



**Oduor & another v Oduor (Environmental and Land Originating Summons  
E008 of 2022) [2024] KEELC 3410 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3410 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2022**

**AY KOROSS, J**

**APRIL 25, 2024**

**BETWEEN**

**MORNICA AGOLA ODUOR ..... 1<sup>ST</sup> PLAINTIFF**

**CONSOLATA ATIENO ODUOR ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MELITUS OLUOCH ODERO ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiffs are widows of Wilson Oduor Ouma (Wilson) and they have filed the originating summons ('OS') dated 7/06/2022 against the defendant.
2. The plaintiffs' claim of adverse possession is in respect of a portion of 5.6 ha. (disputed portion) of land parcel no. Uholo/Ugunja/264 (suit property) which is currently registered in the defendant's name.
3. It is noted prior to such registration, Wilson at one time had registered interests over a subdivision of the suit property. Nonetheless, his interests were cancelled vide a decision rendered on 19/08/2013 in Kisumu HCCC 69 "B" of 1996 (previous case). Accordingly, the previous case led to a reversion of the suit property into the defendant's name.
4. In the OS, the plaintiffs have raised the following issues for resolution by this court: -
  - a. Whether they have been in peaceful occupation, use and possession of the disputed portion and whether title therein should vest in them.
  - b. Whether they have overriding interests under Section 28 (a) (c) (e) and (j) of the [Land Registration Act](#).



- c. Whether they have been in adverse possession for a period of over 12 years and the defendant's title extinguished by operation of law.
  - d. If issues (a) (b) and (c) are in the affirmative, whether Siaya county/district land registrar should be directed to register the disputed portion in the plaintiffs' names.
  - e. Whether the plaintiffs are entitled to costs.
5. The originating summons is premised on the supporting affidavit of the plaintiffs Mornica Agola Oduor and Consolata Atieno Oduor which they deposed on 7/06/2022. In reply to the OS, the defendant Melitus Oluoch Odero filed a replying affidavit deposed on 17/08/2022.
  6. The suit proceeded by viva voce evidence and the parties' respective cases and evidences have been summarized in this judgment.

#### **Plaintiffs' evidence.**

7. The 2<sup>nd</sup> plaintiff testified as PW1 and adopted her witness statement as her evidence in chief. It is her testimony she entered the disputed portion in 1972 which is 50 years ago whilst the 1<sup>st</sup> plaintiff entered it in 1960 which is 62 years ago.
8. It is her testimony their occupancy since entry to the disputed portion has been peaceful, quiet and without interruption and the remainder of the suit property which measures 23 ha is occupied by other 3<sup>rd</sup> parties. She states the defendant has never occupied or utilized the suit property in any way.
9. To support her case, she produced title to the suit property, certificate of official search and photographs which ostensibly proves their occupancy.
10. On cross examination, it is her testimony she entered the suit property by virtue of her marriage to Wilson and she is privy of the previous case.
11. She testified that unfortunately, she does not know the outcome of the previous case and had she been aware, she could not have filed the instant suit. She asserts her claim in the disputed portion is derived from the interests Wilson held over the suit property.

#### **Defendant's evidence**

12. The defendant testified as DW1 and relied on his witness statement as his evidence in chief. It is his evidence that in the previous case, he was the plaintiff whereby Wilson was one of the defendants.
13. He testified that having obtained judgment in his favour, titles of the subdivisions that had been irregularly derived from the suit property were cancelled and title reverted to him. According to him, Wilson's widows could not come back and claim the disputed portion.
14. He stated in addition, the plaintiffs have not met the ingredients of adverse possession and even if the plaintiffs occupy a portion of the disputed portion, it was interfered with by the court cases. On cross examination, he testified he does not live on the suit property.
15. George Oduol Opondo who is an acting chief and led the defendant's evidence as DW2 stated the plaintiffs are known to him and they are Wilson's widows.
16. Upon conclusion of hearing parties' respective cases and closing them, parties were directed to file submissions and in particular to address the court on the principle of res judicata.



17. Both counsels complied with M/s. Ken Omollo & Co. Advocates which firm is on record for the plaintiffs filing theirs dated 13/12/2023. Mr. Charles Onyango who is on record for the defendant filed his which were dated 9/02/2024.

