



Ekisa & 3 others v Ojwang & another (Environmental and Land Originating Summons E040 of 2024) [2025] KEELC 867 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E040 OF 2024
BN OLAO, J
FEBRUARY 27, 2025**

BETWEEN

**LINUS ORODE EKISA 1ST APPLICANT
EMMANUEL GEGE EKISA 2ND APPLICANT
LILIAN EKISA 3RD APPLICANT
DAVID GEEGE EKISA 4TH APPLICANT**

AND

**SAPHINA OJWANG 1ST DEFENDANT
NAPOLEON NAMDY NYONGESA 2ND DEFENDANT**

RULING

1. Linus Orode Ekisa, Emmanuel Gege Ekisa, Lilian Ekisa and David Geege Ekisa (the 1st to 4th Applicants) filed an Originating Summons dated 19th December 2024 directed at Maximinus Emodo Baraza, Osikuku Baraza Ekapolon, Grafas Isokaa Baraza, Victor Opiyo Mungao, Josephat Murono Tuloi, Robert Amugune and Emmanuel Euria (the 1st to 7th Respondents respectively) seeking the substantive remedy that they have acquired by way of adverse possession the land parcels No South Teso/Angoromo/18353, 18354, 18355, 18356, 18357 and 18358 (the suit lands) having been in open and notorious occupation thereof for a period exceeding twelve (12) years.
2. Simultaneously with that Originating Summons, the Applicants filed a Notice of Motion anchored under the provisions of Order 40 Rule 1 and Order 53 Rule 3 of the Civil Procedure Rules. They sought the following orders:
 1. Spent
 2. Spent



3. That a temporary order of injunction be and is hereby issued restraining the Respondents whether by themselves, their employees, agents, workers and/or servants from interfering with the Applicants' occupation and use of the land parcels NO South Teso/Angoromo/18353, 18354, 18355, 18356, 18357 and 18358 pending the hearing and final determination of the suit herein.
4. That the costs of this application be provided for.

The Motion is premised on the grounds set out therein and is supported by the affidavit of Emmanuel Gege Ekisa the 2nd Applicant herein.

3. The gravamen of the Motion and which is the subject of this ruling is that the Respondents have unlawfully and without the Applicants' knowledge or consent registered themselves as the owners of the suit land, entered onto the same and have started demarcating and allocating it to purchasers while the Applicants are in possession thereof. Every efforts by the Applicants to restrain the Respondents from trespassing onto the suit land and illegally alienating or selling it have been ignored and the Respondents are on the verge of disposing it to West Sugar Industry thus violating the Applicants' constitutional rights and hindered their quiet enjoyment and use of the same hence this application.

4. The following documents are annexed to the supporting affidavit:

1. Copy of Identity Card NO 30490163 belonging to the 2nd Applicant.
2. Copies of the Green Cards to the suit land registered in the names of the following Respondents:
 1. South Teso/Angoromo/18353 – 2nd Respondent
 2. South Teso/Angoromo/18354 – 1st Respondent
 3. South Teso/Angoromo/18355 – 3rd Respondent
 4. South Teso/Angoromo/18356 – 3rd, 4th and 5th Respondents
 5. South Teso/Angoromo/18357 – 2nd and 6th Respondents
 6. South Teso/Angoromo/18358 – 3rd and 7th Respondents

3. Photographs of homes.

The 4th, 5th, 6th and 7th Respondents filed a Notice of Preliminary Objection dated 13th January 2025 and a replying affidavit of Victor Opiyo Mung'ayo also dated 13th January 2025 in response to the Motion.

5. In the Notice of Preliminary Objection, the Respondents have pleaded as follows:

1. This suit is in breach of the sub judice rule under Section 6 of the *Civil Procedure Act* and a violation of the overriding objective under Section 1B of the *Civil Procedure Act* which requires that there be an efficient use of the available Judicial and Administrative resources for reasons that:
 - a. The Applicants have deliberately failed to disclose to this Court the existence of Busia Environment and Land Court case NO 187 of 2017 Josephat Obarasa Ekisa -v- Osiku Barasa Ekapolon & 2 others and Busia CMC ELC No E172 of 2024 Victor Opiyo Mungayo & Another -v- Linus & Another which matters are still pending before this Honourable Court for hearing and determination.



