

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COUER AT SIAYA**  
**ELC CASE NO. E027 OF 2024**

**DOMITILLA ANYANGO OUMA**

**MAURICE OTIENO OUMA**

**JOSEPH OWINO OUMA**

**OUMA OKOTH PETER.**

**.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**FELIX ODUOR OLOO (Legal Rep) (Sued on behalf of the  
estate of MICHAEL OLOO OGUTU-  
DECEASED.....DEFENDANT/APPLICANT**

**RULING**

1. This ruling is the subject of the Notice of Motion application dated 11/04/2025. The applicant is the defendant and seeks that the suit herein be struck out for being res judicata and abuse of the court process and the law and for costs of the application.
2. The application is premised on the following grounds; -
  - 1) THAT a similar matter between the same parties over the same subject matter to wit LR NO. EAST UGENYA/KATHIENO 'B'/237 was heard interpartes and determined in favour of the applicant vide SIAYA ELC CASE NO. 15 OF 2021.

- 2) THAT the respondents then filed appeal at the Court of Appeal designated as KISUMU COURT OF APPEAL, KISUMU CIVIL APPLICATION NO. E049 OF 2024.
  - 3) THAT the respondents did not disclose to court the existence of the earlier suit nor the appeal at the Court of Appeal.
  - 4) THAT the suit herein is res judicata, an abuse of the court process and the law and ought to be dismissed with costs.
3. The application is supported by the affidavit of Felix Oduor Oloo sworn on 11/04/2025. I note that the same rehashed the grounds listed above and I will not repeat them. The applicant has also annexed copies of the decree in **SIAYA ELC CASE NO. 15 OF 2021** and certificate of urgency, Notice of Motion and hearing notice from the Deputy Registrar Court of Appeal Kisumu in **KISUMU COURT OF APPEAL, KISUMU CIVIL APPLICATION NO. E049 OF 2024.**
  4. The application is opposed by the replying affidavit of the applicant sworn on 19/05/2025 with the authority of the co applicants and filed on 20/5/2025. It is deponed that the allegations in the entire application are misleading. That Siaya ELC 15 of 2021 main claim was based on adverse possession and purchasers interest on parcel North Ugenya/Kathieno B/237. That the current suit is on Eviction among others from parcel East

Ugenya/Kathieno/237. That therefore the subject matter is different as confirmed by the attached document.

5. In rejoinder for non disclosure of the Siaya Case it is submitted it was absolutely unnecessary to disclose it as the said case is incompetent and totally irrelevant to the instant suit. Further that even if the subject matter was the same, the existence of an appeal or appeal pending renders the doctrine of res judicata inapplicable.

### **SUBMISSIONS**

6. The application was canvassed by way of written submissions. The defendants/applicants submissions are dated 14/5/2025. The respondents/plaintiff submissions are dated 19/5/2025.

### **DETERMINATION**

7. The court has considered the application, response in rebuttal and submissions filed by counsel and the main issue for determination is whether the present suit is resjudicata.
8. The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides 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 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”**

9. The **Black’s law Dictionary 10<sup>th</sup> 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...”**

10. I will proceed to review the application against the foregoing criteria.

11. According to the defendant the former suit is Siaya ELC No. 15 of 2021. It is stated that the issues in the present suit were litigated upon therein on the same subject matter and between the same parties. A copy of Decree dated 4/4/2024; Notice of Motion dated 18/4/2024 filed in the Court of Appeal at Kisumu Civil Application and attendant supporting affidavit and Certificate of Urgency are annexed.

12. My perusal of the above documents clearly reveals the subject of the proceedings in Siaya ELC No. 15 of 2021 is parcel North Ugenya/Kathieno ‘B’ 237. In the present suit the Plaint dated 9/12/2024 gives the subject as East Ugenya/Kathieno ‘B’ 237. The question that begs an answer is whether these two parcels refer to the same

parcel. Prima facie it would seem the answer would be no because they are distinguished by East and North.

13. However, a close scrutiny of the plaintiffs list of documents dated 9/12/2024 in the present suit, the copy of title deed is for East Ugenya/Kathieno 'B' /237 which is the same title in issue in the former suit. The Notice to Vacate dated 22<sup>nd</sup> July 2024 addressed to Felix Oduor Oloo refers to parcel East Ugenya/Kathieno 'B' /237; The survey /report dated November 2024 also pertains parcel East Ugenya/Kathieno 'B' /237;
14. Based on the above therefore this court makes a finding that the subject matter is the same.
15. With regard to the parties, the plaintiff in the former suit is Felix Oduor suing as the Legal Representative to the Estate of his father Michael Oduor. The Defendants are Domtilla Anyango Ouma, Maurice Otieno Ouma, Joseph Owino Ouma and Ouma Okoth Peter. The defendants are named as the plaintiffs in the present suit while the plaintiff in the former suit have been sued as the defendant in the present suit.
16. It is also the finding of this court that the parties in the former suit and the present suit are the same.
17. It has been urged by the plaintiffs in the present suit that the issues are different. The former suit having been substantively on adverse possession and the present one on eviction. A look at the decree and the plaint does not

portray this at all. The bottom line is ownership and occupation of the same property. A determination was made by a competent court which is this court clothed with jurisdiction to determine claims of adverse possession. The plaintiffs in the present suit had an opportunity to answer to the allegations of adverse possession which they did and participated in the proceedings as seen in the grounds of the Notice of Motion to the Court of Appeal. A determination was therefore made for a portion to be excised in favor of Felis Oduor.

18. But the pertinent issue that arises is whether the decision above having been appealed against by the Defendants in the former suit and who are the plaintiffs in the present suit meet the criteria for finality? An appeal is a suit for purposes of section 2 of the Civil Procedure Act. The appellate court could affirm or overturn the said decision. This therefore casts a doubt on the question of finality as long as there is an appeal pending before court on ownership. The matter then becomes subjudice at the Court of appeal. It is not yet finally decided.
19. In view of the foregoing I would hesitate to make a finding that the present suit is resjudicata.
20. But having made the above finding what orders therefore commend in the circumstances of the case. It is my humble view that it would only be proper that the proceedings in the present suit are stayed pending determination of the appeal.

21. The following orders therefore issue to dispose of the application dated 11/04/2025

- 1) The application lacks merit and it is dismissed as the suit is not resjudicata.
- 2) The present proceedings shall be stayed pending the outcome of the Appeal in the Court of Appeal at Kisumu
- 3) To keep track on the appeal filed at the Court of Appeal at Kisumu this matter shall be fixed for Mention after 45 days to confirm the progress of the appeal and further directions.
- 4) Meanwhile any party will be at liberty to apply
- 5) Costs of this application to abide the outcome of this suit.

Orders accordingly

**Delivered and Dated at Siaya This 27<sup>th</sup> Day of November 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**27/11/2025**

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

Mr. Momanyi for the Plaintiff

Mr. Ashioya for Respondent

Court Assistant: Ishmael Orwa

ORIGINAL