



**Koskei & 9 others v Yegon & 3 others (Environment and Land Case E009 of 2021) [2025] KEELC 5517 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5517 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND CASE E009 OF 2021**

**LA OMOLLO, J**

**JULY 24, 2025**

**BETWEEN**

- JOHANA KOSKEI ..... 1<sup>ST</sup> APPLICANT**
- REUBEN KOSKEI ..... 2<sup>ND</sup> APPLICANT**
- ELIUD CHERUIYOT ..... 3<sup>RD</sup> APPLICANT**
- ESTHER MISOI ..... 4<sup>TH</sup> APPLICANT**
- DAVID TOWETT ..... 5<sup>TH</sup> APPLICANT**
- NELSON ROTICH ..... 6<sup>TH</sup> APPLICANT**
- WESLEY KITUR ..... 7<sup>TH</sup> APPLICANT**
- JOEL MUTAI ..... 8<sup>TH</sup> APPLICANT**
- GEOFFREY KOSKEI ..... 9<sup>TH</sup> APPLICANT**
- JOEL ROTICH ..... 10<sup>TH</sup> APPLICANT**

**AND**

- EZEKIEL KIPRONO YEGON ..... 1<sup>ST</sup> RESPONDENT**
- JOEL KIPNGETICH YEGON ..... 2<sup>ND</sup> RESPONDENT**
- JOSEPH CHERUIYOT YEGON ..... 3<sup>RD</sup> RESPONDENT**
- KORGOREN KIBET DAVID ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Respondents/Applicants Notice of Motion application dated 18<sup>th</sup> April, 2024. The application is



expressed to be brought under Sections 3A & 7 of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules.

2. The application seeks the following order;
  - a. That the Plaintiffs' suit be struck out with costs as;
    - [a] It is res-judicata and
    - [b] It not only vexatious but also constitutes an utter abuse of the Court process.
3. The application is based on the grounds on its face and the supporting affidavit of Ezekiel Kiprono Yegon the 1<sup>st</sup> Respondent/Applicant.

### **Factual Background.**

4. The Applicants/Respondents commenced the present proceedings vide the Originating Summons dated 19<sup>th</sup> October, 2021 where they seek the determination of the following questions;
  - a. Whether the Applicants are entitled to the entire parcel of land measuring 6.2 Hectares [HA] being of all that land known as LR No. Kericho/Merigi/507 registered in the names of Ezekiel Kiprono Yegon, Joel Kipngetich Yegon, Joseph Cheruiyot Yegon and Korgoren Kibet David by virtue of the Applicants' adverse possession of the same in open, quiet and peaceful occupation for a period of over 40 years. [sic]
  - b. That the Applicants should be registered as the proprietors of all that parcel of land known as LR No. Kericho/Merigi/507 measuring 6.2 Hectares. [HA]
  - c. Whether the Respondents should be ordered to execute the transfer and all the requisite forms and perform all acts necessary to effect registration of the Applicants as proprietors of the said parcel of land, and in default, the Deputy Registrar of the Court be authorized to execute them.
  - d. Whether or not the Applicants are entitled to an order of permanent injunction restraining the Respondents, their agents, employees from entering, cultivating, occupying, trespassing, alienating, transferring, and/or in any other manner adversely dealing with the Applicants' aforesaid parcel of land.
  - e. Whether an order do issue that the Officer Commanding Station [OCS] Longisa Police Station oversees the enforcement and compliance with these orders.
  - f. Whether the Respondents should be ordered to pay the costs of this suit to the Applicants.
5. As at the time of writing of this ruling, the Respondents/Applicants have not filed a response to the Originating Summons.
6. On 16<sup>th</sup> May, 2024, the Respondents/Applicants informed the Court that they had filed the application under consideration. The Court granted the Applicants/Respondents time to respond to the application.
7. The application was mentioned on 13<sup>th</sup> June, 2024 and 16<sup>th</sup> October, 2024 when the Applicants/Respondents granted more time to file their response.
8. On 18<sup>th</sup> November, 2024 the Court issued directions that the application be canvassed by way of written submissions. On 29<sup>th</sup> January, 2025, it was mentioned to confirm filing of submissions and reserved for ruling



