



**Amakalu & 2 others v Wanyungu (Environment and Land Case
E012 of 2024) [2025] KEELC 5392 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE E012 OF 2024**

**A NYUKURI, J
JULY 16, 2025**

BETWEEN

PETER WAMUKOYA AMAKALU 1ST PLAINTIFF

SAMUEL KWEYU 2ND PLAINTIFF

GRACE O. AMAKALU 3RD PLAINTIFF

AND

JACKSON A. WANYUNGU DEFENDANT

RULING

1. Before court is a Notice of Motion application dated 14th June 2024 filed by the plaintiffs seeking for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That a temporary injunction be issued against the defendant/respondent by himself, his servants, agents restraining him from dealing with or trespassing onto or interfering with the plaintiffs use/enjoyment of land parcel LR No. Marama/Shinamwenyuli/619 pending the hearing and determination of this case.
 - d. Costs be provided for.
2. The application is supported by the supporting affidavit of the 1st plaintiff sworn on 14th June 2024 who deposed that together with his co-plaintiffs they jointly owned parcel No. Marama/Shinamwenyuli/619 having acquired the land by transmission upon succession. That vide Butere CM CC 175 of 2010, the plaintiffs sued the defendant for eviction but the court found that it had no jurisdiction. That in 2012, the defendant on behalf of the estate of Zablon Katembu sued the plaintiffs



vide Kakamega HCC No. 173 of 2012 which became Kakamega ELC 473 of 2017 which was finalized on 21st June 2023 with a judgment dismissing the defendant's claim of the suit property by way of adverse possession.

3. That when the above suit was pending, the plaintiff was served with a court order which was found to be bogus and which resulted in the prosecution of the defendant for forgery and uttering a false document, leading to his conviction on the two charges in Butere CM Criminal Case No. 41 of 2014.
4. Further, that upon determination of Kakamega ELC 434 of 2017, the plaintiffs engaged a surveyor for purposes of partitioning the suit property and that in February 2024, the defendant on seeing the surveyors ploughed a portion of the suit property and planted thereon. They stated that they had sought the help of the local administration to get the defendant to stop trespassing on their land in vain. They argued that the defendant having failed to get the suit property lawfully resorted to using force. They attached copies of the register, certificate of official search, certificate of confirmation, judgment in Butere CMCC 175 of 2010, originating summons and judgment in Kakamega ELC No. 434 of 2017, a fake order, and Judgment in Butere Criminal Case No. 41 of 2014.
5. The application was opposed. In response, the defendant filed replying affidavit dated 13th September 2024. He stated that the applicants were untruthful as they had never been in occupation of the suit property at any time which is why he sought eviction in Butere CMCC 175 of 2010. He denied entering the suit property in February 2024 and stated that together with his siblings they have been in possession of the suit property since 1973 when the same was purchased by their father. Further that having been dissatisfied with the judgment in Kakamega ELC 434 of 2017, he filed an appeal before the Court of Appeal vide Kisumu Appeal No. 183 of 2023 which is still pending hearing.
6. He further argued that the suit herein was res judicata and ought to be dismissed. He attached a copy of the Memorandum of appeal in Kisumu Civil Appeal No. 183 of 2023.
7. Besides the replying affidavit, the respondent also raised a preliminary objection against the application and suit in terms of paragraph 10 of his statement of defence wherein he stated that this suit is res judicata as there was a decision in Kakamega ELC No. 434 of 2017.
8. Parties filed submissions in regard to the application and the preliminary objection which this court has duly considered.

Analysis and determination

9. I have considered the application, the responses, submissions and authorities cited. In my considered view, the issues that arise for this court's determination are:-
 - a. Whether this case is res judicata in view of the judgment delivered in Kakamega ELC 434 of 2017.
 - b. Whether the plaintiffs have met the threshold for grant of orders of temporary injunction against the defendant in respect of the suit property.
10. Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata as follows;

“Res judicata

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.

Explanation. — [1] The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — [2] For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — [3] The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — [4] Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — [5] Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — [6] Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

11. The doctrine of res judicata bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit where a competent court has determined such matter or issue with finality.

12. Therefore, the elements of res judicata are as follows;

- a. There is a judgment or order in a former suit which is final.
- b. The judgment or order in the former suit was on merit.
- c. The judgment or order was rendered by a competent court with jurisdiction.
- d. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.

13. In the case of *The Independent Electrical and Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal held as follows;

For the bare 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 the 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 issue in which the issue is raised.



14. In the above case, the Court of Appeal went on to state the purpose of the doctrine of res judicata as follows;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of res judicata this rest in the public interest for swift, sure and certain justice.

15. I have considered the judgment in Kakamega ELC Case No. 434 of 2017. In that case the defendant herein sought to be declared the owner of the suit property alleging to have acquired the same through the doctrine of adverse possession. In its judgment, the court dismissed the defendant's claim. This means that on 21st June 2023, the court declared that the defendant had no legal claim over the suit property.