2. It is therefore clear that this suit is an abuse of the Court process and should be struck out.
6. In his replying affidavit, the 4th Respondent has deposed, inter alia, that this suit is sub judice as there is another suit namely Busia Environment and Land Court Case No 187 of 2017 Josephat Obarasa Ekisa -v- Osikuku Barasa Ekapolon & 2 others which is still pending before this Court for hearing and the suit land is a sub-division of the land, parcel No South Teso/Angorom/705 which belonged to the late Barasa Ekapolon (deceased).
7. That prior to his demise, the late Barasa Ekapolon had been sued by Santrino Madola Ekisa and Sebastiano Ekisa Geege (both deceased) vide Busia Environment and Land Court case No 187 of 2017 Josephat Obarasa -v- Osikuku Barasa Ekapolon & 2 others on allegations that the late Barasa Ekapolon had acquired land parcel No South Teso/Angorom/705 by fraud. That upon the demise of Santrino Madola Ekisa and Sebastiano Ekisa Geege, one Josephat Obarasa Ekisa took over the prosecution of the matter which is still pending. That all along, since 2017, the family of Barasa Ekapolon has been using the suit land as confirmed in the pleadings in Busia Environment and Land Court case No 187 of 2017 wherein Josephat Obarasa Ekisa sought an order to evict the Respondents from land parcel No South Teso/Angorom/705 and also introduced as interested parties Benjamin Pamba Ekisa, Benard Ekisa, Jackline Akinyi Ouma and Everline Omela Omuse. That the Applicants herein are related to both the plaintiffs and the Interested Parties in Busia Environment and Land Court case NO 187 of 2017. The 1st Applicant Linus Orode Ekisa is a son to Santrino Madola Ekisa, the 2nd Applicant is son to Josephat Obarasa Ekisa while the 4th Applicant is son to Benjamin Pamba Ekisa who are all parties in Busia Environment and Land Court case NO 187 of 2017.
8. That in October 2019 the Applicants together with the above-mentioned parties forcefully entered into the land parcel NO South Teso/Angoromo/705 with a view to claiming adverse possession. That was brought to the attention of the Court vide an application dated 11th October 2019 in Busia Environment and Land Court case No 187 of 2017. Interim orders of eviction and injunction were issued barring the Applicants herein from trespassing onto the land parcel NO South Teso/Angoromo/705 which has since been sub-divided to create the suit land. Upon being interfered with by the Applicants the 4th and 5th Respondents filed Busia CMC ELC Case No E172 of 2024 with a view to protecting their interest and orders of injunction were issued. Upon being served with the order of injunction and instead of filing a response, the Applicants rushed to file this suit. It is not true that the Applicants have been using the suit land since 1992 but have been doing so as recently as 11th December 2024 and 5th January 2025 as confirmed by the local Administration. The Applicants therefore have no right on the suit land and have been in contempt of Court orders by ignoring them. There is no valid ground to grant the orders sought.
9. The following documents have been annexed to the replying affidavit:
 1. Copy of Green Card for the land parcel No South Teso/Angorom/705.
 2. Copy of amended plaint filed in Busia ELC Case No 187 of 2017.
 3. Copy of order issued on 17th December 2024 in Busia CMC ELC Case No E172 of 2024.
 4. Copy of letter dated 6th November 2025 from the Chief Oludhe Location addressed to whom it may concern under reference South Teso/Angorom/18356.
 5. Copy of order issued on 8th January 2025 in Busia CMC ELC Case No E172 of 2024.
10. The 2nd Applicant filed a further affidavit dated 21st January 2025 in which he deposed, inter alia, that his uncle Santarino Madila Ekisa (now deceased) had filed Busia ELC Case No 187 of 2017 and had



