

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. E026 OF 2024**

**EMMANUEL OKONDA OKAKA .....PLAINTIFF**

**-VERSUS-**

**CALISTO ODEMBA OJANGO.....1<sup>ST</sup>**  
**DEFENDANT**

**JOHN ASUTSI ODEMBA .....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

**Introduction**

1.This ruling is in regard to the preliminary objection dated 12/5/2025 and applications dated 12/05/2025, 25/09/2025 and 26/09/2025. The preliminary objection dated 12/05/2025 was filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking orders that this suit be struck out for being *res judicata* in view of decisions made in Kakamega High Court Criminal Appeal No. 14 of 2018 and Kakamega

ELC Case No. 66 of 2019. The application dated 12/05/2025 was filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and sought the striking out and or dismissal of this suit for being *res judicata* in view of decisions made in Kakamega Criminal appeal No. 14 of 2018 and Kakamega ELC Case No. 66 of 2019. The application dated 25/09/2029 was filed by the plaintiff and it sought orders of temporary injunction to restrain the defendant from evicting the plaintiff from parcel No. Kisa/Wambulishe/2032 and 2033 pending determination of this suit. Lastly, the application dated 26/09/2025 was filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking temporary injunction against the plaintiff from burying the remains of his deceased brother on the suit property or interfere therewith pending hearing and determination of this suit.

2.As a preliminary objection and subsequently an application that this suit is *res judicata* may dispose of the suit in its entirety, I will first determine the preliminary objection, then the application dated

12/05/2025 before dealing with the two applications seeking temporary injunctions.

**Preliminary objection dated 12/ 05/2025**

3. In the preliminary objection dated 12/05/2025, the 1<sup>st</sup> and 2<sup>nd</sup> defendants argued that this suit is *res judicata* as the claim herein had been determined by courts of competent jurisdiction in Kakamega High Court Criminal Appeal Case No. 14 of 2018 and Kakamega ELC Case No. 66 of 2019. Further that this suit is an abuse of the court process, frivolous, vexatious and does not disclose a reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

4. A preliminary objection is a pure point of law raised on the basis that the facts relied upon are not in dispute. It must be specific on the law and not be vague.

5. A preliminary objection was described in the case of **Mukisa Biscuits Limited vs West End Distributors [1969] E.A 696** as follows;

**“So far as I am aware, a preliminary objection consists of a point of law which has been**

**pleaded, or which arises by clear implication out of the 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, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

6. Similarly, in the case of **Hassan Ali Joho, & Another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] e KLR** the Supreme court of Kenya held as follows;

**“A preliminary objection consists of 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.”**

7. The preliminary objection raised in this matter is that this suit is *res judicata* and contrary to section 7 of the Civil Procedure Act.

8. Section 7 of the Civil Procedure Act bars a court from trying a suit or issue between the same parties which has with finality and on merit been determined by a

competent court. To prove *res judicata*, an applicant must present evidence of pleadings of a former suit between the same parties or their privies and a decision by a competent court on merits on the said pleadings. It is obvious therefore that such proof would require evidence. A matter that requires proof by evidence is not a pure point of law capable of being raised through a preliminary objection. A defence based on *res judicata* ought to be raised through a notice of motion so that the required evidence is attached to the supporting affidavit to allow the opposing party an opportunity to present any evidence in rebuttal if they so wish. That being the case, as the preliminary objection herein requires evidence to prove the grounds raised, I find and hold that the preliminary objection dated 12<sup>th</sup> May 2025 is not a proper preliminary objection which I hereby strike out.

**Application dated 12/05/2025**

9. In the motion dated 12<sup>th</sup> May 2025, the 2<sup>nd</sup> defendant sought the dismissal of the suit herein for being *res judicata*, vexatious, and an abuse of the court process.

The applicant argued that the issues raised herein were conclusively adjudicated upon in Kakamega High Court Criminal Appeal No. 14 of 2018 and Kakamega ELC Case No. 66 of 2019. That the plaintiff's father filed Kakamega High Court Civil Case No. 93 of 2008 claiming ownership of the suit property based on adverse possession and trust. That the plaintiff's father died in 2012 before prosecuting the matter and was substituted in that suit by the plaintiff's brother one Dickson Athanas Akaka. That the latter also made a criminal complaint against the 2<sup>nd</sup> defendant resulting in his prosecution and subsequent conviction in Butere Chief Magistrates Court Criminal Case No. 32 of 2015, but that the conviction was quashed on appeal vide Kakamega High court Criminal Appeal 14 of 2018.

10. That High Court Case No. 93 of 2008 wherein the plaintiff's father sought the suit property on the basis of adverse possession and trust, was transferred from the High court to the ELC, being Kakamega ELC Case No. 66 of 2019 which suit was dismissed by this court. That it is an abuse of the court process for the plaintiff, who

is a sibling of the plaintiff in the former suit, to file the current suit as it amounts to relitigating the same issues. That Dickson Okaka also filed Kakamega ELC Case No. 490 of 2014 and has placed a caution on the title of the suit property. That this suit is vexatious. He attached the Originating Summons in Kakamega HCC No. 93 of 2008; affidavit regarding the demise of the plaintiff's father; Amended Originating Summons; Charge sheet against the 1<sup>st</sup> defendant; Judgment in Kakamega HCC Criminal Appeal 14 of 2018; Judgment in Kakamega ELC Case No. 66 of 2019 and official search certificate.