16. The plaintiffs who are the registered owners of the suit property have rights over the suit property as conferred by sections 24, 25 and 26 of the *Land Registration Act* which they can enforce against anyone interfering with their rights. While the parties in the former suit are the same as those in the current suit, the issue that was in contention in the former suit was whether the defendant had been in open, continuous, and hostile occupation of the suit property as of right having disposed it from the plaintiffs. That question was determined by court and therefore, it is the defendant who is barred from raising the argument that he has been on the suit property since 1973 as this court disagreed with him on that position. The plaintiffs' position is that the defendant entered the suit property in February 2024 and that he has no right to be on the suit property. The question before this court is whether the court having dismissed the defendant's claim for adverse possession, he has any right to use the suit property without consent and authority of the plaintiff. That question neither arose nor was it determined on merit in Kakamega ELC No. 434 of 2017. That being the case, and there being no determination on merit by a competent court on whether the defendant has trespassed on the suit property, I find and hold that this suit is not res judicata.

17. As regards the question of whether the applicants are entitled to a temporary injunction, Order 40 Rule 1 of the Civil Procedure Rules provides for the power of court to grant orders of temporary injunction as follows;

“Where in any suit it is proved by affidavit or otherwise-

- a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



18. For a court to grant a temporary injunction, an applicant must demonstrate that he has a suit in which the subject matter in the dispute is in danger of being wasted, damaged, alienated, disposed of or be dealt with in a manner that may obstruct or delay the applicant in the execution of any decree that may be passed in their favour against the respondent.
19. Principles for grant of temporary injunctions are well settled. In the case of *American Cyanamid Co v Ethicon Limited* 1975 AAER 504, the court enumerated elements to be satisfied before grant of a temporary injunction as follows;
 - a. There must be a serious/fair issue to be tried;
 - b. Damages shall not be an adequate remedy
 - c. The balance of convenience lies in favour of granting or refusing the application.
20. The same principles had earlier been stated in the case of *Giella v Cassman Brown* [1973] E.A 358
21. In the case of the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] e KLR, the court held that all the three conditions set out in *Giella v Cassman Brown* [supra] are distinct and logical hurdles which must be surmounted sequentially.
22. A prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya and 2 Others* [2003] KLR as follows;

“ A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
23. In the instant case, the applicants stated that they are registered owners of the suit property while the defendant has no legal claim whatsoever, yet he has been interfering with the same by ploughing the suit property and planting crops thereon. The plaintiffs attached a photograph of a maize crop on the suit property. The defendant did not deny that he is the one who planted maize on the suit property. His case was that since 1973 together with his siblings, he has been in occupation of the suit property. As stated in this ruling above, the legality of the defendant’s occupation of the suit property was determined on merit and with finality on 21st June 2023 in *Kakamega ELC Case No. 434 of 2017* by a competent court. Therefore this court is literally barred from listening to a similar narrative from the defendant hence cannot entertain the defendant’s assertion that he has been on the suit property since 1973, as that would be granting the defendant a second bite at the cherry.
24. The plaintiffs having shown that they are the registered proprietors of the suit property and that the defendant’s claim of the same was dismissed vide *Kakamega ELC Case No. 434 of 2017* by an order of dismissal, I am clear in my mind that the plaintiffs have demonstrated a prima facie case with high chances of success.
25. The concept of irreparable injury seeks to protect the prima facie case established by the applicant from being rendered nugatory, hence there must be a prima facie case, before the existence of an irreparable injury. To show that the applicant shall suffer irreparable injury, they have to demonstrate that the injury likely to be suffered cannot be adequately compensated by costs. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] e KLR, the court stated as follows;

“ Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The



Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

26. On whether the plaintiffs stand to suffer irreparable injury, they have shown that the defendant is using the suit property yet he has no iota of claim and therefore I am satisfied that they have shown irreparable loss.
27. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [supra], the court held that for the balance of convenience to tilt in favour of the applicant, they must show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it. In this case, the plaintiffs being the registered proprietors of the suit property, the scale of convenience tilts in favour of granting the injunction.
28. In the premises, I find and hold that the Notice of Motion application dated 14th June 2024 is merited and the same is allowed as follows;
 - a. That a temporary injunction be and is hereby issued against the defendant/respondent by himself, his servants and agents restraining him from dealing with or trespassing onto or interfering with the plaintiffs use/enjoyment of land parcel LR No. Marama/Shinamwenyuli/619 pending the hearing and determination of this case.
 - b. Costs the application shall be borne by the defendant.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 16TH DAY OF JULY 2025.

A. NYUKURI

JUDGE

In the presence of;

Ms Masakhwe for the plaintiff/applicant

Ms Muleshe for Defendant/respondent

Court Assistant: M. Nguyai