appointed the firm of Okeyo Ochiel & Company Advocates to act for him. But as the said case was going on, it came to his knowledge that the 7th Respondent who is an Associate in the said firm had been registered as proprietor of the land parcel No South Teso/Angorom/18358 which is part of the land of Santrimo Madila Ekisa (deceased) and which he had instructed the firm of Okeyo Ochiel & Company Advocates to pursue. That when the Applicants tried to follow up the case in Busia ELC Case No 187 of 2017 with the firm of Okeyo Ochiel & Company Advocates, they were frustrated and realized that the Associate in the said firm had turned against them and had registered himself as owner of part of the land which the Applicants are pursuing. They therefore withdrew their instructions from the said firm and filed a notice to act in person. It is therefore unfair for the Respondents to claim that there is another suit in this Court when the Applicants' uncle has already withdrawn that suit. This application is merited.

11. The application has been canvassed by way of written submission. However, only Mr Ouma instructed by the firm of B. M. Ouma Advocates for the Applicants elected to file submissions. MR Okeyo Instructed by the firm of Okeyo Ochiel & Company Advocates for the Respondents elected not to file any submissions.
12. I have considered the Notice of Motion dated 19th December 2024, the rival affidavits, the Notice of Preliminary Objection dated 13th January 2025 and the submissions by Mr Ouma.
13. The Preliminary Objection dated 13th January 2025 is on a matter of law as it raises the issue of this suit being sub-judice. It therefore meets the threshold set out in the case of Mukisa Biscuit Manufacturing Company Ltd -v- West End Distributors LTD 1969 E.A 696 where it was held that a Preliminary Objection "consists of a point of law".
14. In order to determine whether infact this suit is res judicata, I have perused the pleadings in the cases cited. These are:
 1. Busia ELC Case No 187 of 2017 which is before this Court; and
 2. Busia CMC ELC Case No E172 of 2024 which is before the Chief Magistrate.

I shall now consider the pleadings in those cases including the parties.

1. Busia ELC Case No 187 of 2017:

15. In this case, the parties are Josephat Obarasa Ekisa suing as the legal Administrator to the Estate of Santrino Madola who was the legal Administrator to the Estate of Sebastiano Ekisa Ngege (as plaintiff) -V- Geore Oside Ekapoloni And Simona Mukhone Barasa sued as the legal Administrator to the Estate of Barasa Ekaboloni Auku, Osikuku Barasa Ekapoloni, Maximinus Emodo Barasa and Grifas Isokaa Barasa as defendants. Benjamin Pamba Ekisa, Benard Ekisa, Jackline Akinyi Ouma and Everline Omela Omuse are named as the 1st to 4th Interested Parties. That suit is coming up for hearing on 8th May 2025 before this Court and as per the further – re-amended plaint dated 16th December 2021, the subject of that suit is land parcel No South Teso/Angoromo/705. It is common knowledge from the Green Cards produced in this case, and now the subject of this ruling, that the said land parcel NO South Teso/Angoromo/705 has since been sub-divided to give rise to the land parcels No South Teso/Angoromo/18353, 18354, 18355, 18356, 18357 and 18358 which are the subject matter in this suit.
16. It is also clear from the un-rebutted averments of the 4th Respondent herein that the 1st Applicant is a son to Santrino Madola Ekisa whose Estate was represented by Josephat Obarasa Ekisa in Busia ELC Case No 187 of 2017. The 2nd Applicant is a son to Josephat Obarasa Ekisa while the 4th Applicant is a son to Benjamin Pamba Keya who are all parties in Busia ELC Case No 187 of 2017. In Busia ELC Case No 187 of 2017, the substantive remedy which the plaintiff seek is the cancellation of the title to



