



**Juma v Khayundi (Environmental and Land Originating Summons
E002 of 2021) [2024] KEELC 251 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

MARGRET OYIELA JUMA APPLICANT

AND

MOHAMMED OMOLLO KHAYUNDI RESPONDENT

JUDGMENT

1. Proceedings in this matter commenced on 28th September 2021 when the applicant filed Originating Summons (OS) dated 22nd September 2021. She averred in the OS that she was entitled to a 1.2 hectares portion of the parcel of land known as Marama/Lunza/1188 (the suit property) by adverse possession. The OS was supported by an affidavit sworn by the applicant.
2. The respondent opposed the OS through an affidavit in which he deposed that he was the registered proprietor of the suit property and that he had been utilizing the suit property to the exclusion of all other persons including the applicant. That the applicant together with her husband Joseph Shikanda Chuma and her children attempted to enter the suit property on 22nd December 2016 but were violently repulsed by the respondent's son and a report made to the police. He added that this suit is *res judicata* since Joseph Shikanda Chuma who was the applicant's husband filed Kakamega ELC No. 371 of 2013 (OS) seeking adverse possession and the suit was dismissed.
3. Hearing of the OS proceeded by way of *viva voce* evidence. The applicant testified as PW1 and adopted her witness statement dated 18th March 2022. She stated that the respondent was the registered proprietor of the suit property which measures approximately 2.4 hectares. That sometime in the year 1992, she entered and occupied a portion of the suit property measuring approximately 1.2 hectares and that she had been in peaceful, quiet, and uninterrupted occupation and use of the portion for the last 18 years. That she had been cultivating bananas, vegetables, and groundnuts on the portion during the 18 years and had also planted trees on the portion. She added that the respondent was also peacefully and quietly occupying and working on the remaining portion and had no issue with



- her occupation of the 1.2 hectares portion. She contended that the respondent's title to the portion had been extinguished through adverse possession. She produced a copy of the respondent's title deed in respect of the suit property, certificate of official search as on 13th September 2021 and several photographs as her exhibits.
4. The applicant further stated that there was no building on the suit property in 1992 and that neither Joseph Shikanda Juma nor Farijallah Masai was her husband. She denied ever being chased away from the suit property in the year 2021 by the respondent or the respondent's son.
 5. Samson Tindi Wandahwa testified next as PW2 and stated that he had been the Assistant Chief of Lunza Sub-location since the year 2005. He adopted his witness statement dated 18th March 2022 wherein he stated that the suit property was occupied by both the applicant and the respondent, and that the applicant had occupied it quietly, peacefully, and uninterruptedly for more than 12 years. He further stated that he did not know Farijallah and that he had never seen him on the suit property.
 6. Lastly, Aggrey Osore Muyayi testified as PW3. He adopted his witness statement dated 18th March 2022 and stated that he was a village elder in Lunza Sublocation and a neighbour to the applicant. That the suit property was occupied by both the applicant and the respondent, and that the applicant had been in occupation for more than 12 years. He further stated that Joseph Shikanda Juma was the applicant's husband. The applicant's case was thereby closed.
 7. The respondent testified as DW1 and adopted his affidavit which he swore on 29th November 2021 and filed in this matter on 14th September 2022. He deposed in the affidavit that he became the registered proprietor of the suit property on 3rd August 1995 having purchased it from Joseph Mbayi Nyangule on 17th June 1995. That he obtained vacant possession and used the suit property to the exclusion of everybody else including the applicant. That the suit property was the subject of another claim for adverse possession in Kakamega ELC No. 371 of 2013 (OS) filed by Joseph Shikanda Chuma who was the applicant's husband filed and that the said suit was dismissed on 26th July 2018.
 8. The respondent further deposed that he built a semi-permanent house on the suit property and that his son Ishmael Mwinyi, and his brothers Farijallah Masai and Ibrahim Khayundi were his caretakers on the suit property. That the applicant had never used the suit property peacefully since she together with her husband Joseph Shikanda Chuma and her children attempted to enter the suit property on 22nd December 2016 but were violently repulsed. The respondent produced copies of the documents listed as item number 1 to 7 in his list of documents dated 5th September 2022 as his exhibits.
 9. Ishmael Mwinyi Khayundi testified next as DW2 and adopted his affidavit which he swore on 30th October 2021 and filed in this matter on 14th September 2022. He deposed that on 24th December 2016, the applicant, together with her children, her husband Joseph Shikanda Chuma and five other persons went to the suit property to cultivate it but were forcefully stopped and in the process DW2 was injured. That a report was made at Butere Police Station and recorded as OB 23/24/12/2016.
 10. Lastly, Farijalah Maasayi Khayundi testified as DW3 and adopted his affidavit which he swore on 30th October 2021 and filed in this matter on 14th September 2022. He deposed that the respondent was his elder brother, and that the applicant was Joseph Shikanda Chuma's wife. That on 22nd December 2016, the applicant together with her husband Joseph Shikanda Chuma and her children attempted to forcefully enter the suit property to cultivate it but were ejected. He added that the applicant had not used the suit property peacefully and that there had been various reports made at Butere Police Station and recorded.
 11. The respondent's case was then closed. Parties thereafter filed and exchanged written submissions.



12. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the suit is *res judicata*, whether adverse possession has been established and whether the reliefs sought should issue.

13. *Res judicata* is a doctrine of general application which has found statutory expression in Section 7 of the [Civil Procedure Act](#) which 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.

14. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR and [Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others](#) [2018] eKLR.

15. There is no dispute that there have been previous proceedings in Kakamega ELC No. 371 of 2013 and that judgment was delivered in the said case on 26th July 2018. The judgment is reported as [Joseph Shikanda Chuma v Mohammed Omollo Khayundi](#) [2018] eKLR. It is not disputed that the respondent herein was a party to the said case. As regards Joseph Shikanda Chuma who was the plaintiff in the case, I note that even though the applicant herein denied that he was her husband, PW3 who was her own witness categorically stated that Joseph Shikanda Chuma was the applicant's husband. Suffice it to state that there is a very close relationship between the applicant herein and Joseph Shikanda Chuma. Pursuant to Explanation (6) of Section 7 of the [Civil Procedure Act](#), the applicant is deemed to have claimed adverse possession under Joseph Shikanda Chuma in Kakamega ELC No. 371 of 2013.

16. The opening paragraph in the judgment in Kakamega ELC No. 371 of 2013 states:

“This is the application of Joseph Shikanda Chuma who claims to be entitled to the land parcel No. Marama/lunza/1188 by adverse possession.”

Thus, there is no doubt that just as in the present case, adverse possession in respect of the parcel of land known as Marama/Lunza/1188 which is the suit property in the present case was in issue in Kakamega ELC No. 371 of 2013.

17. The applicant's and Joseph Shikanda Chuma's claim for adverse possession in respect of the suit property having been dismissed in Kakamega ELC No. 371 of 2013, she cannot be permitted to litigate the issue again. I see her current suit and prayers therein as cosmetic facelifts to the old dispute. See [E.T. v Attorney General & another](#) [2012] eKLR. I find that this suit is *res judicata*. That being the case, I need not determine the remaining issues for determination.

18. In the result, I strike out the applicant's case with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



No appearance for the Applicant

Mr Ojuro holding brief for Mr Luchivya for the Respondent

Court Assistant: E. Juma

