

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND CASE NO. E002 OF 2025

MARGARET ADHIAMBO OURU PLAINTIFF

VERSUS

JILLYANUS AKUN 1ST DEFENDANT

DALMAS OGUMBO ADERO 2ND DEFENDANT

JOHN OLUOCH ATINGA 3RD DEFENDANT/APPLICANT

LAND ADJUDICATION OFFICER KISUMU 4TH DEFENDANT

LAND REGISTRAR KISUMU COUNTY 5TH DEFENDANT

HON ATTORNEY GENERAL 6TH DEFENDANT

R U L I N G

This ruling is in respect of the Notice of Motion dated 28th April, 2025 filed on behalf of the 3rd Defendant seeking for orders that;

- 1) the honourable court be pleased to issue an order striking out the Plaintiff's suit filed vide the plaint dated 13th January, 2025 for being res judicata as the matters that are directly and substantially in issue have been conclusively determined in KISUMU ELC CASE NO.26 OF 2019 and KISUMU HCCC NO.7 OF 2004.

- 2) the honourable court be pleased to issue an order striking out the Plaintiff's suit filed vide the plaint dated 13th January, 2025 for being an abuse of the court process.
- 3) Upon prayers 1 and 2 being granted, this honourable court be pleased to issue an order restraining the Plaintiff by herself her servant and/or agents from interfering with the 3rd Defendant's quiet enjoyment of his rights and interest in the property known as Kisumu/Wathorego/1852.
- 4) Costs of and incidental to the application for.

The grounds upon which the application was brought are that;

- (a) This Honourable court lacks the requisite jurisdiction to hear the present suit as the same is vexatious, an abuse of the court process and res judicata.
- (b) The 3rd Defendant herein is the registered and lawful proprietor of the all that property known as Kisumu/Wathorego/1852.
- (c) That the matters raised in the present suit vide the Plaint dated 13th January, 2025 are materially and substantially similar to the issues in KISUMU ELC CASE NO.26 OF 2019 in which the 3rd Defendant herein was the Plaintiff.

(d) In the said matter, the 3rd Defendant herein (then the Plaintiff) vide a PLAINT dated 19th August, 2019 sought for orders inter alia;

a) A declaration that the transfer to the 1st Defendant of all land parcel of land known as Kisumu/Wathorego/1852 (hereinafter referred to as “the suit property”) and all subsequent transactions involving the property are unlawful and thus null and void.

b) A declaration that the Plaintiff is the rightful and legal owner of the suit property now fraudulently and illegally subdivided into eight parcels namely KISUMU/WATHOREGO/5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 (hereafter together referred only as “the subdivision” and individually as “Plot Nos.5007, 5008, 5009, 5010, 5011,5012, 5013 and 5014).

c) An order compelling the 8th Defendant to revoke all the said titles issued in respect of the subdivision.

d) An order compelling the 8th Defendant to restore the ownership of the suit property to the Plaintiff.

e) The costs of the suit.

(e) That the said matter was conclusively determined by the Environment and Land Court in a judgement

delivered on 14th March, 2024 in which the 3rd Defendant herein was declared the lawful and registered owner of the suit property.

(f) The Honourable court determined that Jillyanus Akun (the 1st Defendant) herein was the first registered owner of the suit property having been registered as such on 29th November, 1994 and that the 3rd Defendant herein lawfully purchased the same from him in 2006.

(g) Further in the said judgement, the Honourable Court directed the Land Registrar Kisumu County to forthwith restore the ownership of the suit property to the 3rd Defendant herein.

(h) That subsequent to the judgement, the 2nd Defendant (then the 1st Defendant) filed an application to set aside the Judgement, but the same was dismissed for want of prosecution on 19th July, 2024.

(i) That further the 2nd Defendant herein (the then 1st Defendant is KISUMU ELC CASE NO.26 OF 2019) filed an application dated 25th July, 2025 seeking to review the said judgement and adduce new evidence, which

application was, however, withdrawn thus bringing the matter to closure.