### **The Respondents/Applicants Contention.**

9. The affidavit in support of the application is sworn by Ezekiel Kiprono Yegon the 1<sup>st</sup> Respondent/Applicant.
10. He contends that he has the authority of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents/Applicants to swear the affidavit.
11. He also contends that the Applicants/Respondents Originating Summons has been filed over land parcel No. Kericho/Merigi/507 which parcel was the subject matter in the Principal Magistrate's Court in Bomet ELC Case No. 21 of 2019.
12. He further contends that the matter was heard and the Court delivered its judgement.
13. It is his contention that the Respondents/Applicants had instituted the suit in Bomet where they sought eviction orders against the Defendants therein who were in illegal occupation of the suit parcel.
14. It is also his contention that after the Court issued eviction orders, the Defendants were evicted from the suit parcel. He adds that the only persons in occupation of the suit parcel were Johana Koskei, Reuben Koskei, Eliud Koskei and their respective families.
15. It is further his contention that shortly after their eviction, the said Defendants forcefully re-entered the suit parcel and leased it to various third parties that include the Applicants/Respondents herein.
16. He contends that the Applicants/Respondents herein are proxies of the Defendants in the former suit in their quest to frustrate the implementation of the judgement and decree of the Court.
17. He also contends that the Respondents/Applicants filed an application citing the said Defendants for contempt which application is still pending before the Court.
18. He further contends that the Applicants/Respondents claim was only contrived to defeat the ends of justice as they have never been in occupation of the suit parcel.
19. It is his contention that if the Applicants/Respondents claim of adverse possession is genuine, it would have been supported by cogent evidence of their purported long-term occupation. The said evidence would be their houses and/or other developments which should be clearly demarcated to depict their individual claim.
20. It is also his contention that the suit parcel is open and does not have any houses on it save for re-fabricated [sic] structures which were occupied by the Defendants in the matter filed before the subordinate Court. This is a clear indicator that the Applicants/Respondents have never been in possession of the suit parcel.
21. It is further his contention that the OCS Longisa who provided security during the eviction, swore an affidavit stating that the Applicants/Respondents have never been possession of the suit parcel.
22. He ends his deposition by stating that questions regarding the use and occupation of the suit parcel were already canvassed in Bomet PM ELC Case No. 21 of 2019 and determined. He adds that the present suit is res judicata and does not disclose any reasonable cause of action.



### **The Applicants/Respondents Response.**

23. In response to the Application, the Applicants/Respondents filed Grounds of Opposition dated 11<sup>th</sup> November, 2024 and a Replying Affidavit sworn on 4<sup>th</sup> November, 2024 by Wesley Kitur ; the 7<sup>th</sup> Applicant/Respondent.
24. The grounds of opposition are as follows;
  - a. That for a suit to be barred by invoking the principle of res judicata, a party is required to demonstrate that the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.
  - b. That the proceedings before the lower Court vide, Bomet Senior Principal Magistrate ELC No 21 of 2019 and the instant [sic] are distinct and not related and, therefore, the plea of res judicata has no factual or legal basis and ought to be dismissed.
  - c. That the whereas [sic] both in the instant matter and in the previous suit the claim is ownership of the suit property, the former claim, [Bomet Senior Principal Magistrate ELC No 21 of 2019] dealt with ownership based on succession law, as the respondents' herein [Plaintiffs in the former suit] claimed ownership through inheritance, whereas the current claim is based on a claim adverse possession by the Applicants. [sic]
  - d. That the claim of adverse possession involves different legal principles and factual considerations which were not subject of determination in the previous suit, hence it presents a totally different cause of action.
  - e. That the Applicant has failed the test of establishing whether the matter was “directly and substantially in issue” as the specific issue of adverse possession was not contested and determined in the previous suit.
  - f. That another condition a party needs to meet in order to invoke res judicata is that the former suit must have been between the same parties or parties claiming under them.
  - g. That the claim of adverse possession involves factual consideration, and where a party claims ownership through adverse possession, then an allegation of that [sic] the said parties are the same can only be distinguished upon production of evidence.
  - h. That the Applicants have miserably failed to demonstrate that the former suit is between the same parties or claiming under them.
  - i. That in an effort to demonstrate that the parties are the same, and or proxies they have annexed an affidavit marked as EKY-3 [b] which veracity can only be vouched after cross-examination. [sic]
  - j. That the Respondent [sic] in this matter are different from the [Defendants] in the former suit, as 6 Applicants were never included in the former suit, and it would be only just and fair that their claim based on adverse possession be heard on merit.
  - k. That averments by the Applicants herein that the parties have never been in occupation of the suit parcel, is purportedly supported by bundles of photographs Marked as “EKY5”, which reliance of the same [sic] offends the express provisions of Section 106 B of the Evidence Act.
  - l. That the previous proceedings did not involve adjudication of the issue of adverse possession, nor was it a matter that was determined by the Court, and thus for the Applicant [sic] to benefit



