



REPUBLIC OF KENYA



Kimemia & 2 others v Mungai & 2 others (Environmental and Land Originating Summons E012 of 2023) [2025] KEELC 5752 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2023**

**A KANIARU, J
JULY 30, 2025**

BETWEEN

**JOHN NYAGA KIMEMIA 1ST PLAINTIFF
JOSEPH KITHUMBU 2ND PLAINTIFF
MARY MUTHONI KIMEMIA 3RD PLAINTIFF**

AND

**ESTHER NDUTA MUNGAI 1ST DEFENDANT
SAMUEL GACHAU MUNGAI 2ND DEFENDANT
GRACE SARAH NJERI MUNGAI 3RD DEFENDANT**

RULING

1. This Ruling is on a preliminary objection raised by the defendants via a notice dated 26/8/2024. The objection is based on Section 7 of the [Civil Procedure Act](#) (Cap 21). I now set out the objection ad verbum:

“That the entire suit filed herein is an abuse of court process and is bad in law in that it offends the provisions of Section 7 of the [Civil Procedure Act](#) in that the same is Res Judicata vide the following cases and judgements.

- a. HCCC No. 108 of 1980 (OS) at Nyeri between Njeru Mwaririe –vs- John Mungai Gachau & 3 Others. Decree dated 27th day of November 1990 of Justice P. K. Tunoi and orders of 10th day of November 1992 of Justice P. K. Tunoi.”



2. The plaintiffs' suit herein is based on adverse possession. It relates to land parcels No's. Nthawa/Siakago/1804 and Nthawa/Siakago/1573 which they claim to have occupied and/or possessed adversely for over twelve (12) years.
3. The defendants believe that the plaintiffs' case is based on the wrong premise. According to them adverse possession does not arise as there has been disputes whose existence and outcomes make it not possible to lodge the kind of claim now brought before this court.
4. The objection was canvassed by way of written submissions. In the defendants' submissions, reference is made to an originating summons dated 19/4/1980 which was filed in the High Court, Nyeri, as Case No. 108 of 1980 (OS). The case is said to have been determined. Thereafter a decree was extracted from the decision made. The plaintiff in the Nyeri matter was Njeru Mwaririe who was the plaintiffs' father. The fourth defendant in that matter was said to be the father of 2nd and 3rd defendants in this matter. The subject matter in that case is also the subject matter in this case. The claim was also for adverse possession.
5. The defendants' submitted that Res Judicata applies here. They cited and quoted Section 7 of *Civil Procedure Act* (CAP 21) which forms the statutory basis for enforcement of the doctrine of Res Judicata in Kenya. For good measure, the cases of Kennedy Mokuia Ongiri –vs- John Nyasende Mosioma and Florence Nyamoita Nyasende [2022] eKLR, Njangu –vs- Wambugu & Another HCC No. 2340 of 1991, Nairobi and Siriram Karua –vs- M. J. Morgan: C.A. 71/1960 [1961] EA 462, were all cited and quoted as deemed appropriate.
6. The arguments raised while citing and quoting the above cases are that it is improper to commence more than one action relating to the same or substantially similar subject matter (Kennedy Mokuia's case – supra) and that parties cannot be allowed to go on litigating forever over the same issues with the same opponent before courts of competent jurisdiction and that the court will not allow it to happen even where parties try to disguise the matter by giving it a cosmetic face-lift (Njagu's case – supra). Further that discovery of fresh evidence is clearly not a reason for filing a fresh suit (Siriram's case – supra).
7. The plaintiffs were said to have lost their case in Nyeri. They have now brought this one. The court was asked to dismiss their matter.
8. The plaintiffs on the other hand admitted in their submissions that there were previous cases and there was even an order to evict their father from the land. The order however has never effected and the 12-year period within which it could be executed has also lapsed. Their case before court therefore is one that applies to themselves independently of their father who was involved in the matter at Nyeri. To drive the point home, the plaintiffs cited and quoted Section 4 (4) of the *Limitation of Actions Act* (Cap 22) and Section 28 (h) of the *Land Registration Act*. Section 4 (4) of the *Limitation of Actions Act* forbids execution of judgement twelve (12) years after its issuance or delivery. The decree from the Nyeri matter was said to be dated 10/11/1992 and calculation of time from that point onwards take us to 11/11/2004. The plaintiffs' suit was filed in the year 2023, which is way beyond the twelve (12) year period within which the decree from Nyeri should have been enforced. Section 28 (h) of *Land Registration Act* recognizes adverse possession as an overriding interest. It was ultimately submitted that the plaintiffs' case is not res judicata and the court was urged to dismiss the objection raised.
9. I have had a look at the case as filed. I have also considered the rival submissions. I think the issue before me for determination is whether the merits of the objection have been demonstrated.



10. First, the law: Section 7 of the *Civil Procedure Act* (Cap 21) provides the statutory basis for application of the doctrine of Res Judicata in Kenya. It states as follows:

“(7) No court shall try any suit or issue in which the matter directly or substantially in issue has been directly or 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.”

11. In independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others [2017] eKLR, the court stated the elements for proof of res judicata as follows:

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

12. The purpose of res judicata was succinctly stated in the case of William Koross –vs- Hezekiah Kiptoo Komen & 4 Others [2015] eKLR where the court stated:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and unsuccessful one must learn to let go.”

13. Further, Kuloba Richard in his seminal book: *Judicial Hints on Civil Procedure: Law Africa Publishing (K) Ltd: 2nd Edition*, at page 471 stated the following regarding what should preoccupy the mind of the court while trying to consider whether res judicata is demonstrated:

“The test whether a suit is barred by res judicata is this: Is the plaintiff in the 2nd suit trying to bring before the court, in another way and in form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of res judicata applies not only to the points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

14. Turning now to the matter at hand, the plaintiffs put forth a formidable argument in their submissions. They didn't seem to deny that there was litigation involving their father. They seem to accept that eviction orders had even been issued. Their position is that the order of eviction was issued in 1992. That order however was never enforced. Their father continued occupying the disputed land until 12/2/2010 when he passed away. There is a period of twelve (12) years within which a judgement rendered by a court of law is supposed to be enforced. That period is clearly stated at Section 4 (4) of the *Limitation of Actions Act* (Cap 22). From 1992 when the judgement was rendered, twelve (12)



years ended in the year 2004. The plaintiffs are said to have all along been on the land. From 2004 to the time of filing this suit, twelve (12) years had lapsed. Their argument is that the suit before court is their own cause of action that arose after year 2004. It is separate from, and even independent of, all the previous disputes.

15. This argument or position requires further interrogation by way of trial. The defendants certainly need to respond to it in an exhaustive and conclusive way. Prima facie, the plea of res judicata cannot be said to apply if the situation or position is as put by the plaintiffs.
16. I have no hesitation therefore in making a finding that the merits of the objection have not been demonstrated. My finding is that the objection is for dismissal and I hereby dismiss it with costs to the plaintiffs.

RULING DATED, SIGNED AND DELIVERED IN ONLINE AT KITUI THIS 30TH DAY OF JULY, 2025.

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