- (j) That further, the documents relied upon by the Defendant are the very same supporting documents that were sought to be sneaked through the application dated 25th July, 2025 filed by the firm of AYOO-SEE & ASSOCIATES IN KISUMU ELC CASE NO.26 OF 2019.
- (k) That as further enforcement of the decision of the ELC Court in Case No.26 of 2019 above the 3rd Defendant/Applicant vide an application dated 19th November, 2024 sought and obtained eviction orders against the trespassers.
- (l) That in light of the above, the plaint herein dated 13th January, 2025 runs a foul the provisions of section 7 of the Civil Procedure Act and Order.
- (m) That in any case, while the present suit has been instituted by one MARGARET ADHIAMBO OURU, the same is contrary to section 7 of the Limitation of Actions Act as more than thirty (30) years have

elapsed since the alleged fraudulent transfer of the suit property took place in 1994.

- (n) That moreover, the transfer of the suit parcel to the 1st Defendant herein had been challenged by THOMAS ADERO who was until his death the Plaintiff's Husband in KISUMU HCCC NO.7 OF 2004.
- (o) Upon the death of THOMAS ADERO who was the 1st Plaintiff in KISUMU HCCC NO.7 OF 2004, the suit abated and was eventually withdrawn on the 18th day of August, 2005 before Honourable Justice B.K. Tanui and a decree issued on 6h April, 2006 which confirmed that the suit had been determined and caution removed.
- (p) To date, the same never been appealed against.
- (q) The present suit is an abuse of the court process and an attempt by the Plaintiff to frustrate the 3rd Defendant's constitutionally sanctioned right to property.
- (r) That by exercising its jurisdiction over this suit, this Honourable court would essentially be irregularly

reviewing the judgement of the Honourable Justice Okong'o which judgement was never appealed against.

(s) That this application raises various preliminary issues and should be heard and canvassed on priority basis.

(t) That it is in the interest of justice that this application be allowed as prayed.

The application was supported by the averments in the Supporting Affidavit sworn by the 3rd Defendant/Applicant and the annexures thereto.

In reply to the application, the Plaintiff filed a Replying Affidavit sworn on 12th May, 2025. The Plaintiff deposed that the application does not satisfy the requisite elements for the doctrine of res judicata to be upheld. That she has brought the suit in her capacity as the legal representative of the estate of her deceased husband Thomas Ouro Adero who was the first registered owner during adjudication and demarcation of the suit land.

That the parties in the present case are different from the former suit and the pleadings and prayers in the two suits are distinguishable thus not res judicata. That registration of the suit

land in the name of JillyAnus Akun as the owner on 29th November, 1994 is the bone of contention in the present suit.

That case No. KISUMU HCCC NO.7 OF 2004 was not heard conclusively as the suit was withdrawn and parties not heard on merit.

The Plaintiff deposed further that section 7 of the Limitation of Actions Act is not application in the case as section 26 of the same Act provides for extension of the limitation period.

The 1st Defendant filed a Replying Affidavit dated 26th May, 2025 in response to the application. He stated that he had instituted an adjudication matter over the suit property at the Kisumu Adjudication Department through Land Committee Case no.166/1981. That in the case, the Plaintiff's husband who was the Defendant in the case confirmed that he had sold the land to the 1st Defendant and that the Committee rendered its decision determining that the 1st Defendant was the registered owner of the land.

That the 1st Defendant was sued in KISUMU HCCC NO. 7 OF 2004. That later the 3rd Defendant filed suit No. KISUMU ELC CASE NO.26 OF 2019 where it was determined that he (1st Defendant) had acquired a good title over the suit property.

That every aspect touching on the suit property had been litigated cumulatively before the Land Adjudication Committee, Kisumu High Court Civil Case No.7 of 2004 and KISUMU ELC CASE NO.26 OF 2019 over the same issues.

