



**Odi v Bodo (Environment and Land Case Civil Suit E035 of 2022)  
[2024] KEELC 5341 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5341 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E035 OF 2022  
SO OKONG'O, J  
JULY 18, 2024**

**BETWEEN**

**LUKE OTIENO ODI ..... PLAINTIFF**

**AND**

**VITALIS SIGU BODO ..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant through a plaint dated 14<sup>th</sup> December 2022. The plaintiff averred that at all material times, all that parcel of land known as Kisumu/Kolunje/1798 (hereinafter referred to as “the suit property”) was owned by one, Bernard Onditi, deceased (hereinafter referred to as “the deceased”). The plaintiff averred that the deceased was a paternal uncle to his father, one, John Odi Odi. The plaintiff averred that sometime in 1978, the deceased gave the plaintiff’s father the suit property as a gift. The plaintiff averred that after the suit property was given to his father as a foresaid, his father moved his family to the property and had occupied the same over the years. The plaintiff averred that his father and other family members were buried on the suit property upon their death. The plaintiff averred that his family held the property under customary trust.
2. The plaintiff averred that following the death of the deceased and his father, the defendant who was his father’s step brother secretly conducted a subdivision of the suit property. The plaintiff averred that when his father died in 2016, he was not aware of any subdivision affecting the suit property. The plaintiff averred that there was an order allegedly issued by the Chief Magistrate’s Court at Kisumu on 9<sup>th</sup> February 2012 through which the court adopted an alleged order by Kisumu West District Land Disputes Tribunal (hereinafter referred to as “the tribunal”) made on 3<sup>rd</sup> February 2012 in Tribunal Case No. 16 of 2011. The plaintiff averred that the said tribunal order was vague and ambiguous as it awarded the defendant a portion of the suit property without specifying the specific portion and the measurement thereof. The plaintiff averred further that the said order by the court was illegal as it purported to adopt an order of the tribunal that purported to cancel a title of the first registered owner



of the suit property. The plaintiff averred that the tribunal had no jurisdiction to cancel a title to land and as such it acted ultra vires its powers.

3. The plaintiff averred that following the said illegal orders, the defendant proceeded to subdivide the suit property into five (5) portions which had been registered and given numbers. The plaintiff averred that he stood the risk of being displaced from his ancestral home since the portion of the suit property under his occupation had been registered in the name of the defendant. The plaintiff averred that on 11<sup>th</sup> November 2022, the Chief Magistrate's Court made an order in Kisumu CMCC No. 11 of 2022 that the dispute between the parties be referred to the High Court. The plaintiff sought judgment against the defendant for;
  1. A declaration that the ruling of the tribunal was null and void.
  2. An order directing the Land Registrar Kisumu County to cancel the subdivision of the suit property and the registration of the subdivisions of the property in the name of the defendant.
  3. An order restoring the suit property in the name of the deceased pending the filing of succession proceedings in respect of his estate.
  4. An order restraining the defendant from entering into and/or dealing in any manner with the suit property.
  5. The costs of the suit.
4. The defendant filed a statement of defence on 3<sup>rd</sup> February 2023 and a Notice of Preliminary Objection to the suit also dated 3<sup>rd</sup> February 2023. The defendant denied the plaintiff's claim in its entirety. The defendant denied that the suit property was subdivided secretly without the knowledge of the plaintiff's family. The defendant averred that the subdivision of the suit property was carried out following an order that was issued by the tribunal in Tribunal Case No. 16 of 2011. The defendant averred that the tribunal in its award found that the suit property was owned by five (5) people who included the defendant and the plaintiff's father. The defendant averred that the tribunal directed that the property be subdivided so that each owner could have his separate portion. The defendant averred that the plaintiff's father was a party to the tribunal proceedings and as such it was not open to the plaintiff to feign ignorance of the said proceedings.
5. The defendant averred that following the said subdivision of the suit property, he was registered as the owner of two portions thereof namely; Kisumu/Kolunje/2455 and 2457. The defendant averred that the plaintiff's father also got his portion of the suit property. The defendant averred that he was also related to the deceased, Bernard Onditi like the plaintiff. The defendant averred that he would raise an objection to the suit since the issues raised by the plaintiff had been heard and determined by the tribunal whose decision was adopted by the Chief Magistrate's Court in Kisumu CMC Land Case No. 2 of 2012. The defendant urged the court to dismiss the plaintiff's suit with costs.
6. In his Notice of Preliminary Objection, the defendant contended that the plaintiff's suit offended the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as the suit was res judicata the issues raised in the same having been determined by the tribunal whose decision was adopted by the Chief Magistrates Court.
7. The defendant's preliminary objection was heard by way of written submissions. The defendant filed submissions dated 21<sup>st</sup> December 2023 while the plaintiff filed submissions in reply dated 9<sup>th</sup> January 2024. I have considered the defendant's Notice of Preliminary Objection together with the submissions by the advocates for the parties.



