

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 18 OF 2017 (OS)

AUGUSTUS KIURA NGARI
PLAINTIFF

VERSUS

JAMES NGUYU MAKOTHEE
DEFENDANT

RULING

Through the application dated 18/7/2025, the Defendant seeks to have this suit struck out with costs for being *res judicata*. The application was made because Siakago MCELC Case No. 79 of 2017 between the same parties and in respect of Embu/Kithunthiri/1016 (the suit land) was heard and determined. It is contended that that suit determined the question of ownership of the suit land in favour of the Defendant and resulted in a decree that directed the Plaintiff to vacate the suit land within 60 days or he would be forcefully evicted from the land.

The application was supported by the Defendant's affidavit. The Defendant annexed copies of the plaint, judgment and decree in the Siakago suit to his affidavit. He averred that the issues of ownership, occupation and use of the suit land had been conclusively determined in his favour by a competent court and he urged that there should be an end to litigation.

The Plaintiff filed a replying affidavit in in opposition to the application, in which he denied that his suit was *res judicata*. He stated that he was claiming adverse possession of the suit land having been in occupation since 1992. He argued that adverse possession was not the subject of litigation in Siakago MCELC No. 79 of 2017. Further, that the Defendant filed the Siakago case seeking his eviction from the suit land yet his title had already been extinguished since he had occupied the suit land for more than 12 years. The other point made was that the Siakago case was not defended and that the Defendant only served a decree on him on 17/7/2025. He exhibited copies of the letter dated 15/7/2025 notifying him about the decree together with the decree which this court notes was issued on 14/11/2023.

Parties filed and exchanged written submissions on the application, which the court duly considered. The Defendant submitted that the Siakago case was between the same parties as those in this case and was over the same suit land. The suit before the Siakago court was determined and culminated in a decree against which the Plaintiff did not appeal. The Defendant submitted that the Plaintiff did not seek to stay the proceedings in the Siakago Case but he continued as a Defendant in the suit. He urged that the Siakago court, which is a competent court, found that the Plaintiff did not have any proprietary interest over the suit land.

The Defendant cited Section 7 of the Civil Procedure Act on the ingredients of *res judicata*. The Defendant concluded that to bring

up the same issues between the same parties over the same subject matter that has been determined by a court of competent jurisdiction, is an abuse of the court process.

The Plaintiff submitted that his suit is for adverse possession and that the Defendant's title over the suit land had already been extinguished. He also cited Section 7 of the Civil Procedure Act and urged that the issue of adverse possession had not been litigated before. Further, that the Siakago court lacked jurisdiction to adjudicate the claim for adverse possession. The Plaintiff urged that the Defendant did not attach proof that the Siakago case was heard on merit or evidence of his defence and participation in that suit. He argued that his defence was not taken into account in the Siakago suit and that the suit was not heard on merit.

The issue for determination is whether this suit is *res judicata*. The Defendant filed Siakago SPMCC No. 79 of 2017 against the Plaintiff and John Kamau Githinji claiming that they had unlawfully entered his land. He sought an eviction order. The court notes from the judgment of the Learned Magistrate dated 2/11/2023 that the Defendant in that case filed a joint statement of defence on 31/12/2016 in which they denied the Plaintiff's claim. The Siakago court noted that the hearing notice was served on the Defendants.

The Plaintiff could have made the claim of adverse possession as a shield to the Defendant's suit for his eviction before the Siakago court. While it is true that the Siakago court lacks jurisdiction to

determine a claim for adverse possession, such a claim could have been filed before the Environment and Land Court.

The court agrees with the Defendant that this suit is res judicata because the issue of ownership of the suit land was determined by a court of competent jurisdiction between the parties to this suit. It is struck out with costs to the Defendant.

Delivered virtually at Bungoma this 18th day of February 2026.

**K. BOR
JUDGE**

In the presence of: -

Court Assistant- Diana Kemboi

No appearance for the parties