from their plea of res judicata, there must be a judgment on the merits concerning the issue between the same parties, which was not the case in the previous proceeding. [Sic]

- m. That it is the interest of justice that the Respondent be allowed to pursue the claim for adverse possession as failing to do so would deny the Respondents, moreso the Respondents who not parties [sic] in the previous lower Court proceedings, a fair chance to assert their rights over the suit property.
  - n. That the doctrine of res judicata must be applied with caution to avoid denying access to justice and in this instant, the Applicant has not demonstrated whether the determination of the question of adverse possession was adjudicated and determined with finality, nor have they pleaded that the said claim if determined will prejudice their rights.
25. In the Replying Affidavit, the 7<sup>th</sup> Applicant/Respondent deposes that he is one of the Applicants/ Respondents herein and that he has instructed the firm of M/S Leteipa Silei Law Advocates [sic] to represent him.
26. He also deposes that he occupies a distinct and identifiable portion of land parcel No. Kericho/ Merigi/507 having lived on the said portion for a period of thirty years.
27. He further deposes that he was not a party in Bomet PM ELC Case No. 21 of 2019 as he was never served with the pleadings filed in the said matter. Therefore, he was not afforded an opportunity to ventilate his claim of adverse possession.
28. It is his deposition that he continues to occupy the said distinct portion of the suit parcel and it is only just and fair that he be afforded an opportunity to ventilate his claim of adverse possession.
29. He ends his deposition by stating that it is in the interest of justice that this suit be determined on merit.

**Issues for determination.**

30. The Respondents/Applicants filed their submissions on 28<sup>th</sup> January, 2025 while the Applicants/ Respondents filed their submissions on 25<sup>th</sup> February, 2025.
31. The Respondents/Applicants submit on the following issues;
- a. Whether the instant suit is res judicata.
  - b. Whether the instant suit is, scandalous, frivolous, vexatious and is otherwise an abuse of the Court process.
32. On the first issue, the Respondents/Applicants rely on Section 7 of the Civil Procedure Act, the judicial decision of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR and submit that they had initially filed Bomet PM ELC Case No. 21 of 2019. The subject matter in the said suit and the present suit i.e. land parcel No. Kericho/Merigi/507 is the same.
33. The Respondents/Applicants also submit that the parties in the present and former suit are almost similar as they [Respondents/Applicants] and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Applicants/Respondents were parties in both suits save for one Esther Yaibei who was one of the Defendants in the subordinate Court.
34. The Respondents/Applicants further submit that the Defendants in the suit filed before the subordinate Court admitted to being the only ones in occupation of the suit parcel.



