



REPUBLIC OF KENYA



Kateto & another v Mosiany (Enviromental and Land Originating Summons E009 of 2022) [2025] KEELC 866 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022
LC KOMINGOI, J
FEBRUARY 27, 2025**

BETWEEN

EDWARD TIPAPE KATETO 1ST APPLICANT

EMMANUEL KATORIA KATETO 2ND APPLICANT

AND

KAAKAI ENE NANKOO MOSIANY RESPONDENT

JUDGMENT

1. By the Originating Summons dated 17th May 2022 brought under Section 1A, 1B and 3A of the [Civil procedure Act](#); Order 37 Rule 7(1), (2) and (3) of the Civil Procedure Rules; and other enabling provisions, the Applicants seek:
 - i. To be declared by way of adverse possession as the legal owners of Property Kajiado/Dalalekutuk/3134.
 - ii. The Land Registrar do cancel the existing title and to register and issue new title deed for parcel Kajiado/Dalalekutuk/3134 in favour of Adeard Tipape Kateto and Emmanuel Katoria Kateto.
 - iii. Costs be provided for.
2. The Applicants in their Supporting Affidavit state that they have been in occupation of the suit property together with their families for over twenty five (25) years and the Respondent who is over eighty (80) years old has never evicted them despite being aware of their exclusive possession of the land.
3. In her Replying Affidavit and Further Affidavit 26th June 2023 and 22nd September 2023 respectively, the Respondent contested the claim stating that it was an abuse of the Court process and ought to be dismissed. This is because the suit is res judicata because the same issue was determined in Kajiado ELC



440 of 2017 between Kaakai Ene Nankoo Mosiany (the Respondent herein) vs Kateto Ole Kironki Miisia and 2 others and a judgement delivered by Justice Christine Ochieng' on 29th April 2020.

4. It is her case that as the Applicant in ELC 440 of 2017 one of the prayers was for her to be declared as the owner of property Kajiado/Dalalekutuk/3134 which had been erroneously registered in the names of two people being her and Kateto Ole Kironki. Upon hearing the case, the Court declared her as the legal owner of the suit property. Therefore, the grounds raised in this suit ought to have been raised and canvassed in the earlier suit. She also stated that Kateto Ole Kironki is the father of the Applicants in this current suit.
5. She also contested the claim for adverse possession on the grounds that the Applicants reside on the adjacent property; Kajiado/Dalalekutuk/3133 which is owned by their late father Kateto Ole Kironki and not on the suit property. She further stated that her late father Lengatu Raurau was the initial owner of the suit property and it devolved to her by transmission upon his demise following the Succession cause No. 14 of 2006. She became the registered owner on 23rd December 2011. She added that Kateto Ole Kironki who is her cousin had severally tried to divest her of the property which led to the filing of Kajiado ELC 440 of 2017.
6. She also state that the existence of the earlier suit was evidence that if the Applicants were at all occupying the property, then they cannot claim that their occupation had been uninterrupted. It is her case that the suit property was part of the Sajiloni Group Ranch until 8th April 2010 when it was registered in their favour and in her favour in 2011. Therefore, the claim for adverse possession could not stand as 12 years had not lapsed by the time this suit was filed in 2022. She also added that there was a boundary dispute between her and the Applicants' father. She urged that, this suit be dismissed and the Respondent be allowed to enjoy her property.

Evidence of the Applicants

7. PW1 Edward Tipape Kateto the 1st Applicant, adopted his Supporting Affidavit dated 18th May 2022 as part of his evidence and produced documents which were marked as P. Exhibit 1 to 4. He confirmed that the 2nd Applicant was his brother and sought that the prayers in the Originating Summons to be granted.
8. On cross examination he confirmed that he was familiar with Kateto Ole Kironki who is his father and that he was a party in ELC 440 of 2017. He stated that he was not aware that the judgement had been delivered. He stated that whereas he was aware of the suit, he did was not party to it and did not seek to be enjoined.
9. On re-examination he stated that this suit and ELC 440 of 2017 were different.
10. PW2 Ketente Swakei Morio, a boda boda rider and a resident of Sajiloni area adopted his witness statement as his evidence. He confirmed that he was familiar with the Applicants who had been residing on the suit property since birth.
11. On cross examination he stated that he has known the Applicants since they were born because their father was his friend. He stated that he also had land in Sajiloni although he could not recall its parcel number. He did not know the parcel number of the suit property.
12. PW3 Lemito Ole Shokino also adopted his witness statement as his evidence. He stated that he was a livestock farmer and a resident of Sajiloni.



13. On cross examination he stated that the Applicants were born about twenty (20) years ago on the suit property. He stated that he was familiar with their father Katelo Ole Kironki who was his friend. He confirmed that the said Katelo Ole Kironki had a case in this Court but was not aware of the outcome.

Evidence of the Respondent

14. DW1 Kaakai Ene Nankoo Mosiany adopted her Replying Affidavit as her evidence and produced the documents in her bundle of exhibits.
15. On cross examination she stated that she was a resident of Eiti Dalalekutuk. That she has lived there for several years and it was her marital home. She stated that although she was currently not a resident of Sajiloni, she was the owner of the suit property which is her ancestral home. She confirmed that she knew the Applicants as well as their father Kateto Ole Kironki Miisia.
16. At the close of the oral testimonies parties tendered final written submissions.

The Applicants' Submissions

17. On whether this suit was res judicata counsel only submitted that this was enshrined under Section 7 of the *Civil Procedure Act* and cited cases supporting the claim for adverse possession.
18. On whether the Applicants were entitled to be registered owners of the suit property, counsel submitted that they had resided on the suit property together with the families for over 25 years thus meeting the set threshold under Section 38 of the *Limitation of Actions Act* that is being in open and continuous possession of the property for over 12 years as was held in Christopher Mbayi & another vs Aggrey Makomere [2022] eKLR and Tabitha Waitherero Kimani vs Joshua Ng'ang'a [2017] eKLR. Therefore, the Respondent's title should be cancelled in their favour and costs of this suit be borne by the Respondent.

