



**Okombo v Ajwang (Environment & Land Case E010 of 2023)
[2024] KEELC 1387 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E010 OF 2023**

GMA ONGONDO, J

MARCH 12, 2024

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF THE REGISTERED LAND ACT
CAP 300 LAWS OF KENYA (NOW REPEPEALED)**

AND

IN THE MATTER OF ORDER 37 RULE 7 AND 14 OF THE CIVIL PROCEDURE RULES.

AND

**IN THE MATTER OF APPLICATION FOR DECLARATION OF ACQUISITION
BY ADVERSE POSSESSION OF LAND REGISTERED UNDER LAND ACT**

BETWEEN

JOHN ODERO OKOMBO PLAINTIFF

AND

SAMSON OOKO AJWANG DEFENDANT

RULING

1. The instant ruling is in respect of a preliminary objection on a point of law namely that this suit is res judicata as pleaded in the replying affidavit sworn on 3rd July 2023 by the defendant represented by Robert Ochieng Advocates.



2. At paragraphs 8, 9, 10, 14 and 15 of the said affidavit, the defendant averred;

- “(8) That sometime in March 1995, the Plaintiff instituted suit No. 125/1995 in the High Court at Kisii. The matter was later dismissed for want of prosecution.
- (9) That pursuant to suit No. 100/2008 consolidated with Suit No. 10 of 2008 the court issued an order of eviction of the Plaintiff from the Land Parcel number Kanyamwa/Kochieng/Omungu/Kakaeta/169 (the suit land). The plaintiff has been evicted twice from the suit land, however, he still insists on residing thereon.
- (10) That the plaintiff instituted ELC case No. 21 of 2020, before the Principal Magistrate Court at Ndhiwa, the same subject matter, wherein the court delivered a ruling stating that the matter is res judicata and proceeded to strike out the entire suit.
- (14) That the suit land has been subject of litigation in several courts and the courts have continued to determine the same in my favour, and the plaintiff continues to forum shop and approach several courts which unreasonable causes of action for the same.
- (15) That the best of my knowledge and belief and pursuant to Article 159(2) of the Constitution of Kenya, litigation must surely come to an end and matters finally heard and determined”.

3. In *Mukisa Biscuit Manufacturing Company Ltdv West End Distributors* (1969) EA 696, the Court of Appeal reasoned that;

“.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit.....”

4. The plaintiff commenced this suit by way of an originating summons dated 23rd May 2023 pursuant to Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 that Rispa Obonyo Ajwang the mother of the defendant was erroneously registered on the land parcel number Kanyamwa/Kachieng/Kakaeta/169 for determination of the following questions;

- a. Whether the plaintiff settled on the land parcel No. Kanyamwa/Kochieng/Kakaeta/1152 which was divided from the land parcel No.Kanyamwa/Kochieng/Komungu/Kakaeta/168. (The suit land herein) and in the year 1973 before adjudication and registration.
- b. Whether the suit land was registered in the plaintiff father’s name and settled on it until the time of his demise and even buried on the same land.
- c. Whether the defendant was present when the plaintiff was settling on the suit land after inheriting from his father.
- d. Whether the defendant should be compelled to leave the suit land which was mistakenly registered in his mother’s name during the demarcation period by the plaintiff failure which the court administrator does singe the necessary documents to enable the Land Registrar HomaBay County to show up and held the court with the land history.



- e. Whether the plaintiff has quietly, openly, peacefully and without any disturbance occupied the suit land for a period of more than 35 years unchallenged.
 - f. Whether an injunction should issue against the defendant, their agents, servants or anybody deriving authority from them, restraining them from evicting, dispossessing or in any way interfering with the plaintiff peaceful occupation, use and quiet enjoyment of the suit land.
 - g. Whether the said occupation and possession of land parcel No. Kanyamwa/Kochieng/Komungu/Kakaeta/1152 and the suit land can now amount adverse possession and if so, what is the effect thereof.
 - h. That such orders be issued as the Honourable court may attain the ends of justice.
5. By a further replying affidavit sworn on 20th November 2023, the plaintiff asserted, inter alia, that the suit land is his father's estate which was subdivided and he was given LR No. Kanyamwa/kochieng/Komungu/Kakaeta/1152 which the defendant's parents merged with LR No. Kanyamwa/Kochieng/Komungu/Kaketa/169. That he has acquired the suit land by way of adverse possession.
 6. In paragraph 18 of the further affidavit, he deposed;