the land parcel No South Teso/Angoromo/705 so that the same can revert to Sebastiano Ekisa Ndege. Since the said land parcel No South Teso/Angoromo/705 has since mutated to create the suit land subject matter of this case, it is obvious that the subject matter in this case and in ELC Case No 187 of 2017 are the same. Any cancellation of the title to the land parcel No South Teso/Angoromo/705 in Busia ELC Case No 187 of 2017 will clearly have a bearing on the suit lands in this case. Clearly, this suit is res judicata Busia ELC Case No 187 of 2017. Counsel for the Applicants did not make any submissions on the issue of sub judice. Rather he confined himself to the application for temporary injunction to restrain the Respondents from interfering with the Applicants' occupation and use of the suit land. However, if the Preliminary Objection is up-held, that application for temporary injunction will become water under the bridge.

2. Busia CMC ELC Case No E172 of 2024

17. That case involves Victor Opiyo Mungayo and Josphat Murono Tuloi as plaintiffs against Linus Ekisa and Henry Ekisa as defendants. The subject matter is the land parcel No South Teso/Angoromo/18356 which is also among the subject matter in this case. The suit was filed on 17th December 2024 and as is already clear from the plaint, both Victor Opiyo Mung'ayo and Josephat Murono Tuloi who are the plaintiffs are also the 4th and 5th Respondents in this case while Linus Ekisa the 1st Defendant in that case is the 1st Applicant in this case. There can be no doubt in my mind that this suit is sub judice Busia CMC ELC Case No E172 of 2024.
18. The above un-disputed facts must be juxtaposed against the legal provisions and relevant precedents to fully comprehend the above.
19. The doctrine of sub judice is captured in Section 6 of the *Civil Procedure Act* as follows:

- 6: “No Court shall proceed with the trial of any suit or proceeding 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 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.” Emphasis mine.

There is no doubt that the two Courts handling Busia ELC Case No 187 of 2017 and Busia CMC ELC Case No E172 of 2024 are competent to handle the disputes before them. It is also common knowledge that both those two cases were filed on 4th December 2017 and 17th December 2024 respectively and were therefore filed before this suit which was filed on 27th January 2025. That being the un-disputed fact, then this case ought to be stayed. This is because, the Supreme Court in the Advisory Opinion in Kenya National Commission on Human Rights -v- A.g, Independent Electoral & Boundaries Commission & 16 others 2020 eKLR at paragraph 67 elaborates on the doctrine of sub-judice and said:

“The term ‘sub-judice’ is defined in Blacks 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 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.” Emphasis mine.

Upon evaluation of all the matters herein, I am persuaded that this case is sub judice Busia ELC Case No 187 of 2017 and Busia CMC ELC Case No E172 of 2024. As to what disposal orders I should make, I take the view that the best option is not to dismiss or strike out this suit but rather, taking the cue from the Supreme Court’s decision in Kenya National Commission On Human Rights -V- A.G. & others (supra), the better option is to stay this suit in order to await the determination to be made in the earlier suit(s). I will therefore not dismiss it as sought by the Respondents.

20. Having stayed this suit, it follows that I cannot interrogate the Notice of Motion by the Applicants seeking injunctive orders. It also must follow that the temporary ex parte orders of injunction granted on 22nd December 2024 must be vacated. In any case, they have already lapsed by effluxion of time.
21. The up-shot of all the above is that having considered the Preliminary Objection dated 13th January 2025 and the Notice of Motion dated 19th December 2024, I issue the following orders:
 1. This suit is sub-judice ELC Case No 187 of 2017 and CMC ELC Case No E172 of 2024. It is ordered stayed.
 2. The ex-parte orders of temporary injunction issued on 22nd December 2024 are vacated having also already lapsed by effluxion of time.
 3. This suit having been declared to be sub-judice, the Notice of Motion dated 19th December 2024 is not available for consideration.
 4. Costs to the 4th, 5th, 6th and 7th Respondents.

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025

RULING DATED, SIGNED AND DELIVERED ON THIS 27TH DAY OF FEBRUARY 2025 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025