### **Plaintiffs' submissions**

18. The plaintiffs' submissions identify 2 issues as arising for determination; adverse possession and res judicata.
19. On the 1<sup>st</sup> issue, counsel submits the plaintiffs have met the elements of adverse possession and on the 2<sup>nd</sup> issue, counsel submits the doctrine of res judicata is found in Section 7 of the *Civil Procedure Act* and counsel argues that though it is undisputed there were previous proceedings, the other ingredients of the doctrine have not been met.
20. It is counsel's argument the previous suit was between different parties, the claim therein was on ownership whilst the current suit is on adverse possession and issues in the previous suit have not been raised in the instant suit.

### **Defendant's submissions**

21. The defendant's submissions raise identical issues as the plaintiffs'. On the 1<sup>st</sup> issue of adverse possession, counsel submits the plaintiffs have not met the threshold because of the myriad of court cases and places reliance on several authorities including *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased))* [2022] eKLR.
22. On the issue of res judicata and citing Section 7 of the *Civil Procedure Act*, counsel submits the plaintiffs' argument that the suit is not res judicata is untenable. In giving a history of suits between parties, counsel submits the previous suits involved the suit property and title is the same. To buttress his argument, counsel relies on the Court of Appeal decision of *Independent and Electoral Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR.

### **Undisputed facts**

23. From parties' evidence and pleadings, it is undisputed there were previous proceedings between the defendant herein and Wilson, the plaintiffs occupy a portion of the suit property and the defendant does not occupy it.

### **Issues for determination**

24. The court has carefully read and considered parties' pleadings, adduced evidence, submissions, provisions of law and authorities cited and establishes the issues arising for determination are;
- a. Whether the suit is res judicata.
  - b. Whether the previous suit barred the plaintiffs from lodging claims against the defendant.
  - c. If either (a) or (b) or both are in the negative, whether the plaintiffs have met the threshold for grant of orders of adverse possession.
  - d. What orders should this court issue including an order as to costs of the suit?



## Analysis and determination

25. Having identified the issues that arise for determination that were earlier illustrated in this judgment, these issues shall be addressed consecutively:-

### a. Whether the suit is res judicata.

26. The legal framework of the doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#) which stipulates 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.”

27. For the doctrine of res judicata to suffice, it must be on a previous suit in which the matter is in issue, the parties are the same or litigating under the same title, a competent court heard the matter in issue and the issue has been raised once again in a fresh suit.

28. This court agrees with Mr. Onyango that the essence of the doctrine is that it bars a party from relitigating matters already determined on facts by a competent court. It brings litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits.

29. The intent of the doctrine is aptly summarized by the Supreme Court of Kenya decision of [John Florence Maritime Services Limited & another vs. Cabinet Secretary, Transport and Infrastructure & 3 others](#) [2021] eKLR as follows: -

“It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest publicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
- (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.”

30. Since res judicata is a matter of fact, I am called to revisit and interrogate the previous case since it determined the dispute between the defendant herein who was then the plaintiff and Wilson who was a co-defendant in the previous case.

31. Thus, in doing so, it will seek to establish if the current case is res judicata. The previous case has significant impact on the findings of this court on all the issues that arise for determination as shall be confirmed in this judgment.

32. During hearing of the current case, the defendant produced the judgment of the previous case and in this decision, the court held thus: -

“I find the original first defendant held the land subject matter in trust for the heirs of his friend Odero Oluoch; the plaintiff’s father...”



The said defendant knowing well that the property belonged to the family of Odero Oluoch in keeping with Luo custom and having fraudulently registered himself as the owner was fraudulent and in breach of trust when he subdivided, gave portions of the same to his family and sold to third parties and especially so when he knew that there were existing dispute (sic) between him and the family of Odero Oluoch.

...the court directs and orders that all portions subdivided from the original Title No. Uholo/Ugunja/264 and being held by the defendants do revert back to the plaintiff as the sole heir of Odero Oluoch.”

33. Accordingly, having outlined the law and outcome of the previous case, I will now apply the principles set out in Section 7 of the *Civil Procedure Act* to the instant case. However, since it is undisputed the previous suit was heard and determined on merits by a competent court, the 1<sup>st</sup> principle will not be analysed.
34. The 2<sup>nd</sup> principle to test is whether the former suit is between the same parties or parties under whom any of the parties claim. Even if in this case the plaintiffs are different, they are Wilson’s wives who was a co – defendant in the former suit. Further, PW1 admitted her rights over the suit property were derived from Wilson.
35. It is not lost to this court the plaintiffs in this case have by craft conjured new parties in this suit for purposes of circumventing res judicata. By explanation 6 of Section 7 of the *Civil Procedure Act*, their allegation that they are new parties cannot pass the test. This explanation 6 provides as follows: -