“That in response to the contents of paragraph 10 of the replying affidavit by the defendant, I wish to state that there have been several suits filed in respect to the suit land which started way back in the year 1962 when my father-initiated Land Case No. 54 of 1962 at Ndhiwa law courts and the judgment was delivered in favour of my father and the defendant's father appealed against the judgment vide Kisumu High Court Civil Appeal No. 5 of 1970 which was dismissed and he was ordered to vacate the suit land which order he refused to obey and/or comply with and the subsequent cases at Kisii High Court were not heard and finalized on merit”.
 7. It is important to note that a preliminary objection is a threshold question and has been taken at inception. It calls for a definitive, determinative and prompt pronouncement as held in *Kakuta Maimai Hamisiv Peris Pesi Tobiko & 2 others* (2013) eKLR.
 8. On that account, the preliminary objection was heard by both oral and written submissions as discerned in the court's directions of 12th February 2024.
 9. Accordingly, Mr. Robert Ochieng learned counsel for the defendant orally submitted on 12th February 2024 as follows;

“I pray that the court considers this suit res judicata. May the court look at paragraphs 8, 9, 10, 14 and 15 of the defendant's replying affidavit sworn on 3rd July 2023.”
 10. In the plaintiff's submissions dated 26th February 2024, reference was made to the parties' respective pleadings in this matter and section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and that the elements of res judicata are; re-litigation, same suit or issues or cause of action, same parties or closely related parties. The plaintiff submitted in part that the former suits were not determined on merits. He cited the case of *Hezron Kamau Gichuru & 6 others v Richardson Kipkoach Bundotich & 5 others* (2021) KLR, among others and urged the court to dismiss the defendant's preliminary objection and hear this suit on merit.
 11. In the foregone, the issues for discussion relate to;
 - a. Whether this suit is res judicata?



- b. Subject to issue (a) above, what orders can this court make to meet the ends of justice?
12. The principle of Res judicata is rooted in section 7 of the *Civil Procedure Act* (Supra) and the essential elements of the principle as set out in the said section, are borne in mind herein.
13. Similarly, in *Black's Law Dictionary* 10th Edition at page 1504, the term "res Judicata" means;
 - a. An issue that has been definitively settled by judicial decision.
 - b. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not-raised in the first suit.
14. The three essential elements of res judicata principle are stated thereunder as follows;
 - a. An earlier decision on the issue,
 - b. A final judgment on merits and
 - c. The involvement of the same parties, or parties in privity with the original parties.
15. Notably, in Kisii HCC NO. 125 of 1995, the plaintiff and Amolo Opiyo sued the defendant's late mother, Risper Obonyo Ajwang. The suit related to the suit and it was dismissed with costs to be borne by the plaintiff on 1st October 2001.
16. By the court's ruling rendered on 11th June 2021 in Ndhiwa PMC Environment & Land Case No. 21 of 2020, the plaintiff sued the defendant, Samson Ooko Ajwang (Sued as Administrator of the Estate of Risper Obonyo Ajwang-Deceased) and County Land Registrar Homa Bay) and the suit was found to be res judicata. The same involved the suit land and was struck out with costs to the 1st defendant on 1st June 2021.
17. In Kisii HCCC No. 100 of 2008, a consent judgment was entered on 13th July 2010 as revealed in the Ndhiwa case as noted in paragraph 16 hereinabove. The said judgment can only be set aside on the same grounds as would justify the setting aside a contract as held in *Brooke Bond Liebeg (T) Ltdv Mallya* (1975) EA 266 and *Flora Wasikev Destimo Wamboko* (1988) KLR 429. There is no revelation of grounds such as coercion, fraud or undue influence in regard to the terms of the consent judgment as noted in *National Bank of Kenya Ltdv Pipe Plastic Samkolit Ltd and another* (2002) EA 503.
18. Further, there is a ruling delivered in Kisii Environment and Land Court Misc Application number 313 of 2012 as per the defendant's list of documents dated 21st August 2020 filed at the said Ndhiwa case. By the ruling, an application by way of a notice of motion dated 27th December 2012 for review of the consent judgment, was dismissed with costs on 27th June 2014.
19. The entire replying affidavit, the originating summons, the further affidavit and the defendant's submissions reveal that the same dispute involving the same parties and the suit land, has been litigated and determined by courts of competent jurisdiction. Therefore, this suit is an abuse of the process of the court as litigation cannot be endless.
20. The cardinal principle is that litigation has to come to an end; see Halsbury's Laws of England 4th Edition Volume 22 page 273.
21. In conclusion, it is the considered view of this court that the suit is res judicata as noted in Black's Law Dictionary and section 7 of the *Civil Procedure Act* (both supra). I proceed to uphold the preliminary objection captured in the defendant's replying affidavit at paragraphs 8, 9, 10,14 and 15.



22. A fortiori, this suit generated by way of an originating, summons dated 23rd May 2023, be and is hereby dismissed with costs to the defendant.

23. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 12TH DAY OF MARCH 2024.

G.M. A ONG'ONDO

JUDGE

PRESENT;

- a. The Plaintiff in person.
- b. Mr. Robert Ochieng learned counsel for the defendant.
- c. Court Assistant, T. Luanga

