



REPUBLIC OF KENYA



KENYA LAW
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Wekesa & 2 others v Namianya & 2 others (Enviromental and Land Originating Summons E010 of 2024) [2024] KEELC 7452 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7452 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2024
EC CHERONO, J
OCTOBER 24, 2024

BETWEEN

GABRIEL WANYINYI WEKESA 1ST APPLICANT
AGNES NELIMA WAFILA 2ND APPLICANT
EMMANUEL MARUNI WAMUKONYE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES SIMIYU HULULA 3RD APPLICANT

AND

JULIUS W NAMIANYA 1ST RESPONDENT
ABEL WALEKWA NAMIANYA 2ND RESPONDENT
HENRY WAMALWA NAMIANYA (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOHN NAMIANYA MUNIALO 3RD RESPONDENT

RULING

1. Before me for determination is the Applicants' Notice of Motion application dated 27th May 2024 brought under the provisions of Sections 3.3A,7,63(1) &80 of the [Civil Procedure Act](#) and Order 40 Rule 1,2,3 &4 of the [Civil Procedure Rule](#) for the following orders;
 - a. That it pleases this Honourable court to strike out the suit herein for being incompetent, res judicata and void ab initio.
 - b. Costs be provided for.
 - c. Any other order the court deems fit and just to grant.
2. The Application is predicated upon grounds on the face of the application and the supporting affidavit sworn by Julius W. Namianya on 28th May, 2024.



3. In support of the application, the applicant averred that they are the sons of Namianya Munialo-deceased. It was further averred that the Respondents sought the revocation of a grant issued to the Applicants in Bungoma High Court Succession Cause No. 390 of 2010, claiming they were grandchildren and rightful heirs to the estate. Additionally, it was stated that in *Bungoma ELC No. 319 of 2013*, the Applicants sought to evict the Respondents for encroaching on their father's land, a matter that was heard and determined. It was argued that the court had already ruled on the issue by establishing that L.R No. Bokoli/Chwele/982 (the suit land) was part of the estate of Namianya Munialo. Consequently, the Applicants averred that the matters in dispute had been resolved in the aforementioned cases and that the parties had been involved in litigation for over 20 years, rendering the claim baseless.
4. The Respondents herein opposed the said application vide a Replying affidavit sworn by Gabriel Wanyonyi Wekesa on 4th June 2024. In the said affidavit, the Respondents contend that in *Bungoma ELC No. 319 of 2013*, the Applicants sought for injunctive orders against the Respondents which case was dismissed. Further, they stated that they moved the court in *Bungoma High Court Succession Cause No. 390 of 2010* where they sought for revocation of the grant issued to the Applicants and the court in its ruling directed them to seek redress before this court which has jurisdiction to determine issues of ownership of land by adverse possession. They averred that the current claim has been brought on grounds of beneficial interest through the doctrine of adverse possession. It was their contention that the existence of the two separate suits does not bar them from bringing the current suit.
5. When the application came up for directions, the parties agreed to have the application canvassed by way of written submissions. The Applicant filed submissions dated 2nd July, 2024.

Legal Analysis and Decision.

6. This Court has considered the application filed herein, the affidavit in support thereof as filed by the applicant. The Court has also considered the Replying affidavit filed by the Respondent and the written submissions by Counsel for the Applicant in making this decision. The issue that arises for determination is whether the application dated 27th May, 2024 is merited.
7. The principle of res judicata is defined under 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.”

8. In *Karia & Another v Attorney General* (2005) 1 E.A 83 and also *Kamunye & Others v Pioneer General Assurance Society Ltd* (1971) E.A 263 Res-judicata is basically a bar to subsequent proceedings involving an issue that has been heard and determined by a court of competent jurisdiction involving the same parties or those litigating under them. Its rationale is based on the principle that there must be an end to litigation.
9. The Applicant contends that the subject matter of the suits as attached is directly and substantially in issue in the current suit. I have however perused the judgments attached by the Applicants with regards to *Bungoma High Court Succession Cause No. 390 of 2010* and *Bungoma ELC No. 319 of 2013* and note that the parties in the abovementioned cases and the current suit are more less the same. I also confirm that Land Parcel No. Bokoli/Chwele/982 is at the center of the said proceedings. However,



the cause of action in the current suit which is a claim on adverse possession is different from the cause of actions in the other suits which both parties have properly identified as eviction/ injunctive orders and revocation of grant respectively.

10. I find that this matter has not been determined by another court of competent jurisdiction previously and that it is not res judicata as alleged by the Applicant.
11. In the end, I find the application dated 27th May, 2024 is devoid of merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Juma Waswa for the applicant.
2. Mr. Wamalwa R H/B for Mr. Sichangi for Respondent.
3. Bett C/A.