That the suit offends the provision of section 7 of the Limitation of Actions Act and ought to be struck out because the suit was registered in the name of the 1st Defendant in 1994 and the Decree in KISUMU HCCC NO.7 OF 2004 was issued in the year 2006.

That the suit is fatally defective, vexatious and an outright abuse of the court process through endless litigation.

The doctrine of res judicata is anchored on section 7 of the Civil Procedure Act which provides;

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

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

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

Explanation. (4) - 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.

Explanation. (5) - Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to claim under the person so litigating.

Explanation. (6) - Where person litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all person interested in such right

shall, for the purposes of this section be deemed to claim under the person so litigation.

The 3rd Defendant's case is that all the matters raised in the present suit filed through a plaint dated 13th January, 2025 are similar both substantially and materially with the matter in KISUMU ELC CASE NO.26 OF 2019 in which the 3rd Defendant herein was the Plaintiff and hence res judicata.

Attached to the Supporting Affidavit is a plaint and judgement in KISUMU ELC NO.26 OF 2019.

The parties in the suit were the 3rd Defendant as the Plaintiff and the Defendants were Dalmas Adero Gumbo and others who are not parties herein. The Land Registrar was the 8th Defendant.

The 1st Defendant was a witness (PW2) in the former suit. From the judgement in the former suit attached to the application, the issues that arose for determination included ownership of the suit land. The court considered whether the 1st Defendant in that suit, Dalmas Ogumbo Odero, who is the 2nd Defendant herein acquired the suit land lawfully.

The trial court considered the issues raised and noted;

“the plaintiff acquired the suit properly from PW2 who was the 1st registered owner of the suit property having been registered on 29th November, 1994.”

The plaintiff proved its registration and ownership of the property and that he lawfully acquired the property from PW2 (the 1st Defendant herein). Hence the issue of ownership of the suit property was decided in the former suit. The title of the 3rd Defendant herein who was the Plaintiff in the former suit was tested and confirmed by the court as lawful. There is no evidence that the decision has been overturned

The other issue in the former suit was whether the holders of the resultant parcels after sub-division of the suit land had valid titles.

The court determined the issue and found that the sub-division of the suit property to create the resultant parcels was unlawful that the titles held in respect of the resultant parcels were tainted with illegality hence null and void. The court ultimately found that the Plaintiff (3rd Defendant herein) was entitled to the land.

The same issues are raised by the Plaintiff herein against the 3rd Defendant. A court of competent jurisdiction already found that the suit land belonged to Jillyanus Akun, the 1st Defendant herein on a

first registration and that the transfer by the 1st Defendant herein to the 3rd Defendant was lawful.

I find that to hear the suit herein against the 1st and 3rd Defendants will be to relitigate matters already determined by court of equal status. The Plaintiff has recourse either to appeal or review upon joinder in the former suit.

The other limb of the objection is that the suit is statute barred.

The Plaintiff's suit is based on the tort of fraud. Under the provisions of section 4 (2) of the Limitation of Actions Act, claims/actions founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued.

Although the cause of action for the Plaintiff clearly arose in 1994 when the suit land was registered in the name of the 1st Defendant, it was not until January, 2025 that the present case was filed. The Plaintiff pleaded in paragraph 10 of the plaint that it was in the year 2019 that she noticed the fraud. And even then, she did not file the suit till 2025 which was about 6 years later. For claim based on tort, it was time barred. Under section 7 of the Limitation of Actions Act, being claim to recover land, the limitation period is 12 years from the date the course of action occurred which is yet to elapse.

I find that the suit herein is res judicata and hereby allow the application. The suit is struck out. Each party to bear own costs of the suit.

Orders accordingly.

**Ruling read and signed at Kisumu and delivered virtually
this 20th day of November, 2025**

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Nyagol for the Plaintiff

Ogony for the 3rd Defendant/applicant.

No appearance for the 1st and 2nd Defendants