



**Atika & another v Ombat (Enviromental and Land Originating Summons
E009 of 2023) [2024] KEELC 3456 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023
GMA ONGONDO, J
APRIL 11, 2024**

BETWEEN

RHODA AKOTH ATIKA 1ST APPLICANT

WICLIFFE ONYANGO OGWEL 2ND APPLICANT

AND

JOHN HARRISON OMBAT RESPONDENT

RULING

1. The defendant through C' Ombat & Ombat Company Advocates raised a preliminary objection dated 12th February 2024 to this suit on grounds that;
 - a. The suit by the 1st plaintiff/applicant against the defendant/respondent is *Res Judicata* as the same issues being canvassed herein have been fully addressed in a former suit between the 1st plaintiff and the defendant being Chief Magistrate's court civil land case number 28 of 2022 at Oyugis; the plaintiff versus the defendant & 2 others and High Court ELC Appeal No. E010 OF 2023; The plaintiff versus the defendant & 2 others.
 - b. The Honourable court having pronounced itself in Chief Magistrate's Court civil land case No. 28 of 2022 Oyugis and High Court ELC Appeal No. E010 OF 2023 as stated in (a) above, is *functus officio*.
 - c. The suit raises no reasonable cause of action against the defendant.
2. The preliminary objection was heard by written submissions further to the court's directions given on 12th February 2024.
3. The defendant's counsel failed to file submissions regarding the preliminary objection.



4. On the other hand, learned counsel for the applicant filed submissions dated 28th February 2024 and implored the court to dismiss the preliminary objection with costs. That the same does not meet the tenets of *res judicata* principle under section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. That the said principle is founded upon public policy and end to litigation.
5. Further, counsel stated brief facts of the suit, Oyugis Senior Principal Magistrate’s Court Environment and Land case number E028 of 2022 where the 1st applicant sued the respondent in respect of LR No. Central Karachuonyo/Kotieno 874 but was struck out on the basis that the court was devoid of jurisdiction thereof. That no party ventilated issues raised in the originating summons. That thus, the preliminary objection be dismissed with costs. Reliance was made to [Nicholas Njeru-v-The Honourable Attorney General](#) (2013) eKLR.
6. The applicant’s counsel L. K Obwanda and Company Advocates filed a notice of appointment of advocates for the applicant and duly served on the respondent’s counsel with submissions on the preliminary objection through on c.ombatadvocates@gmail.com as per the affidavit of service sworn on 4th March 2024 by learned counsel Kimberly Ashley.
7. In addition, on 18th March 2024, Ms L.K Obwanda alongside O.J Okoth learned counsel for the plaintiffs orally submitted thus;

“ Ms Ombat did request for more time.....herein are on adverse possession.....”

8. It must be noted that the plaintiffs through O.J Okoth and Company Advocates generated this suit by way of an originating summons dated 4th December 2023 claim to have acquired title through adverse possession of the whole of that parcel of land known as Central Karachuonyo/Kotieno/874, the suit property herein. In summary, they state that the suit land was originally adjudicated in the name of Rispa Juma Atika (Deceased) as the true owner in 1980s. That the 1st and 2nd plaintiffs are the daughter and the grandson to the deceased respectively. That the defendant unlawfully got registered the suit land in his name and attempted to fence the same. Therefore, it precipitated this suit.
9. I take into account the preliminary objection and the originating summons and the submissions on record. So, is the preliminary objection merited?
10. The Preliminary Objection contains points 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; see *Mukisa Biscuit Manufacturing Co. Ltd-v-West End Distributors* 1969 EA 696T
11. The Principles of “*resjudicata*” and “*functus officio*” were raised in the Preliminary Objection. The latter is anchored in section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
12. 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 the claim arising from the same transaction or series of transactions that could have been-but was not raised in the first suit.
13. The three essential elements set out thereunder are;
 - a. An earlier decision on the issue.
 - b. A final judgment on the merits and



- c. The involvement of the same parties or parties in privity with the original parties.
14. The term “*Functus officio*” is defined in *Black’s Law Dictionary* (*supra*) at page 787 as follows;
“Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
15. The cardinal principle is that litigation has to come to an end; see *Halsbury’s Laws of England* 94th Edition) Volume 22 page 273.
16. The present Preliminary Objection refers to Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. 28 of 2022 which involved a total of five parties. The said suit was not determined on merit.
17. Indeed, the Preliminary Objection was raised in line with *Mukisa Biscuit case* (*supra*) but has not met the threshold in *Black’s Law Dictionary* (*supra*) as noted in paragraphs 13 and 14 hereinabove. The same fails.
18. Wherefore, the Preliminary Objection is devoid of merit and is hereby dismissed.
19. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 11TH DAY OF APRIL 2024.

G.M.A ONG’ONDO

JUDGE

Present

Ms Ombat learned counsel for the respondent.

Ms L.K Obwanda and Okoth learned Counsel for the applicants.

Mutiva and Obunga, court assistants.

