



**Bunde v Osoro & 2 others (Environment and Land Appeal  
E017 of 2022) [2024] KEELC 5788 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5788 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E017 OF 2022  
GMA ONGONDO, J  
JULY 23, 2024**

**BETWEEN**

**JOSEPH ODHIAMBO BUNDE ..... APPELLANT**

**AND**

**JOHN OPIYO OSORO ..... 1<sup>ST</sup> RESPONDENT**

**OMONDI OSORO ..... 2<sup>ND</sup> RESPONDENT**

**ODONGO OSORO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The present ruling is in regard to the preliminary objection dated 16<sup>th</sup> May 2024 raised by the respondents through Robert Ochieng and Company Advocates against the appellant/applicant's application dated 6<sup>th</sup> May 2024 (The application herein) on the grounds infra;
  - a. The said application seeks the same orders between the same parties as the same notice of motion application dated the 9<sup>th</sup> day of October 2023 and the subsequent Amended Notice of Motion application dated the 19<sup>th</sup> day of October 2023 (The earlier application herein) and thus offending the principle of *Res Judicata* as provided for in section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya (The CPA herein) in view of the fact that a ruling dated the 18<sup>th</sup> day of March 2024 was issued by the Honourable Justice Ongondo dismissing the earlier application wherein the prayers and issues raised in the present application were the same prayers and issues raised in the dismissed application as the subject matter was directly and substantially in issue in relation to the proceedings herein and the parties were the same.
  - b. The only avenue available to the respondent/applicant is review or appeal.
  - c. The application is frivolous and an abuse of the court process.



2. The appellant filed his response dated 24<sup>th</sup> June 2024 to the preliminary objection. He reiterated the contents of his affidavit dated 6<sup>th</sup> May 2024 in support of the application.
3. In the application supported by the affidavit of 17 paragraphs and grounds 1 to 8 set out on the face of the same, the applicant/appellant through Nancy Nyarige and Company Advocates, is seeking, inter alia, that he be granted leave to file additional evidence in support of the instant appeal. In summary, he averred that owing to his discovery of new documents (JOB 1 and 2) being a certificate of official search and consent orders together with the ruling that revoked the grant issued in Homa Bay High Court Probate and Administration No. 3 of 2018 citation in the estate of Bunde Odongo (Deceased), the same be presented in the appeal to meet the ends of justice.
4. The preliminary objection was heard by written submissions.
5. By the submissions dated 5<sup>th</sup> July 2024, learned counsel for the respondents termed the application *Res Judicata* and cited *Siri Ram Kirura v MJE Morgan* (1961) EA 462. That there was no answer to the defence of *Res Judicata* under section 7 of the [CPA](#). That the Ruling delivered on 8<sup>th</sup> March 2024, was in respect of the earlier application involving the same parties and issues as in the application.
6. In that respect, counsel submitted that litigation has to come to an end. Further, counsel relied upon *Henderson v Henderson* (1843) 67 ER 313 on the dictum plea of *Res Judicata* and [Mulla Code of Civil Procedure 18<sup>th</sup> and 20 page 293](#) that *Res Judicata* is a matter of public policy. Thus, counsel prayed that the application be dismissed with costs.
7. The appellants submissions dated 24<sup>th</sup> June 2024 made reference to the application, the preliminary objection and cited sections 1A, 1B, 3, 3A and 78 (1) (d) of the [CPA](#), Rule 29 of the [Court of Appeal Rules](#) and Order 45 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#) 201 pursuant to which the application was originated. That there is new evidence regarding the parties or suit which was not available during the hearing and determination of the original suit.
8. Further, counsel submitted that the grounds of the preliminary objection do not support *Res Judicata* principle as the previous earlier application was struck out hence, not determined on merit. Counsel relied on Section 7 of the [CPA](#), [Black's Law Dictionary](#), the Court of Appeal decision in the case of [Attorney General v Torino Enterprises Ltd](#) (2019) eKLR and the case of [Enock Kirao Mubhanji v Hamid Abdala Mbarak](#) (2013) eKLR, among others, concerning matters struck out and dismissed. That in view of these principles, additional evidence, would be directly relevant to the matter hence, he be granted leave to file additional evidence and the application be allowed with costs.
9. Having carefully considered the preliminary objection, the application, the earlier application and the rival submissions, are the grounds of the preliminary objection tenable?
10. The anchorage of the preliminary objection is section 7 of the [CPA](#) on *Res Judicata* principle. I note the essential ingredients of the principle herein.
11. Also, in [Black's Law Dictionary 10<sup>th</sup> Edition at page 1504](#), the term '*Res Judicata*' means an issue that has been definitively settled by judicial decision. The three elements of the said term are; An earlier decision on the case, a final judgment on the merits and the involvement of the parties or parties in privity to the original parties.
12. The ruling delivered on 18<sup>th</sup> March 2024 (JOB-3) reveals that the earlier application namely an amended Notice of Motion dated 19<sup>th</sup> October 2023, was struck out by this court. The court applied, inter alia, Order 9 of the Oaths and Statutory Rules under the [Oaths and Statutory Declarations Act](#) (Cap 15 Laws of Kenya) in arriving at the said decision.



13. It is noteworthy that any matter including an application that is struck out and not dismissed can be reinstated or regenerated by a party; see *Ngoni Matengo Cooperative Union Ltd v Ali Mohamed Osman* (1959) EA 577.
14. The applicant has sought to present in the present appeal, additional evidence in form of documents which include; ruling dated 12<sup>th</sup> July 2023 and consent order dated 12<sup>th</sup> September 2023 and court Order adopting consent dated 29<sup>th</sup> September 2023. No doubt, the court has to consider the relevance of the proposed additional evidence as envisioned in section 78 of the *CPA* and as observed in the Court of Appeal decision in *Attorney General v Torino Enterprises Limited case (supra)* and other authoritative pronouncements.
15. Moreover, I bear in mind a fair opportunity to be heard which is a fundamental principle of justice and permeates our entire justice system, has to be accorder to the applicant in respect of the application; see *Halsbury's laws of England 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639* and *James Kanyita Nderitu and another v Marios Philotas Ghikas and another* (2016) eKLR and Articles 25(c), 48 and 50(1) of the *Constitution* of Kenya 2010.
16. In the instant circumstances, the application does not meet the threshold of *Res Judicata* doctrine. So, the same cannot stand.
17. Wherefore, the respondent's preliminary objection dated 16<sup>th</sup> May 2024 herein, is not tenable and is hereby dismissed.
18. Costs of the preliminary objection be in the cause.
19. It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 23<sup>RD</sup> DAY OF JULY 2024.**

**GEORGE M A ONGONDO**

**JUDGE**

In the presence of;

Nancy Nyarige learned counsel for the appellant/applicant

Robert Ochieng learned counsel for the respondents

T. Luanga, court assistant

