance of convenience tilts towards protecting their registrable right to property. They reiterate that the Counterclaim by Musa Muna Kasanga (deceased) in ELC No. 1531 of 2007 and the instant suit are similar and thus the suit is res judicata. Further, that the abatement order of the counterclaim was a final determination of the issues raised in the counterclaim and the cause of action arising therefrom. They insist that the plaint herein should be hence be struck out with costs. Further, that the plaint fails to raise any triable issues and is an abuse of court process within the meaning of Order 2 Rule 15(1)(b), (c), and (d) of the Civil Procedure Rules. They contend that the continued occupation of the suit property by the Plaintiff, violates their constitutional right to property under Article 40 of *the Constitution*.
23. To buttress their averments, the Defendants relied on very many decisions including: Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] eKLR; Kihanya & 4 Others v Gichuri & Another (Civil Appeal 15 of 2019) [2024] KECA 852 (KLR) (12 July 2024); John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR; Ngotho & another (Suing on their Behalf, and on Behalf of 41 Others, All Residents of Joseph Kang'ethe Estate Nairobi) v The Nairobi City County Government & 2 Others (Environment & Land Petition E093 of 2024); Mutai v Serem & 3 Others (Environment and Land Appeal E002 of 2023) [2024] KEELC 4149 (KLR) (16 May 2024) (Judgment), Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority [2016] KECA 411 (KLR) and Mumira v Attorney General (Constitutional Petition E007 of 2020) [2022] KEHC 271 (KLR) (8 April 2022) (Ruling).

Analysis and Determination

24. Upon consideration of the two applications including the respective affidavits, Grounds of Opposition and rivalling submissions, the following are the issues for determination: Whether this suit is res judicata in light of ELC No. 1531 of 2007 and whether the Plaint should be struck out. Whether the Plaintiff has established the threshold for grant of a temporary injunction or if the ex parte orders granted on 29th October 2024 should be discharged. Whether the Defendants are entitled to eviction orders against the Plaintiff and others.

As to whether this suit is res judicata in light of ELC No. 1531 of 2007 and whether the Plaint should be struck out.

25. The Defendants contend that this suit is res judicata in light of ELC No. 1531 of 2007 where the counterclaim abated. They contend that the instant suit is brought under the guise of a new cause of



action but it is a thinly veiled attempt to resurrect the exact claim previously lodged and abandoned in ELC No. 1531 of 2007, thus it should be dismissed.

26. On her part, the Plaintiff denies knowledge of ELC No. 1531 of 2007. She insists that the said suit was not fully determined but abated and was between different parties, hence it is not res judicata.

27. On whether the suit should be struck out, the Court of Appeal stated as follows in *D.T. Dobie & Company (Kenya) Limited v Joseph*

Mbaria Muchina & Another [1980] KECA 3 (KLR);

“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.”

28. On the doctrine of res judicata, Section 7 of the *Civil Procedure Act*, stipulates 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 can 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.”

29. In the Supreme Court of Kenya 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), it was held that:

“Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

30. In relying on the legal provisions, I have cited above as well as associating myself with the decisions quoted while applying them to the circumstances at hand, I find that since the Counterclaim in ELC No. 1531 of 2007 abated due to the failure to substitute Muna Musa Kasanga, the said suit was hence not heard and determined on merit. Further, insofar as the subject matter in both suits were similar, I note both the parties in this suit represent respective deceased estate and in my opinion there seems to be a history over the suit land, which now involves third parties that purchased land from the Plaintiff's deceased husband and are now in possession; I hence find that this case should be set down and heard on merit. In the circumstances, I decline to strike out the plaint on the ground that it is res judicata.

As to Whether the Plaintiff has established the threshold for grant of a temporary injunction or if the ex parte orders granted on 29th October 2024 should be discharged



31. The Plaintiff has sought for Orders of interlocutory injunction to restrain the Defendants from interfering with the suit land or from evicting her therefrom pending the outcome of the suit. I note the trial Judge on the 29th October, 2024 granted orders of status quo which the Defendants are seeking to discharge as they oppose the grant of orders of injunction. They have also sought to evict the Plaintiff from the suit land. In line with the principles established in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 as well as the definition of a prima facie case as espoused in the case of *Mrao Limited v First American Bank Limited*, I will first proceed to decipher whether the Plaintiff has established a prima facie case to warrant the orders sought before I determine if the aforementioned ex parte orders should be discharged and the Plaintiff evicted from the said suit land.
32. It is not in dispute that the Plaintiff is on the suit land and has been thereon for over four decades. It has further emerged that the Defendants as representatives of the estate of Jason Ouko who allegedly sold the suit land to the Plaintiff's husband have now acquired a Certificate of Lease to the suit land. The Plaintiff claims to have developed the suit land. The Defendants contend that the Plaintiff has also sold portions of the suit land to third parties hence they seek to evict them. The Defendants dispute that the suit land was sold to the Plaintiff's husband and claim that the late Jason Ouko only gave him a portion as a friend, to put up temporary structures but he later on fenced a large portion of five acres. There is also the presence of the two aforementioned sale agreements dating back to 1969 and in one the late Jason Ouko was even a witness. What is worth noting is that the late Jason Ouko never evicted the Plaintiff's husband from the suit land, during his life time. In my view, all these issues have to be interrogated through viva voce evidence. From this analysis, I find that indeed the Plaintiff has established a prima facie case and will suffer irreparable harm if the injunction orders are not issued pending outcome of the suit.
33. At this juncture, I opine that eviction orders sought by the Defendants' would be final and there will no need for this suit. In the foregoing, I find that the Plaintiff is entitled to orders of interlocutory injunction pending outcome of this suit. I will hence decline to discharge the orders granted on the 29th October, 2024 and to issue eviction orders as against the Plaintiff.
34. In the circumstances, I find the Plaintiff's Notice of Motion application dated 28th October 2024 merited and will allow it. I find the Defendants' Notice of Motion application dated 3rd March 2025 unmerited and will disallow it.
35. Costs will be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Otieno for Defendant

Matiba for Plaintiff

Wangare for Irungu for Intended Plaintiff

Court Assistant: Joan