8. Res judicata is provided for in Section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya 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”

9. In [Black's Law Dictionary](#) 10<sup>th</sup> Edition “res judicata” is defined as:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

10. In [Christopher Kenyariri v. Salama Beach](#) [2017] eKLR, the court stated as follows on *res judicata*:

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit;
- b) Former suit between same parties or parties under whom they or any of them claim;
- c) Those parties are litigating under the same title;
- d) The issue was heard and finally determined; and
- e) The court was competent to try the subsequent suit in which the issue is raised.”

11. In [E.T v. Attorney General & Another](#) [2012] eKLR the court stated that:

“The Courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

12. In [Omondi v. National Bank of Kenya Limited and Others](#) [2001] EA 177 the Court stated that:

“Parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”

13. In [Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 others](#) (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, [Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors](#) (1969) EA 696.

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of



the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.”

14. In *Oraro v. Mbaja* [2005] 1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

15. It is on the foregoing principles that the defendant’s Notice of Preliminary Objection falls for consideration. The defendant’s objection to the plaintiff’s suit is that the same is *res judicata*. In my view, the question that I should answer is not whether the point taken by the defendant fits the description of a preliminary objection but rather whether the defendant’s preliminary objection has merit. There is no doubt that in his preliminary objection, the defendant has raised a pure point of law which if determined in his favour would dispose of the plaintiff’s suit.

16. I have not been persuaded by the defendant that the plaintiff’s suit is *res judicata*. The plaintiff’s suit may be weak and its prospects of success may be minimal in light of the nature of the previous proceedings but it is another thing to say that the suit is *res judicata*. In my view, in this suit, the plaintiff is challenging the legality of the proceedings and the award by the Kisumu West Land Disputes Tribunal in Tribunal Case No. 16 of 2011 made on 9<sup>th</sup> November 2011. The plaintiff has also challenged the legality of the proceedings and the order that was made by the Chief Magistrate’s Court at Kisumu in Land Case No. 2 of 2012 on 3<sup>rd</sup> February 2012 through which the said award of the tribunal was made an order of the court. The plaintiff has contended that the award by the tribunal was null and void in that the tribunal had no jurisdiction to determine land ownership and cancel a title. The plaintiff has contended that since the said award was made without jurisdiction and as such was a nullity, the Chief Magistrate’s court similarly had no jurisdiction to adopt the same. The plaintiff has contended that the Chief Magistrate’s Court order adopting the said award was similarly null and void. In *The MV SS Lillian S* [1989] KLR 1, Nyarangi JA. stated as follows at page 14:

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. In *Samuel Kamau Macharia & Another v. Kenya Commercial Bank and 2 others* [2012] eKLR, the Supreme Court held that:

“A court’s jurisdiction flows from either the *constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”



18. Jurisdiction of the Land Disputes Tribunal (“the tribunal”) was set out in section 3 (1) of the [Land Disputes Tribunals Act](#), 1990 (now repealed) which provided that the tribunal had the power to determine:

“...all cases of civil nature involving a dispute as to:-

- a. The division of, or the determination of boundaries to land including land held in common.
- b. A claim to occupy or work land; or
- c. Trespass to land.”

19. According to the plaintiff, although the defendant’s complaint at the tribunal was framed as a claim for trespass, it was a land ownership dispute having regard to the fact that in its award, the tribunal ordered that the suit property be subdivided and the defendant be registered as the owner of a portion thereof. If the plaintiff proves at the trial of this suit that the dispute that was before the tribunal was a land ownership dispute, then the tribunal would have had no jurisdiction to determine the same. It will also follow that the award of the tribunal was a nullity and likewise the order of the Chief Magistrate’s Court that purported to adopt it since the court had no jurisdiction to adopt as its order an order of the tribunal which was itself a nullity.

20. The plaintiff was not a party to the tribunal case and the proceedings before the Chief Magistrate’s Court. I am of the view that the plaintiff had a right to challenge the said proceedings in a new suit if they affected his rights. As rightly observed by the court in Kisumu Chief Magistrate’s Court ELC No. 11 of 2022, it is only this court that can give redress to the plaintiff. It is only this court that can declare the award by the tribunal and the order of the Chief Magistrate’s Court adopting the same nullities and inconsequential. The issue of the jurisdiction of the tribunal and the legality of its award and the adoption thereof by the Chief Magistrate’s Court have never been determined by any court of competent jurisdiction. In the circumstances, the plaintiff’s suit is not res judicata.

21. The upshot of the foregoing is that the defendant’s Notice of Preliminary Objection dated 3<sup>rd</sup> February 2023 has no merit. The objection is dismissed with costs to the plaintiff.

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyambeki for the Plaintiff

Ms. Mac Ogot for the Defendant

Ms. J. Omondi-Court Assistant