“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.”
36. Wilson having litigated in the former suit; his wives and descendants were estopped from filing a subsequent suit since they derived their rights and interests through him.
37. The 3<sup>rd</sup> principle is for the court to establish if the parties are litigating under the same title. In both cases, Wilson and the plaintiffs approached this court as owners and occupiers of the suit property. It is therefore clear that the parties are litigating under the same title.
38. The 4<sup>th</sup> and 5<sup>th</sup> principles are whether the issues are the same and whether the issues that have been brought up in the instant case were dealt with in the former suit. As evident from the further amended plaint of the previous case which was produced before this court, the instant defendant’s claim was on ownership, breach of trust and fraud.
39. The instant suit is on ownership and possession. The claims in the previous suit and apparently this suit are very thin. Although by explanation 4 of Section 7 of the *Civil Procedure Act*, Wilson was required to bring his entire grounds of defence in the previous case failure of which, he and people claiming through him were estopped from lodging a subsequent suit against the defendant herein. This explanation 4 states: -

“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.”
40. However, it is noted the defence of adverse possession was not available to Wilson in the previous suit. This is because he was by then, a registered owner of one of the subdivisions of the suit property.



41. Since it settled law claims of adverse possession arise against registered owners, it was not tenable for Wilson to raise the issue of adverse possession in his defence. On this, I adopt the position held in the case of *Henderson -v- Henderson* 1843 67 E.R. 313 that is cited with approval in *Onyango v Ochiemo* (Environment & Land Case E008 of 2022) [2023] KEELC 18938 (KLR) (18 July 2023) (Ruling) which held thus: -

“... where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time...”

Therefore, it is on this premise alone that I find the instant suit is not *res judicata*.

**b Whether the previous suit barred the plaintiffs from lodging claims against the defendant.**

42. The plaintiffs are bound by the equitable maxim of *nullus in domino suo capere potest de injuria sua propria* which is explicated by the decision of the Supreme Court of India in *Union of India & Ors v Major General Madan Lal Yadav* (1996) AIR 1340 which is cited in the Court of Appeal decision of *Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchellah & 2 others* [2018] eKLR thus: -

“...*nullus in domino suo capere potest de injuria sua propria* - meaning no man can take advantage of his own wrong”

43. This maxim is further enunciated in the Court of Appeal decision of *Kinluck Holdings Limited v Mint Holdings Limited & another* [2019] eKLR as follows: -

“Clearly, the conduct of the 1st respondent smacks of bad faith, since it had breached its obligation, and thereafter sought to benefit from its unlawful conduct. The law recognizes, and we reiterate that no man shall be allowed to benefit from his/her wrong doing with a view to prejudicing or injuring the rights and interests of another party.”

44. The extract of the previous case is earlier highlighted in this judgement and from it, Wilson was found to have acquired a subdivision of the suit property by fraudulent means. In compliance with the said decision, the land registrar cancelled Wilson’s registration together with that of several other third parties which consequently led to reversion of the suit property into the defendant’s name.
45. With all due respect to the plaintiffs who derive their interests from Wilson, it is most absurd that they have now come to this court as alleged adverse possessors and seek to benefit from Wilson’s wrongs. Wilson having so acquired a portion of the suit property by fraudulent means, it is unconscionable the plaintiffs have the audacity of approaching this court.
46. A countenance of the plaintiffs’ behaviour would be illogical and ridiculous and I say so for good reason. Wilson fraudulently registered a subdivision of the suit property into his name to the detriment of the defendant and it is audacious for his wives- the plaintiffs to come back to this court to seek the same parcel of land that their husband fraudulently acquired.



47. Thus, because of the findings of the previous case on Wilson's fraudulent acquisition of a portion of the suit property, I find the plaintiffs could not benefit from the fraud by lodging this claim. This finding renders a determination on the issue of adverse possession unnecessary.

**c. What orders should this court issue including an order as to costs of the suit?**

48. Having evaluated the adduced evidence and considered the applicable law, I find the plaintiffs could not benefit from the wrongs committed over the suit property by their husband Wilson.

49. For the foregoing reasons and findings, I dismiss the plaintiffs' claim of adverse possession and because it is trite law that costs follow the event, I award costs to the defendant.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 25<sup>TH</sup> DAY OF APRIL 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**25/4/2024**

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

N/A for the plaintiff

Mr. Onyango for the defendant

Court assistant: Ishmael Orwa

