



Too v Teleposta Pension Scheme Registered Trustees (Land Originating Summons E051 of 2025) [2026] KEELC 2346 (KLR) (28 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND ORIGINATING SUMMONS E051 OF 2025**

CA OCHIENG, J

APRIL 28, 2026

BETWEEN

RACHEL JEPTANUI TOO APPLICANT

AND

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES RESPONDENT

RULING

1. What is before the Court for determination is the Respondent's Notice of Motion application dated the 3rd October 2025 in which it seeks the following Orders:
 - a. That the Applicant's Originating Summons dated 1st September 2025 and the Application dated 1st September 2025 and 29th September 2025 be struck out.
 - b. That the costs of this application be awarded to the Respondent.
2. The application is premised on grounds on its face and on the supporting affidavit of Peter K. Rotich, Administrator/Trust Secretary of the Respondent. He avers that the Applicant was a party to ELC Case No. 1321 of 2013 (Mary Lwande & 66 others v Teleposta Pension Scheme) in which she was named as the 59th Plaintiff and wherein she sought reliefs for a claim of ownership of the suit property and/or specific performance. Further, that the said suit was duly heard and determined vide Justice O. A Angote's judgement delivered on 13th October 2022, in which the Applicant herein and her co-Plaintiff's claim as against the Respondent was dismissed.
3. He avers that subsequently the Applicant and her Co-Plaintiffs filed Civil Application No. E420 of 2022 at the Court of Appeal, seeking stay of execution of the said judgement but the same was dismissed vide a Ruling delivered on 17th March 2023. Further, that the Applicant then filed an Application dated 20th March 2024 in ELC No. 1321 of 2013 seeking stay of execution and review of the judgement delivered on 13th October 2022, which application was also dismissed.



4. He contends that the Applicant now purports to have filed a new suit disguised as a claim for adverse possession yet she has all along consistently claimed that she purchased the suit property, and her claim having been determined, the suit is res judicata.
5. In opposition, the Applicant filed a replying affidavit in which she points out that at Paragraphs 35 - 42 of the judgment in ELC Case No. 1321 of 2013, the Court held that the 1st and 2nd Plaintiffs' did not have the requisite locus standi to tender evidence as representatives of the other plaintiffs for want of authority under Order 1 Rule 13 of the Civil Procedure Rules. Further, it found that with the failure of the other Plaintiff's to testify, including herself as the 59th Plaintiff, their case was unprosecuted. She therefore argues that the impugned judgement was not a judgement on merit thus this suit cannot be said to be res judicata.
6. While she admits to having filed an application for review in ELC Case No. 1321 of 2013, she avers that the Court declared it incompetent and dismissed it. She claims that she has been in possession and occupation of the suit property for a period in excess of 12 years in spite of the Respondent's registration, thus her possession and occupation is adverse to the interest and the title held by the Respondent.
7. The application was canvassed by way of written submissions.

Submissions

8. The Respondent reiterates its averments in the affidavit in support of its application and submits that this suit is barred under Section 7 of the *Civil Procedure Act* being that in the former suit, the Applicant and co-plaintiffs sought orders to compel the Respondent to specifically perform obligations under the sale agreement executed between the Respondent and themselves, while in the current suit, the Applicant seeks orders to be declared as the owner of the suit property by way of adverse possession but she is relying on the impugned agreement for sale, which this Court had already inquired into and rendered a judgement against her.
9. It also submits that even if the suit was not res judicata, it is not possible in law to pursue a claim over immovable property on alleged breach of contract and subsequently by way of adverse possession arising from occupation pursuant to a sale agreement.
10. On her part, the Applicant submits that since ELC Case No. 1321 of 2013 failed due to lack of locus standi, her claim was not determined on merit as a suit dismissed for want of prosecution or on procedural grounds cannot constitute res judicata. Further, that the former suit was not an adverse possession claim brought by her individually while the present suit is an Originating Summons grounded on Sections 37 and 38 of the *Limitation of Actions Act* and has never been adjudicated by the Court. It is also the Applicant's submission that the Respondent's application raises disputed factual matters thus it fails the test of what constitutes a preliminary Objection. To this end, she relied on the following decisions: John Florence Maritime Services Limited v Cabinet Secretary for Transport & Infrastructure & 3 Others [2021] eKLR; Njue Ngai v Ephantus Njiru Ngai & Another [2016] eKLR; Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696; E.T v Attorney General & Another [2012] eKLR; Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR and Public Trustee v Wanduru Ndegwa [1984] eKLR.

