



**Ndeda v Otiemo (Environment and Land Case Civil Suit
E033 of 2024) [2025] KEELC 5398 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E033 OF 2024
SO OKONG'O, J
JULY 17, 2025**

BETWEEN

JOEL MIDIGO NDEDA PLAINTIFF

AND

TERESA ANYANGO OTIENO DEFENDANT

RULING

1. The Plaintiff brought this suit by way of Originating Summons dated 16th December 2024 in which the Plaintiff sought to be registered as the proprietor of all that parcel of land known as Kisumu/Kadero Got Nyabondo/1158 (hereinafter referred to as “the suit property”) which is registered in the name of the Defendant by way of adverse possession. Together with the Originating Summons the Plaintiff filed a Notice of Motion application dated 16th December 2024 seeking a temporary injunction restraining the Defendant by herself or through her agents, family, servants and/or whomsoever jointly and severally from transferring, transmitting, disposing or evicting the Plaintiff and his family from the suit property pending the hearing and determination of the suit. The Plaintiff also sought the costs of the application.
2. The Plaintiff’s application which was supported by the affidavit of the Plaintiff and supplementary affidavit of the Plaintiff’s advocate, Agnes Akinyi sworn on 16th December 2024 and 17th December 2024 respectively was based on several grounds. In summary, the Plaintiff averred that he purchased the suit property on 4th January 2010 from one Nereah Ogalo who held herself out as the equitable owner of the property. The Plaintiff averred that he took immediate possession of the suit property and established his home thereon. The Plaintiff averred that later the same year when he attempted to follow up on the title for the property with his surveyors, he came to learn that the suit property was registered in the name of the Defendant. The Plaintiff averred that he managed to locate the Defendant the same year, and the Defendant offered to sell to him the suit property a fresh at Kshs. 800,000/-



3. The Plaintiff averred that he paid the Defendant a deposit of Kshs. 600,000/-. The Plaintiff averred that the balance of the purchase price was to be paid upon the Defendant providing the original title deed for the purposes of the parties drawing a formal sale agreement and executing the transfer instrument. The Plaintiff averred that the Defendant did not furnish him with the title deed but instead instituted a suit against him at Winam Law Court, namely, Winam PMC ELC No. E008 of 2024 seeking to evict him from the suit property. The Plaintiff averred that he filed a defence and a counterclaim against the Defendant seeking to be registered as the owner of the suit property by adverse possession. The Plaintiff averred that the Winam Court declined to hear his adverse possession claim on the ground that it had no jurisdiction to deal with the same. The Plaintiff averred that, he decided to file the claim before this court which has jurisdiction to hear it. The Plaintiff averred that he also filed an appeal against the judgment made by the Winam Court and had obtained an order of stay of execution of the same. The Plaintiff averred that he had occupied the suit property for over 14 years from the date he moved into the property. The Plaintiff averred that his occupation and possession of the suit property had been open, hostile, continuous and uninterrupted for the entire period of 14 years. The Plaintiff averred that the Defendant's interest in the suit property was extinguished after 12 years of such possession/occupation by the Plaintiff. The Plaintiff averred that the Defendant held the suit property in trust for him.
4. The Plaintiff averred that the Defendant had embarked on the process of evicting him from the suit property before his adverse possession claim was heard and determined. The Plaintiff averred that he stood to suffer irreparable harm if evicted from the suit property as he had nowhere else to move.
5. The application was opposed by the Defendant through grounds of opposition dated 11th March 2025. The Defendant contended that the application and the suit were res judicata since the issues raised in the suit and the application had been determined in in Winam PM ELC No. E008 of 2024- Teresa Anyango Otieno v. Joel Midigo (hereinafter referred to as "the first suit"). The Defendant contended that the suit offended the provisions of Section 7 of the *Civil Procedure Act*. The Defendant contended further that application and the suit were sub-judice since the issues raised in the suit were the subject of a pending appeal before the court in the exercise of its appellate jurisdiction in Kisumu ELCA No. E105 of 2024. The Defendant averred that the suit offended the provisions of Section 6 of the *Civil Procedure Act*. The Defendant averred that the suit and the application based thereon were an abuse of court process, misconceived, frivolous, and vexatious. The Defendant contended that the Plaintiff was playing a lottery with the court process.