35. The Respondents/Applicants reiterate the averments in their affidavit in support of the application and submit that the present claim of adverse possession is a deliberate attempt to murky the waters and evade the doctrine of res judicata.
36. The Respondents/Applicants also submit that the Applicants/Respondents are unlawfully trying to retain possession of the suit parcel at their [Respondents/Applicants] exclusion.
37. The Respondents/Applicants urge the Court to make a finding that the inclusion of the Applicants/Respondents in the present proceedings and their purported claim of adverse possession does not protect them from the application of the doctrine of res judicata.
38. The Respondents/Applicants rely on the judicial decision of E.T v Attorney General & another [2012] eKLR as was cited in Alfred Sagero Omweri v Kennedy Onweri Sagero [2021] eKLR in support of their submissions.
39. On the second issue, the Respondents/Applicants rely on the judicial decision of Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR and submit that having established that the present suit is res judicata, it follows that it should be struck out for being frivolous, vexatious and an abuse of the Court process.
40. The Applicants/Respondents submit on the following issues;
  - a. Whether the suit is res judicata.
  - b. Who should bear the costs.
41. The Applicants/Respondents rely on Section 7 of the *Civil Procedure Act*, the judicial decision of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR and submits that the following elements must be met conjunctively for the doctrine of res judicata to be invoked;
  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally 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 is raised.
42. The Respondents/Applicants rely on the judicial decisions of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR as was cited in Congregation of the Sisters Saint Mariana of Jesus [K] Suing through Its Registered Trustees v Njuguna & 3 others [2023] KEELC 20600 [KLR], Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No. 62 of 1958 and submit that the suit filed before the subordinate Court sought for a declaration of ownership based on an inheritance while the present suit raises issues of adverse possession.
43. The Applicants/Respondents rely on Sections 37 and 38 of the *Limitation of Actions Act* and submit that the parties in the present suit and the suit before the subordinate Court are not the same.



44. The Applicants/Respondents submit that the issue of adverse possession was neither raised nor determined in the matter that was filed before the subordinate Court.
45. It is the Applicants/Respondents submissions that the suit that was filed before the subordinate Court was not defended and that the issue of adverse possession could not be raised in those proceedings as the Court was not competent to try it.
46. The Applicants/Respondents rely on the judicial decision of *Sugawara v Kiruti* [Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepas alias Mutaragwa Kiruti Lepas alias Mutaragwa Kiroti Leposo and in her own Capacity] & 3 others [2024] KECA 1417 [KLR] and submit that the Court of Appeal held that Magistrates Courts do not have jurisdiction to hear and determine suits raising issues of adverse possession.
47. The Applicants/Respondents conclude their submissions by urging the Court to dismiss the Respondents/Applicants application with costs.

### **Analysis and Determination.**

48. I have considered the application, the response thereto and the submissions.
49. It is my view that the following issues arise for determination;
  - a. Whether the Applicants/Respondents suit is *res judicata*.
  - b. Who should bear costs of the application.

#### **A. Whether the Applicants/Respondents suit is *res judicata*.**

50. The Respondents/Applicants contend that they filed Bomet PM ELC Case No. 21 Of 2019. The subject matter in the said suit was land parcel No. Kericho/Merigi/507 which is the same subject matter in the present proceedings.
51. They contend that they filed the said suit seeking orders of eviction against Johana Koskei, Reuben Koskei, Eliud Koskei and their families who were in occupation of the suit parcel.
52. They also contend that the subordinate Court delivered judgement in the said matter and eviction orders issued. Consequently, the said Defendants were evicted.
53. It is the Respondents/Applicants contention that the said Defendants re-entered the suit parcel and leased it to various third parties. The third parties include the Applicants/Respondents herein.
54. They contend that the Applicants/Respondents herein are therefore proxies of the Defendants in the said suit.
55. It is also the Respondents/Applicants contention that the issue of use and occupation of the suit parcel was determined in the former suit and therefore the present suit is *res judicata*.
56. In response the Applicants/Respondents contend that they were not parties in the suit filed before the subordinate Court and that the issue of adverse possession was not raised in the said proceedings.
57. The Applicants/Respondents submit that in any case, the Magistrates Court do not have jurisdiction to hear and determine claims of adverse possession.



58. Section 7 of the *Civil Procedure Act* 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.”

59. In the judicial decision of *Christopher Kenyariri v Salama Beach* [2017] eKLR the Court stated as follows on the ingredients to be satisfied when determining res judicata;

“...the following elements must be satisfied...in conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. Former suit between same parties or parties under whom they or any of them claim.
- c. Those parties are litigating under the same title.
- d. The issue was heard and finally determined.
- e. The Court was competent to try the subsequent suit in which the suit is raised.”