Analysis and Determination

11. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Applicant's Originating



Summons dated 1st September 2025 and applications dated 1st September 2025 as well as 26th September 2025 should be struck out.

12. For context, in the Applicant's Originating Summons dated 1st September 2025 which the Respondent seeks to strike out, the Applicant seeks to be declared the legal owner of Nairobi Block 69/117 Unit No. 35, through adverse possession.
13. The Respondent argues that the claim is res judicata having been determined in ELC Case No. 1321 of 2013 (Mary Lwande & 66 others v Teleposta Pension Scheme), where the Applicant herein was the 59th Plaintiff.
14. The Applicant contends that the suit is not res judicata as her claim in the former suit (ELC Case No. 1321 of 2013) was never heard, tested, and determined on merit, as it failed due to lack of locus standi.
15. On res judicata, Section 7 of the Civil Procedure Act provides that:

“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.”

16. In this instance, the Applicant filed the instant Originating Summons where she sought for the following Orders:
 - i. The Applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 4th February, 2005 of all that parcel of land comprised in Title Number Nairobi Block 69/117/Unit No.35.
 - ii. The said Applicant be registered as the sole proprietor of all that parcel of land known as Nairobi Block 69/117/Unit No. 35 in place of the abovenamed Respondent in whose favour the land is currently registered.
 - iii. The Respondent either by himself, his agent, servants and/or employees he restrained from interfering with the Applicants' peaceful possession and occupation of the said parcel Nairobi Block 69/117/Unit No. 35.
 - iv. Costs of this application be borne by the Respondent.
17. In ELC 1321 of 2013 Mary Lwande & 66 Others v Registered Trustees of Teleposta Pension Scheme, the Plaintiffs therein vide their Plaint dated 8th May, 2008 sought for the following Orders:
 - a. An order of permanent injunction restraining the Defendant whether by themselves and/or through Teleposta Pension Scheme, its servants, agents, representatives, advocates or auctioneers or any of them or otherwise howsoever from doing the following acts or any of them that is to say from advertising, disposing or selling by public auction, tender, bids and private treaty, howsoever at any time completely by conveyance, transfer or any sale concluded by auction, private treaty, leasing, letting or otherwise howsoever by interfering with the Plaintiffs/Applicants' peaceful and priority right to purchase the house known as house Number H9/2, H4/3, J11/2, H2/11, H3/2, B2, B3, PF, J4/2, E12, G2/3, P2, B11, G8/3, D1, C8, P7, G5, B12, B2, J5/2, D4, H7/3, A11, F8, A6, D6, E1, P6, H1/3, H8/3, G2/3, G12/3, K11, K3, I11, L11, K1, B6, G1/2 Jogoo Road, C15, B16, B6, B7, and A6, Elgeyo Marakwet and 35, 1 and 15 South B.



