

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC CASE NO. E002 OF 2025 (O.S)
IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22
LAWS OF KENYA
AND
IN THE MATTER OF THE REGISTERED LAND ACT CAP 300
LAWS OF KENYA
AND
IN THE MATTER OF THE LAND PARCEL NO. NORTH
UGENYA/NDENGA/506

BETWEEN

JOSEPHINE TAKA OKADO.....
APPLICANT

VERSUS

DAVID ODHIAMBO.....1ST
RESPONDENT

ELLY DAVID OPONDO.....2ND
RESPONDENT

RULING

1 This ruling is the subject of the Notice of motion dated 29/4/2025 seeking the following prayers;

- 1) THAT this suit be struck out and or dismissed for being res judicata Siaya ELC. 14 of 2021.
- 2) THAT the costs of this application be provided for.

- 2 The application is premised on the grounds on its face and supported by the affidavit of ELLY DAVID OPONDO the 2nd respondent sworn of 28th April 2025. It is deponed as follows;
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- 3 That by an originating summons dated 16/09/2014, the Applicant filed ELC Case No. 14 of 2021 (Originally Kisumu ELC Case No. 858 of 2015) Josephine Taka Okado vs David Odhiambo seeking a declaration that the defendant's title to the suit property was extinguished, her claim of adverse possession had accrued; and she be declared the owner of the suit property. The pleadings are attached as Exhibit 1.
- 4 That the instant suit relates to the same land parcel number North Ugenya/Ndenga/506 hereinafter "suit property" involving the said Josephine Taka Okado and David Odhiambo.
- 5 That both suits relate to the same cause of action, are against the same parties; and seeks the same reliefs being a declaration that the Applicant has acquired proprietorship by way of adverse possession over land parcel NORTH UGENYA/NDENGA/506.
- 6 That a perusal of the pleadings and matters for determination in both suits reveal that both originating summons are identical which narrates the particulars of the suit.

- 7 That consequently, the instant suit is res judicata, if the same is allowed to proceed the Court may arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication or conflict of the relief.
- 8 That ELC Case No. 14 of 2021 (Originally Kisumu ELC Case No. 858 of 2015) has substantially proceeded in court and a judgment delivered on 26th January 2023 by Hon A. Y. Koros. The judgment is annexed as exhibit 2)
- 9 That joinder or non-joinder of parties cannot operate to circumvent the principle of res judicata.
- 10 That consequently, this Honourable Court lacks the requisite jurisdiction to hear and determine this suit.

RESPONSE TO THE APPLICATION

- 11 The plaintiff at the filing of this suit was represented by the firm of Erick Jumba & Company Advocates. They filed grounds of opposition dated 30/6/2025 that the application is frivolous & abuse of the court process. That there is a difference between a suit being dismissed and struck out. The firm of Jumba & Co. Advocates ceased from acting for the plaintiff on 13/10/2025 when the plaintiff was present in court accompanied by his son. On 28/10/2025 court granted her time to file a replying affidavit and issued directions on filing of submissions in disposal of the application.

SUBMISSIONS;

- 12 The applicants' submissions are dated 8/05/2025. The plaintiff did not respond further neither did she file submissions.

ANALYSIS AND DETERMINATION

- 13 The court has considered the application, grounds of opposition and submissions on record and the main issue for determination is whether the present suit is res judicata.
- 14 The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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”

- 15 The **Black's law Dictionary 10th Edition** defines ***“res judicata”*** as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

- 16 The plea of res judicata has been litigated upon to the Apex Court. Its rationale was aptly explained in the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** the essence of the doctrine of res judicata was expounded as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which

is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

- 17 The threshold to be met for a suit to be termed as being res judicata was enunciated by the Court of Appeal in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR)**, and which spells out the factors to be considered as follows;

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

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.

- 18 The court will therefore be guided accordingly.
- 19 The former suit - the former suit from the copy of the judgement annexed is stated to be ELC Case No. 14 of 2021 (O.S) originally Kisumu ELC Case No. 858 of 2015 (OS) Josephine Taka Okado Vs. David Odhiambo as the plaintiff and defendant respectively.
- 20 The issues raised by the plaintiff in the former Suit are well captured in paragraph 1 of the judgement dated 26/01/2023. These are
- a) whether the defendant and his predecessor in title John Onyunde Ogola had ever been in occupation and possession of the suit property
 - b) whether the plaintiff is the registered owner of parcel North Ugenya Ndonga /507 which was adjacent to the suit property (North Ugenya Ndonga /506) which was adjacent to the suit property and there existed no boundary between these two parcels of land and

c) whether the plaintiff utilized the suit property and North Ugenya Ndonga /507 continuously, quietly and uninterrupted and regarded them as one parcel of land

- 21 The subject of the former suit was North Ugenya Ndonga /506 which the plaintiff therein claimed the registered owners title thereof had been extinguished by dint of her adverse possession/occupation. The court found that the claim for adverse possession had not been proved.
- 22 In the current proceedings Plaintiff Josephine Taka Okado has sued David Odhiambo the 1st Respondent and Elly David Opondo as 2nd Respondent. It is not denied that the plaintiff and the 1st respondent are the same parties in the same suit. In fact, the present suit the plaintiff states that there has been a case vides Siaya ELC No. 14 of 2021(OS) which was struck out on 26th January 2023 hence this suit. This in itself is an admission the parties and the issues are the same.
- 23 However, I have noted the inclusion of the 2nd respondent Elly David Opondo who was not a party to the former suit who it is submitted by counsel for the defendant is the 1st defendant's successor in title. But what I seem to gather from the OS is that the 2nd respondent is the proprietor of North Ugenya Ndonga /506 the same property that was subject of the adverse possession claim. The addition of this party does not change the fact that the claim is the same, the orders of adverse possession were not proved against

the 1st defendant and who allegedly sold the property to the 2nd respondent.

- 24 I will go back to the disclosure by the plaintiff of the proceedings in the former suit which she states was struck out. I think this is where the ground of opposition that there is difference between suit being struck out and being dismissed emanates from. This calls for the determination whether the judgement in the former suit was final.
- 25 Based on blacks law definition hereinabove the former suit must have been settled by judicial decision which was a final Judgment on the merits. My review of the said judgement shows that the matter was heard, the plaintiff called 3 witnesses including herself. The court indeed dealt with ***'Whether the plaintiff proved she was an adverse possessor'*** . The court analyzed the law and evidence and made a finding that the court was not convinced that on a balance of probabilities the plaintiff proved her claim of adverse possession.
- 26 I think my hands are tied. The judgement is a judgement on merit determined by a court that was properly seized with jurisdiction and I see no basis upon which I can entertain the present proceedings.

- 27 The upshot of the foregoing is that the application dated 29/4/2025 is merited and the suit is hereby struck out.
- 28 Let the parties bear their own costs to these proceedings.

Delivered and Dated at Siaya This 14th Day of May 2026

**HON. LADY JUSTICE A.E. DENA
JUDGE
14/5/2026**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for plaintiff

Ms Alwanga holding brief for Odhiambo Defendants

Court Assistant: Abiud Wekesa

ORIGINAL