The Respondent's Submissions

19. Counsel submitted that this suit was res judicata contrary to Section 7 of the *Civil Procedure Act* because the issue at hand had already been heard and determined in Kajiado ELC 440 of 2017. Therefore, the Defendant in suit 440 of 2017 Kateto Ole Kironki was trying to re-litigate already concluded issues through his sons the Applicants. Counsel submitted that the suit property was the same and the Applicants in this suit Katelo Ole Kironki's sons who was a party to the said suit 440 of 2017. To support this argument, reference was made to Kazungu Mramba & 45 others vs St. Elizabeth Academy-Karen Ltd & 2 others [2022] eKLR.
20. On whether the Applicants have met the legal threshold for adverse possession, counsel submitted that the Respondent was first registered as the owner on 14th July 2011. Therefore by 19th May 2022, the 12 year period which is the required period for a claim of adverse possession had not lapsed. Adding that their occupation was never open, notorious or adverse citing Chevron (K) Ltd vs Harrison Charo Wa Shutu (2016) eKLR and Wambugu Njuguna [1983] KLR 172. As such the suit should be dismissed with costs to the Respondent.

Analysis and Determination

21. I have considered the pleadings, the evidence on record, submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the Applicants have proved their claim and entitlement for adverse possession;



- ii. Whether the suit is res judicata;
 - iii. What orders should issue?;
 - iv. Who should bear costs of this suit?
22. This Court shall first address the issue of res judicata which a question is touching on this Court's jurisdiction as it has the potential of disposing of the other issues raised. This doctrine bars courts from re-hearing cases already conclusively determined between the same parties or their representatives. This principle ensures finality in litigation, efficient use of judicial resources and bars parties from litigating by instalments in a quest to get favourable outcomes.
23. In this suit, the Applicants claim to have resided on property Kajiado/Dalalekutuk/3134 since birth which is for over 25 years and are entitled to the property by way of adverse possession by virtue of Section 37 of the *Limitation of Actions Act*.
24. The Respondent has contested this claim for being res judicata on grounds that a similar suit pertaining the same subject matter between the same parties and their representatives has been previously determined. The said suit is Kajiado ELC 440 of 2017 (OS). The Supreme Court in Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR held:
- “(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction.”
25. To ascertain whether this suit is res judicata, this court has reviewed the said suit 440 of 2017 which was first filed as Machakos ELC Case No. 146 of 2015(OS) between Kaakai Ene Nankoo Mosiany (the Respondent herein) vs Kateto Ole Kironki Miisia and 2 others. The suit was later transferred to this Court and re-named as Kajiado ELC No. 440 of 2017. It has been confirmed by the Applicants herein that Kateto Ole Kironki Miisia, is their father.
26. In ELC 440 of 2017, Kaakai Ene Nankoo sought to be declared the legal owner of property Kajiado/Dalalekutuk/3134 (the suit property herein) on grounds that it had been erroneously registered in the names of two people that is herself and Kateto Ole Kironki . She claimed that the land belonged to her late father Lengatu Ole Raurau and upon his demise, it devolved to her and supported this by Grant of letters of administration vide SRM Kajiado Succession No. 14 of 2006. She also sought that Ole Kiroki's name be deleted from the register and the title in his name be cancelled.
27. In the judgement dated 29th April 2020, it is indicated that Ole Kiroki in his Replying Affidavit contesting Kaakai ene Nankoo Mosiany's claim stated that he had been residing on the suit property which belonged to his uncle (Kaakai's father) since he was a child and he was thus entitled to it by way of adverse possession because she had never resided on it. Justice C. Ochieng, in her judgement found that Kaakai Ene Nankoo Mosiany who was the daughter of the late Lengatu Ole Raurau was the beneficial owner of the suit property and allowed the Originating Summons dated 14th May 2015 and declared her the lawful owner of property Kajiado/Dalalekutuk/3134.
28. The doctrine of res judicata is codified under Section 7 of the *Civil Procedure Act* 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.”

29. This Section goes on to outline six grounds which should be considered in determining the question of res judicata as follows:

“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.”

30. From the case *Kajiado ELC 440 of 2017* which I have given a brief summary herein above, it is not in contention that the suit property in that case and in this current case being *Kajiado/Dalalekutuk/3134* is one and the same. It is also not in contention that *Kateto Ole Kironki* who was the 1st Respondent in case 440 of 2017 is the 1st and 2nd Applicants father in this suit. It is also not in contention that the subject matter of both suits is the same with *Kateto Ole Kironki* and his sons claiming to be owners of property *Kajiado/Dalalekutuk/3134*. This issue was clearly put to rest by Justice C. Ochieng in *ELC 440 of 2017*. In this regard, the Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate (Supra)* went on to hold:

“(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

31. However, it seems like the said *Kateto Ole Kironki* dissatisfied with that decision sought to have a second bite at the cherry by instituting another suit through his sons which should be shunned upon as



was held by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) where it was stated;

“ 334. ... In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”

32. From the foregoing, I find that this suit is res judicata having been conclusively determined in Kajiado ELC Case No. 440 of 2017. The Applicants therefore have no merit in seeking to be declared as owners of Kajiado/Delalekutuk/3134 by way of Adverse Possession.

33. This suit is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF FEBRUARY 2025.

L. KOMNGOI

JUDGE

In the presence of

N/A for the Applicants.

Mr. Ochieng for the Respondent.

Court Assistant – Mutisya.