- b. An order for specific performance of all the respective Sale Agreements entered into between the Plaintiffs and the Defendant for the purchase of the subject properties.
 - c. An order directed at the Defendant compelling them to supply the relevant documents of Title to enable the Plaintiffs procure financing for the balance of the purchase price for the said houses.
18. Justice Angote vide his judgement dated the 13th October, 2022 dismissed the suit. I wish to reproduce some excerpts from the said judgement:
- ‘ 57. Having regard to the above narration, it is clear that the Plaintiffs breached their part of the bargain with respect to the payment of the purchase price. The Defendant granted the Plaintiffs several opportunities to rectify the position which they failed to do.
 - 58. Other than none payment of the purchase price, it appears that the Plaintiffs are equally in breach of clause 6 which required them to continue paying rent for the houses they were occupying. In conclusion, the court is satisfied that the Plaintiffs committed a fundamental breach of the agreement which destroyed the foundation of the sale agreement.
 - 59. As to whether the Defendant breached the conditions of the Agreement, the Plaintiffs state that the Defendant failed to give them copies of the relevant documents to enable them get financing. This was not a term of the contract and the same cannot be used as against the Defendant.
 - 60. As to whether there was rescission of the contract, there is no evidence of the same. Apart from the letter of February 3, 2008 issuing the notice, which letter was overtaken by the subsequent events, it appears that the Defendants have not formally rescinded the Agreements. However, the agreements between the Plaintiffs and the Defendant remain voidable on account of the Plaintiffs’ breach.
 - 61. Taking into account the circumstances of the case and the totality of the evidence, the court is not convinced that this is a situation which calls for the grant of Specific Performance. As with any other equitable remedy, the party raising it must approach the court with clean hands. The Plaintiffs have failed in this regard.
 - 62. The Plaintiffs being in breach of the contract for non-payment of the purchase price and failure to pay rent, it is the finding of the court that the Plaintiffs’ suit is unmerited. The suit is dismissed with costs to the Defendant.’
19. The Applicant has claimed that the previous suit was dismissed on a technicality but from the excerpt above, I beg to disagree. I note the dispute over the suit property was exhaustively dealt with in the aforementioned suit where the Court found that the Plaintiffs therein that included the Applicant herein had breached their sale agreements by failing to pay the balance of the purchase price. This in essence means that since the Plaintiffs suit was dismissed, the suit properties remained the properties of the Respondent. The Plaintiff has now come to Court to claim for ownership of the suit property through adverse possession.



20. On res judicata, Supreme Court stated as follows in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR):

“(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....There are conditions to the application of the doctrine of res judicata: i. the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title...”

21. The same court stated as follows in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR;

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a. There is a former Judgment or order which was final; b. The Judgment or order was on merit; c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d. There must be between the first and the second action identical parties, subject matter and cause of action.”

22. Based on the facts as presented while relying on the legal provisions cited and associating myself with the decisions quoted, while applying them to the circumstances at hand, I find that the issue revolving around ownership of the suit property herein was already decided by a competent Court. Further, I find that the dispute over ownership of the suit property was in the former suit between the parties and is now directly and substantially in dispute between the parties in this suit. I also find that the Applicant was also a party in the former suit with the same claim and was also litigating under the same title.

23. I opine that the Applicant cannot purport to bring forth another suit on the issues that the parties had litigated upon and now seeks to claim the suit property through another means, being adverse possession and argues that this is a different issue. In my view it is not possible in law to pursue a claim over immovable property on alleged breach of contract and later by way of adverse possession arising from occupation pursuant to the same sale agreement. To my mind, this claim still revolves around ownership of the suit property, which had already been determined. It is my trite that Litigation must come to an end and the Applicant should not be allowed to bring forth another suit on the same title, whose validity had been dealt with.

24. It is against the foregoing that I find that the instant Originating Summons dated the 1st September, 2025 is indeed res judicata. With that finding, I find that the applications dated the 1st September 2025 as well as 26th September 2025, cannot stand as there is no suit.

25. In the circumstances, I find the Notice of Motion application dated the 3rd October 2025 merited and will proceed to strike out the instant Originating Summons including the Applications dated 1st September 2025 and 26th September 2025, with costs to the Respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2026

CHRISTINE OCHIENG



JUDGE

In the presence of:

Ms Ochola for Obiri for Respondent/Applicant

Lagat for Applicant/Respondent

Court Assistant: Joan

