



REPUBLIC OF KENYA



**Nyongesa & another v Okusimba (Environment & Land Case 11 of 2021)  
[2024] KEELC 6026 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6026 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 11 OF 2021  
DO OHUNGO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JOSEPH WERE NYONGESA ..... 1<sup>ST</sup> PLAINTIFF**

**FREDRICK MUSUNGU JUMA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BERNARD SAKWA OKUSIMBA ..... DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced on 14<sup>th</sup> July 2004 in the High Court, as Kakamega HCCC No. 56 of 2004, when the Plaintiffs filed Plaintiff dated 14<sup>th</sup> July 2004. They averred therein that they were the registered proprietors of the parcel of land known as East Wanga/Mung'ang'a/1122 (the suit property) and that they were unable to utilise it since the Defendant (Henry Okusimba) had occupied it. They therefore prayed to eviction of the Defendant, vacant possession, costs and interest.
2. The Defendant filed Defence and Counterclaim dated 19<sup>th</sup> September 2004, through which he denied the Plaintiffs' averments and prayed that their case be dismissed with costs. He averred in his counterclaim that he had been in open, continuous, peaceful and exclusive occupation of the suit property for more than 12 years and sought judgment in that regard. He in essence raised adverse possession.
3. The matter was partly heard in the High Court on 31<sup>st</sup> March 2009 when PW1 testified. Later, Henry Okusimba who was the initial Defendant, passed away on 25<sup>th</sup> September 2012, and was substituted with Dickson Mayabi Okusimba and Bernard Sakwa Okusimba, pursuant to orders made by the High Court on 25<sup>th</sup> November 2013. The Plaintiff was however not amended. Subsequently, the matter was transferred to this Court, hence its current case number. Upon an application by the Plaintiffs, it was ordered that hearing proceeds from where the High Court had reached.



4. Florence A.J Matendechere (PW1) testified that the Plaintiffs are her sons and that they are the registered proprietors of the suit property. That the suit property is a subdivision of East Wanga/Mung'ang'a/204 which she acquired through certificate of confirmation of grant issued to her in Kakamega HC Succession Cause No. 455 of 1999 and that she transferred the suit property to the Plaintiffs. She added that she did not know Henry Okusimba, the initial Defendant.
5. Fredrick Musungu Juma (PW2) adopted his witness statement dated 27<sup>th</sup> October 2011. He stated in the statement that he is the Second Plaintiff and that the First Plaintiff is his elder brother. That the Plaintiffs are the joint registered proprietors of the suit property and that they acquired it from PW1 as an inheritance from their late father. That Henry Okusimba had occupied the suit property and claimed that he purchased it from the Plaintiffs' father in 1971 and that Kakamega SPMCC No. 27 of 1996 which Henry Okusimba filed against the Plaintiffs' father was dismissed and Henry Okusimba was refunded the purchase price.
6. PW2 testified that the suit property subject of litigation in Kakamega ELCC No 93 of 2019 where judgment was delivered on 21<sup>st</sup> February 2023. He produced a copy of the judgment and copies of the documents listed as item numbers 2 to 5 in the Plaintiffs' List of Documents dated 24<sup>th</sup> August 2004. He further testified that Henry Okusimba and Dickson Mayabi Okusimba have their houses in the suit property.
7. The Plaintiffs' case was then closed, and defence hearing scheduled for 29<sup>th</sup> November 2023. Come 29<sup>th</sup> November 2023, the defence sought an adjournment on grounds that they had not filed compliance documents. For reasons stated in a ruling delivered by the court on 29<sup>th</sup> November 2023, the application for adjournment was dismissed and defence case closed. Thereafter, parties filed and exchanged written submissions.
8. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether the Defendant's claim for adverse possession is res judicata and whether the reliefs sought should issue.
9. None of the parties herein raised the issue of res judicata. Nevertheless, res judicata is jurisdictional issue which goes to the very core of any litigation. Every Court has a cardinal obligation to satisfy itself that it has jurisdiction, whether the parties raise the issue or not and whether the parties agree that the court has jurisdiction. Jurisdiction is conferred by law and not parties.
10. The doctrine of res judicata has found statutory expression at Section 7 of the *Civil Procedure Act* 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.

11. In the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR, the Supreme Court stated as follows regarding the doctrine:

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which



would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

12. The conditions required for res judicata to be upheld are that there must have been a previous suit in which the matter was in issue; the parties in both matters are the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
13. The Defendant claimed in his counterclaim that he had acquired the suit property through adverse possession. There is no dispute that the suit property subject of litigation in Kakamega ELCC No 93 of 2019 where judgment was delivered on 21<sup>st</sup> February 2023. A copy of the judgment was produced as an exhibit in this case. A perusal of the judgment reveals that parties herein were also parties in Kakamega ELCC No 93 of 2019. The issue for determination in the case was whether the Defendant herein had acquired land parcel number East Wanga/Mung'ang'a/1122 by adverse possession. In the judgment delivered on 21<sup>st</sup> February 2023, the Court held that adverse possession had not been established and proceeded to dismiss the case. I find and hold that the Defendant's claim for adverse possession is res judicata.
14. The Defendants have not offered any evidence to challenge the Plaintiffs' case. From the material on record, I am satisfied that that the Plaintiffs are the registered proprietors of the suit property. That much is manifest from the copy of Certificate of Official Search dated 5<sup>th</sup> May 2005 which states that the Plaintiffs were registered as proprietors on 19<sup>th</sup> April 2004. Indeed, Henry Okusimba conceded the Plaintiffs' proprietorship, hence his adverse possession claim.
15. The rights of a registered proprietor of land are well spelt out by the law. Such a proprietor is entitled to the rights, privileges, and benefits under Article 40 of *the Constitution* and Section 24 of the *Land Registration Act*. To secure those rights further, Section 26 of the *Land Registration Act* obligates the Court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Defendant made no attempt whatsoever to impeach the Plaintiffs' title.
16. The Defendant did not offer any evidence to challenge the Plaintiffs' case that Henry Okusimba had occupied the suit property and that both Henry Okusimba and Dickson Mayabi Okusimba have their houses in the suit property. All that is in violation of the Plaintiffs' rights as registered proprietors of the suit property. I am persuaded that the Plaintiffs are entitled to the reliefs that they seek.
17. In view of the foregoing, I make the following orders:
  - a. The estate of Henry Okusimba including Dickson Mayabi Okusimba and Bernard Sakwa Okusimba to vacate the parcel of land known as East Wanga/Mung'ang'a/1122 and hand vacant possession to the Plaintiffs within ninety (90) days of delivery of this judgment. In default, an eviction order shall issue.
  - b. The Plaintiffs shall have costs of the suit.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**



**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Amasakha for the Plaintiffs

No appearance for the Defendant

Court Assistant: M Nguyayi