11. The application was opposed. Emmanuel Okonda Akaka, the plaintiff filed a replying affidavit dated 13<sup>th</sup> June 2015 opposing the application. He stated that the issue that was substantively determined in Kakamega ELC Case No. 66 of 2019 was that of adverse possession and that in this suit, the issue is whether or not the suit property is ancestral land, which is a separate and distinct cause of action. That the criminal case did not determine the parties' rights. The plaintiff also filed

grounds of opposition dated 21<sup>st</sup> July 2025. He stated that the suit herein is based on trust which is distinct from adverse possession which was the issue in the previous suit.

12. That the claimant in the previous suit was the father of the plaintiff, that the doctrine of adverse possession is inapplicable to the facts of this case, that the findings of the criminal case are not conclusive on the issue herein and that the plaintiff herein deserves to be granted opportunity to be heard.

13. Parties were directed to file submissions in support of their positions. On record are submissions filed by the plaintiff dated 11<sup>th</sup> October 2025, which the court has duly considered.

### **Analysis and determination**

14. The court has carefully considered the motion together with the replying affidavit, grounds of opposition as well as written submissions. The only issue that arise for the court's determination is whether this suit is *res judicata* in view of decisions made in Kakamega HCC Criminal

Appeal 14 of 2018 and Kakamega ELC Case No. 66 of 2019

15. The doctrine of *res judicata* is predicated on Section 7 of the Civil Procedure Act, which provides as follows;

**“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 it.**

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

**Explanation. (3)—The matter above referred to 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 have been refused.**

**Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

16. Therefore, the doctrine of *res judicata* bars a court from trying a suit or an issue that was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has already determined such suit or issue with finality on merit.

17. In view of provisions of section 7 of the Civil Procedure Act, the elements of *res judicata* are as follows;

- a) **The suit or issue in the current suit was directly and substantially in issue in the former suit.**
- b) **That the former suit was between the same parties or parties under whom they or any of them claim and or their privies.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined on merit in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the issue in which the issue is raised.**

18. In the case of **The Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR** the Court of Appeal aptly captured the purpose of the doctrine of *res judicata* as follows;

**“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed**

**as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* this rest in the public interest for swift, sure and certain justice.”**

19. A bar of *res judicata* is effective against a party who ought to have raised an issue but failed to do so in the former suit, barring such party from filing a fresh suit on an issue which he or she failed to raise in the former suit by mistake or negligence or otherwise. Besides, *res judicata* applies to a person, who was aware that a suit or issue affecting him was being litigated, but sat by with indifference and did not participate in such suit. In the 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**, the Supreme Court of Kenya cited with

approval the case of **Hinderson v. Henderson [1843]**

**3 Hare 100 at page 115**, where it was held as follows;

**“Where a given matter becomes the subject of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....”**

20. In the instant suit, the 1<sup>st</sup> and 2<sup>nd</sup> defendants alleged that the issues herein were determined in Kakamega HCC Criminal Appeal 14 of 2018 and Kakamega ELC Case No. 66 of 2019. Concerning Kakamega HCC Criminal Appeal 14 of 2018, the same concerned

charges of procuring execution of documents by false pretenses. The same were taken through a criminal justice system. The issue was not ownership of the suit property and the parties included the State and the defendants herein. The judgment attached did not determine whether or not the suit property was held in trust for the plaintiff herein. In any event, a determination of a criminal matter touching on the same subject matter cannot render a civil suit over the same subject matter *res judicata* as the jurisdiction invoked in the two instances are different being criminal and civil jurisdiction. And therefore, the issue of *res judicata* does not arise in respect of Kakamega NC Criminal Appeal No. 14 of 2018.

21.Regarding the judgment in Kakamega ELC Case No. 66 of 2019, the plaintiff herein concedes that there was a claim by his family over the suit property in that matter. I have considered the Amended Originating Summons in Kakamega HC No. 93 of 2008. In that suit, the plaintiff's father laid a claim on the suit property based on adverse possession and trust. The issue that the suit property

was family land was raised by the plaintiff's father. In the current suit, the plaintiff sought orders that the suit property was subject to customary trust based on allegations that it is family/ancestral land and that the property be transferred to him.

22. It is clear that the question of trust was raised in the former suit and therefore was substantially and directly in issue in the former suit. If the parties were not satisfied with the decision in the former suit on the question of trust, remedy did not lie in filing a fresh suit on that question. The former suit was determined by a court of competent jurisdiction being the ELC which is a competent court to determine questions of adverse possession and trust.

23. On whether the parties are the same, the former suit was filed by the plaintiff's father who upon demise was substituted by the plaintiff's brother. The plaintiff's claim is one and the same as that filed by his father because if he had a different claim he would not have stood by and let his father fight his battle. In the

premises, I find and hold that the parties in the former suit are the same as those in the current suit.

24. For the above reasons I find and hold that this suit is *res judicata*.

25. That being the case, and there being no suit upon which applications for temporary injunctions may be anchored, the issues as to whether the plaintiff or defendant deserve orders of temporary injunction as sought in their respective applications dated 25/09/2025 and 26/09/2025 are now moot and this court will not interrogate the same.

26. Ultimately, I find and hold that this suit is *res judicata* and I hereby dismiss the same with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

27. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 19TH DAY OF NOVEMBER 2025**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Amasakha for the plaintiff

Ms. Martin for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

No appearance for the 3<sup>rd</sup> defendant

Court Assistant: Delphine