



**Onyango & another v Martin & another; Ogollah & 2 others
(Interested Parties) (Environmental and Land Originating Summons
E007 of 2025) [2025] KEELC 6858 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2025
AE DENA, J
OCTOBER 9, 2025**

BETWEEN

DORCAS ATIENO ONYANGO 1ST PLAINTIFF

FRANCIS OTIENO ONYANGO 2ND PLAINTIFF

AND

BERSIL MARTIN 1ST DEFENDANT

LEAH MASINYA OLOO 2ND DEFENDANT

AND

JAMES WIREH OGOLLAH INTERESTED PARTY

ELISHA OMONDI ONYUOK INTERESTED PARTY

LAND REGISTRAR BONDO INTERESTED PARTY

RULING

1. This suit was commenced by way of Originating summons. Together with the Summons was a Notice of Motion application dated 14th March 2025 seeking orders of injunction restraining the defendants from evicting the applicant from the land parcel No. Bondo/Usenge/1943 pending the hearing and determination of the application.
2. A preliminary objection dated 9th June 2025 was filed in response to the suit and the application by the 2nd Interested Party. It is contended that the suit is time barred by dint of section 7 of the *Limitation of Actions Act* Cap 22 of the laws of Kenya. That it is also resjudicata.
3. The applicants responded by replying affidavit sworn Dorcas Atieno Onyango on 17/07/2025. It is deponed that the suit is within the statutory guidelines of section 7 of the *Limitation of Actions Act*.



As regard res judicata it is stated that the former suit was struck out for want of jurisdiction as such it cannot be termed to be res judicata having not been litigated upon on merit.

4. The ruling herein is therefore a subject of the application and the preliminary objection.
5. The application is also opposed by the defendants vide a replying affidavit sworn on 21/3/2025.

Submissions

6. The application and the preliminary objection were canvassed concurrently by way of written submissions. The plaintiffs' submissions are dated 10/07/2025. I must however note the same have not addressed the preliminary objection.
7. The 1st and 2nd Interested Parties submissions are both dated 19/06/2025.

Preliminary Objection

8. Since by its nature a preliminary objection is capable of disposing an entire suit the court will start with a determination on the same.
9. It is submitted that the grounds for the application clearly state that the land was given to the applicants by the respondent's father when they were displaced by floods in 1963. That this is way beyond the period of 12 years for the recovery of land stipulated in section 7 of the Limitations of Action Act.
10. Section 7 reads as follows

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person”.

11. The applicant's suit is based on the principle of adverse possession. The provisions of section 7 must therefore be read together with the provisions of sections 13, and 38 of the *Limitation of Actions Act* which provide as follows; -

Section 13

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

Section 38 ;-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

12. In *Ongwen & another v Keya & another* (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR) the court stated

29. This right to be adverse to land does not automatically accrue unless the person in whom this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession.



13 Arising from the foregoing it is clear that under the provisions of section 38 the suit is properly before court. The court therefore respectfully agrees with the applicant's deposition that the application is within the statutory guidelines.

14 Consequently, the objection raised on the basis of limitation lacks merit and must fail on this limb.

15 The court has also been invited to make a finding that the suit is res judicata.

16 Section 7 of the Civil Procedure Act. Section 7 is on res judicata and 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.”

17 The Black's law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

18 The 2nd interested party vide his replying affidavit to the application dated 14/3/2025 depones at paragraph 9 that the applicants commenced Bondo MCELC No. E61 of 2024 against him which was dismissed. A copy of the ruling is annexed.

19 I have perused the ruling delivered by Hon Douglas Ogoti. The suit commenced by way of Originating Summons was dismissed for want of jurisdiction. The court clearly and rightly found that since the claim was for adverse possession the trial court lacked jurisdiction to adjudicate upon it. The trial court held that the proper court was this court.

20 In view of the foregoing the suit was not heard and finally decided on merit. It therefore does not meet the legal threshold enunciated in section 7 of the Civil Procedure Act to be rendered res judicata. It is the finding of this court that the present suit is not res judicata.

Application dated 14/03/2025

21 I have considered the application, the responses in opposition thereto and the submissions filed. The main issue for determination is whether the orders sought should issue.

22 The applicants case is that they have lived on the suit property for over 40 years. That they have established a home and buried their relatives in the land. They have attached photographs in this regard. The defendants contend that they are the ones in occupation and that the applicants are in occupation of a parcel bordering the suit property and not the suit property.

23 It has been submitted on behalf of the applicants that, in line with the guiding principles in the celebrated case of Giella vs Cassman Brown the Plaintiffs have established that they deserve the right to be granted the orders as sought in the application. That they have indeed established a prima facie case, and that they stand to suffer irreparable damage as they have been in occupation of the suit property in excess of 40 years. That the property herein constitutes a huge part not only as the plaintiff's home but further a source of their livelihood and as such the eviction as threatened by the Respondents and the Interested Parties herein will render the Plaintiffs homeless and destitute. That it is only prudent that the court preserves the suit property.



- 24 The 1st interested party deponed that she purchased a portion of the suit property after confirming through official search that the defendants were the registered proprietors. She took vacant possession of the portion and has since developed the same. That therefore the applicants were not in possession of this portion. The 2nd Interested party echoes the same position with regard to her portion.
- 25 Having considered all the foregoing the court notes that by the very nature of the applicants claim which is premised on adverse possession the court is duty bound to preserve the status quo. It is also important to note that at this stage the court cannot delve into the merits of the case and especially on whether or not the applicant is in actual possession of the suit property or an adjacent property. I have noted the Interested Parties also claim to be in possession. The court must therefore be careful to balance the interests of the parties at this interlocutory stage. These are matters that can only be decided upon hearing the parties and considering evidence which may also include a visit to the site.
- 26 With the above in mind, this court opines that status quo orders will suffice in the instant suit pending the hearing and determination of the same. What is status quo?
- 27 The Black's Law Dictionary, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'.
- 28 The purpose of an order of status quo has been articulated in many court cases as highlighted here below; -
- 29 In the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR, the court stated:
- “... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
- 30 In the case of Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR. In Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J [as he then was] quotes various decisions in a bid to distinguish status quo from injunctive orders, stated;
- “When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...” In TSS Spinning & Weaving Company Ltd Vs Nic Bank Limited & another [2020] eKLR, the unpacked the purpose of a status quo order as follows: “In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention. ‘In Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] eKLR, the purpose of a status quo order was explained as follows: “..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.” Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No.



11 of 2012, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

31 Applying the above to the present case the lowest risk is to have the situation as it is on the ground remain as is pending the determination of the present suit.

32 The following orders therefore issue to dispose of the Preliminary Objection raised and the application dated 14/03/2025;-

1. The Preliminary Objection is hereby dismissed on both limbs of limitation and plea of res judicata
2. The status quo on the ground shall be maintained to the extent that there shall be no eviction of the plaintiffs from the suit property Bondo/Usenge/1943 by the defendants or their servants or agents or anyone claiming under them. The parties shall co-exist as they currently are including the Interested parties.
3. Further to (2) above an order of inhibition is hereby issued restricting the relevant land registrar against registration of any disposition in the register of land parcels Bondo/Usenge/1943.
4. The orders in (2) and (3) above shall subsist pending the hearing and determination of the present suit.
5. Costs shall abide the outcome of the main suit.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

09/10/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Owenga for the Applicant

Ms. Amondi for Respondents

James Wire Obolla 1st Interested Party

No appearance for 2nd Interested Party

Court Assistant: Ishmael Orwa