Analysis and Determination

6. The Application was argued on 12th March 2025. I have considered the Application together with the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the Defendant in opposition to the application and the submissions by the advocates for the parties. The Plaintiff has sought a temporary injunction restraining the Defendant from dealing with the suit property pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.



7. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*[2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others*[2003]eKLR and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

8. The Defendant has opposed the Plaintiff’s application on pure points of law. The averment by the Plaintiff that he entered the suit property in 2010 has not been controverted by the Defendant. The averment by the Plaintiff that he established his home on the suit property in 2010 and had occupied the same peacefully with the Defendant’s knowledge until 2024 when the Defendant filed a suit at Winam Law Court (the first suit) for his eviction has not been controverted. I am satisfied from the evidence on record that the Plaintiff has established a prima facie case of adverse possession with a probability of success. I am also persuaded that the Plaintiff would suffer irreparable harm if the injunction sought is not granted.
9. With regard to the points of law raised by the Defendant, I am not convinced that this suit is res judicata. Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 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.”

10. In Black’s Law Dictionary 10th Edition “res judicata” is defined 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...”

11. In *Christopher Kenyariri v. Salama Beach* [2017] eKLR, the court stated as follows on 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; and



- e) The court was competent to try the subsequent suit in which the issue is raised.”
12. I have perused the judgment of the lower court in the first suit, which was delivered on 13th December 2024. The lower court struck out the Plaintiff’s adverse possession claim for want of jurisdiction. This means that the adverse possession claim was not heard and determined on merit. The Plaintiff’s adverse possession claim herein, which was brought in a court of competent jurisdiction, is, in the circumstances, not res judicata. The issue of whether or not the Plaintiff has acquired the suit property by adverse possession was not determined in the first suit.
13. On the issue of sub-judice, Section 6 of the *Civil Procedure Act* provides as follows:
- “No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
14. In *Kenya National Commission on Human Rights v. Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR the Supreme Court stated that:
- “(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
15. As mentioned at the beginning of this ruling, this suit was brought by the Plaintiff by way of Originating Summons seeking to be registered as the owner of the suit property in place of the Defendant through adverse possession. There is no other suit before this court between the same parties on the same issue. The only other adverse possession claim was brought by the Plaintiff in the first suit, Winam PM ELC No. E008 of 2024. The adverse possession claim by the Plaintiff in the first suit was struck out by the court for lack of jurisdiction. The other suit before this court involving the same parties and the same subject matter is Kisumu ELCA No. E105 of 2024 (the appeal case). In the appeal, the Plaintiff has challenged the judgment of the lower court in the first suit, which ordered his eviction from the suit property. It cannot be said, therefore, that there is more than one suit before this court involving the same parties, the same subject matter, and the same issues. I am not persuaded by the Defendant that this suit is sub-judice.



Conclusion

16. In conclusion, I find merit in the Plaintiff's application. I am, however, alive to the fact that there is a lawful court decree issued in Winam PM ELC No. E008 of 2024 for the eviction of the Plaintiff from the suit property. The order has been stayed temporarily. This court cannot issue an injunction against the execution of the decree in Winam PM ELC No. E008 of 2024 at this stage. I will therefore grant a temporary injunction restraining the Defendant by herself or through her agents, servants and/or whomsoever jointly and severally from transferring, disposing of or evicting the Plaintiff from the suit property pending the hearing and determination of this suit, save where the Defendant is executing the decree in Winam PM ELC No. E008 of 2024 if not stayed or set aside. The costs of the application shall be in the cause.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF JULY 2025

S. OKONG'O

JUDGE

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

Ms. Akinyi h/b for Mr. Odeny for the Plaintiff

Mr. Okoth Odero for the Defendant

Ms. J. Omondi-Court Assistant