60. As was held in the above cited judicial decision, in determining whether a matter is res judicata, the Court has to consider whether the issues in the present suit and the former suit are the same, whether the parties in both the former and present suit are the same, whether the issue was heard and finally determined and whether the Court is competent to try the subsequent suit.

61. I will first determine whether the parties in the present suit and the former suit are the same.

62. The Respondents/Applicants have attached to their affidavit in support of the application a copy of the pleadings filed in Bomet PM ELC Case No. 21 of 2019. The Plaintiffs in the said suit were;

- a. Ezekiel Kiprono Yegon
- b. Joel Kipngetich Yegon.
- c. Joseph Cheruiyot Yegon.
- d. Korgoren Kibet David.

63. This Court notes that the Plaintiffs in Bomet PM ELC Case No. 21 of 2019 are the Respondents/Applicants herein.

64. The Defendants in the former suit were;

- a. Esther Misoi
- b. Johana Koskei
- c. Reuben Koskei
- d. Eiud Cheruiyot.



65. I have established that Johana Koskei is the 1<sup>st</sup> Applicant/Respondent herein, Reuben Koskei is the 2<sup>nd</sup> Applicant/Respondent herein while Esther Misoi is the 4<sup>th</sup> Applicant/Respondent.
66. Save for the 3<sup>rd</sup>, 5<sup>th</sup> to 10<sup>th</sup> Applicants/Respondents, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Applicants/Respondents were parties in the former suit. It is evident that the parties are different and on this singular point the plea of res judicata fails. The contention by the Respondents/Applicants herein that they [Applicants/Respondents] are proxies of the Defendants' in the former suit can only be determined at a hearing.
67. I will now consider whether the issues raised in the former and present suit are the same. It is not disputed that the subject matter in both suits is the same. Both suits were filed with respect to land parcel No. Kericho/Merigi/507.
68. In Bomet PM ELC Case No. 21 of 2019, the Respondents/Applicants stated that they were the registered owners of the said land.
69. They contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents/Applicants herein trespassed onto the suit parcel and they [Respondents/Applicants] sought for orders of eviction and permanent injunction against them.
70. Upon perusal of the judgement delivered in the former suit, which judgement is attached to the Respondents/Applicants affidavit in support of the application, It has emerged that the suit was not defended and therefore the Court allowed the prayers as sought in the Plaint. It is further evident that the question of adverse possession was not for determination in the said proceedings.
71. It is not disputed that the issue raised in the present proceedings is one of adverse possession. This court is of the view that whereas the subject matter of both suits is the same, the issue whether or not the Applicants/Respondents acquired the suit parcel by way of adverse possession was not determined in the former suit.
72. In any event, and as submitted by the Applicants/Respondents herein, the Magistrates Courts do not have jurisdiction to hear and determine claims of adverse possession. This was the determination of the Court of Appeal in Sugawara v Kiruti [Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity] & 3 others [2024] KECA 1417 [KLR] where it was held as follows;
- “In the circumstances, in view of the express provisions of section 38 of the *Limitation of Actions Act*, as did the Environment and Land Court, we find that Magistrates' Courts do not have jurisdiction to determine the claims of adverse possession.”
73. The issue of adverse possession not having been determined in the former suit coupled with the fact that the parties in the former suit and present suit are not the same, I find that the present suit is not res judicata.
74. The Respondents/Applicants submit that since they have established that the present suit is res judicata, this case is therefore frivolous, vexatious, an abuse of the Court process and should be struck out.
75. Order 2 rule 15 [1] [a], [b], [c] and [d] of the Civil Procedure Rules provides as follows:
- “At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that-
- a. it discloses no reasonable cause of action or defence in law; or



- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the Court.”

76. The Respondents/Applicants have anchored their contention that the suit is vexatious and an abuse of the Court process on the fact that it is res judicata.

77. Having failed to demonstrate that the suit is res judicata, I decline to make a finding that this suit is vexatious and an abuse of the Court process.

**Disposition.**

78. Taking the foregoing into consideration, I find that the Respondents/Applicants application dated 18<sup>th</sup> April, 2024 lacks merit and it is hereby dismissed with costs.

79. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Kipkorir for the Respondents/Applicants.

No appearance for Respondents.

Mr. Pkukat – Court Assistant

