

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO E025 OF 2024

FRED ELUNGAT OTIENG (suing as the Legal Representative of the Estate of **JOSEPH OTIENG ADUSA**
APPLICANT

= VERSUS =

SANTULINO ADUSA
RESPONDENT

R U L I N G

1. **FRED ELUNGAT OTIENG** (the Applicant herein and suing as the Legal Representative of the Estate of **JOSEPH OTIENG ADUSA**) filed this Originating Summons in which he impleaded **SANTULINO ADUSA** (the Respondent) seeking the main remedy that he has acquired a portion of land measuring 1.2 Hectares out of the land parcel **NO SOUTH - TESO/CHAKOL/515** (the suit land) the way of adverse possession and should be registered as the proprietor thereof. The basis of the Applicant's claim are not necessary for purposes of this ruling.

2. What is relevant is that the Respondent filed a Notice of Preliminary Objection dated 17th November 2024 in which he opposed the Originating Summons on the ground that it is an abuse of the process of this Court since the subject matter is also being canvassed in **BUSIA CM P&A CAUSE NO 498 of 2019**.
3. The Respondent also filed a replying affidavit dated 19th February 2025 and raised the following issues:
 - a) **That this suit is res judicata in view of BUSIA P&A CAUSE NO 498 of 2009.**
 - b) **That the Applicant's interests are being catered for in BUSIA CM P& A CAUSE NO 498 of 2019 yet he wants to articulate the P&A matter as a Land case.**
 - c) **That the Grant issued to the Applicant in respect to the Estate of JOSEPH OTIENG ADUSA is irregular and unlawful.**
4. The Respondent's Preliminary Objection forms the gist of this ruling. The Court directed that the Preliminary Objection be canvassed by way of written submissions.

5. The submissions have been filed both by **MR JUMBA** instructed by the firm of **BALONGO & COMPANY ADVOCATES** for the Respondent and by **MR OKEYO** instructed by the firm of **OKEYO OCHIEL & COMPANY ADVOCATES** for the Applicant.
6. The Respondent's Preliminary Objection is hinged on the claim that this suit is res judicata **BUSIA CM'S P&A NO 498** of **2019**. Res judicata is provided for under **Section 7** of the **Civil Procedure Act** which states:

7: "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."

For res judicata to apply, the following must be proved by the party invoking it:

- 1) The matter directly and substantially in issue must have also been directly and substantially in issue in a previous suit.
- 2) The previous suit must have been between the same parties or those under whom they or any of them claim litigating under the same title.
- 3) The previous suit must have been heard and finally decided.
- 4) The Court or Tribunal which determined the previous suit must have been competent.

See **KARIA & ANOTHER -V- ATTORNEY GENERAL 2005 I EA 83** and also **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE C.A. CIVIL APPEAL NO 42 of 2014 [2015 KECA 472 KLR]**.

7. Res judicata is a pure principle of law and is therefore a proper matter to be raised as a Preliminary Objection as defined in the case of **MUKISA BISCUITS**

MANUFACTURING COMPANY LTD -V- WEST END DISTRIBUTORS LTD 1969 E.A. 696. What I must now grapple with is whether or not this suit is res judicata **BUSIA CM'S BUSIA COURT P&A CAUSE NO 498 of 2019.**

8. There is no doubt that the suit land was also the subject in **BUSIA CM'S COURT P&A CAUSE NO 498 of 2019** in which a confirmed grant was issued to the Respondent on 11th June 2024 in respect to the Estate of **JOSEPH OTIENG ADUSA.** The suit land which is the only property of the estate has since been distributed to the beneficiaries who include the Respondent herein. It would appear from the submissions by **MR JUMBA** that notwithstanding the above Grant, the Applicant herein proceeded to file succession proceedings and obtained another Grant while aware about the Grant held by the Respondent in respect to the same Estate thus abusing the Court process. The citation of the other succession cause has not been availed. However, that is neither here nor there. Those are issues to be raised in the succession cause.

9. What is important for purposes of this ruling is that although the suit land was the subject in **BUSIA CM'S COURT P&A CAUSE NO 498** of **2019**, that Court was only dealing with the issue of distribution of the Estate of the deceased **JOSEPH OTIENG ADUSA**. That is the primary duty of Probate Court i.e. to distribute the Estate of a deceased to the rightful beneficiaries. That is why **Rule 41(3)** of the **Probate and Administrative Rules** makes it clear that where a question arises as to the identity, share or Estate of any person claiming to be beneficially interested in or attaching to any Estate, the Court may set aside that share for determination under **Order 37** of the **Civil Procedure Rules** by another Court. The Chief Magistrate's Court Busia which determined the Succession Cause **NO 498** of **2019** was only concerned with the distribution of the Estate of **JOSEPH OTIENG ADUSA**. That was the issue before it. That Court was not handling a claim to the suit land by way of adverse possession and in any case, it was not competent to do so. And even if it had attempted to determine such a claim, any resultant order would have been null and void for

having been made by a Court without jurisdiction. It cannot therefore be alleged, and which is what the Respondent would like to persuade this Court, that the Applicant's claim to the suit land by way of adverse possession is res judicata for having **"been heard and finally decided"** in **BUSIA CM'S COURT P&A CAUSE NO 498** of **2019**. Yet, that is what the principle of res judicata entails. Of course, whether the Applicant's claim to the suit land by way of adverse possession will be proved or not is a matter which will be determined by the trial Court on the evidence to be adduced. However, the Respondent's plea that this suit is res judicata **BUSIA CM'S COURT P&A CAUSE NO 498** of **2019** is clearly without merit. It falls within what the Court said in the case of **MUKISA BISCUIT COMPANY -V- WEST END DISTRIBUTOR LTD** (supra) that:

"The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

I think that sums up the fate of the Respondent's Preliminary Objection.

10. The up-shot of all the above is that having considered the Respondent's Preliminary Objection dated 17th November 2024, I issue the following disposal orders:

- 1) The Preliminary Objection is without merit and is dismissed.**
- 2) The Respondent shall meet the Applicant's costs.**

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

Ruling dated, signed and delivered by way of electronic mail on this 26th day of February 2026 with notice to the parties.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

ORIGINAL