



**Olegerera v Ekapoloni & another (Sued as Legal Representatives of the Estate of Barasa Kapoloni Auku) (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 13653 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023  
BN OLAO, J  
DECEMBER 10, 2024**

**BETWEEN**

**DANIEL OKASISI OLEGERERA ..... PLAINTIFF**

**AND**

**GEORGE OSIDE EKAPOLONI ..... 1<sup>ST</sup> DEFENDANT**

**SIMON MUKHONE BARASA ..... 2<sup>ND</sup> DEFENDANT**

**SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF BARASA  
KAPOLONI AUKU**

**RULING**

1. Daniel Okasisi Olegerera (the Plaintiff) approached this Court vide his Originating Summons dated 10<sup>th</sup> January 2023 and filed on 7<sup>th</sup> February 2023 in which he impleaded George Oside Ekapoloni and Simon Mukhone Barasa (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively and sued as the Legal Representatives of the Estate of Barasa Kapoloni Auku). He sought a determination of the following questions with respect to the land parcel No South-teso/Angoromo/675 (the suit land):
  1. Whether the Plaintiff has been in open and continuous possession of a ½ portion of the land parcel No South-teso/Angoromo/675 since 1948 to-date which is a period exceeding 12 years.
  2. Whether the Defendants' title to the land parcel No South-teso/Angoromo/675 was extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said land.
  3. Whether the Plaintiff has now acquired title to the land parcel No South-teso/Angoromo/675 by virtue of adverse possession.



4. Whether the registration of the Defendants as owner of the land parcel No South-teso/Angoromo/675 should be cancelled and the Plaintiff be registered as the owner of ½ portion out of the land parcel No South-teso/Angoromo/675.
5. Who should pay the costs of this suit.  
And arising out of the determination of the above issues, the Plaintiff sought the following orders against the Defendants:
  - a. That the Defendants' rights over ½ portion out of the land parcel No South-teso/Angoromo/675 got extinguished by adverse possession upon expiry of 12 years from the date the Plaintiff came into possession.
  - b. That the Defendants be perpetually barred from taking and/or using the Plaintiff's land namely ½ portion out of the land parcel No South-teso/Angoromo/675.
  - c. That the Plaintiff be registered as the proprietor of ½ portion out of the land parcel No South-teso/Angoromo/675.
  - d. That the Defendants do execute all the relevant documents to facilitate the transfer of ½ portion of land parcel No South-teso/Angoromo/675 into the name of the Plaintiff and in default, the Deputy Registrar do execute the same in place of the Defendants.
  - e. That the Defendants do pay the costs of this suit.
2. The Originating Summons was supported by the Plaintiff's affidavit of even date in which he deposed, inter alia that although the suit land is registered in the name of Barasa Kapoloni Auku, whose Estate the Defendants now represent, it was initially registered in the names of one Daniel Okasisi & Munyata Ojureti each having ½ share. That Munyata Ojureti (now deceased) was his brother and sold his share to Barasa Kapoloni Auku (also deceased) and then both travelled to Narok County for several months. In their absence, Barasa Kapoloni Auku took advantage and registered the whole suit land in his name fraudulently. That he has established his home on the suit land and also grows maize, beans, cassava and yams thereon. That the Defendants have never been in occupation of the suit land which the Plaintiff has developed ½ portion and has used it for a period exceeding 12 years openly, peacefully, continuously and without interruption by anybody and on or about 30<sup>th</sup> September 2013, he went to the Lands Office to check the status of the suit land only to find that Barasa Kapoloni Auku had fraudulently transferred it to his name. He annexed to the Originating Summons the Green Card to the suit land.
3. In response to the Originating Summons, the Respondents filed a replying affidavit dated 29<sup>th</sup> September 2023 by the 1<sup>st</sup> Respondent in which he deposed, inter alia that the late Barasa Kapoloni Auku was their father and that the Plaintiff and his brothers Indeke Ojureti, Ongaraousi Ojureti And Munyatta Ojureti initially owned the land parcels No South-teso/Angoromo/673, 674 and 675. That in 1980, the late Barasa Kapoloni Auku purchased the said parcels of land from the Plaintiff at a consideration of Kshs.21,000 plus 9 heads of cattle after the Plaintiff and his brothers indicated that they were relocating to Narok. However, the Plaintiff and his brothers relocated before transferring the land prompting Barasa Kapoloni Auku to seek redress from the Land Registrar in 1985. Summons were therefore sent to the Plaintiff and his brothers to appear before the Land Registrar to explain why they had executed the sale agreement, received the consideration but reneged on their obligation to transfer the land. The Plaintiff and his brothers failed to show up.
4. With the assistance of the Land Registrar, Barasa Kapoloni Auku managed to have the above three parcels of land registered in his name. The Plaintiff then filed Busia Elc Case No 163 Of 2014 Daniel Okasis Olegerera & Another -v- Barasa Kapoloni Auku seeking to revoke the ownership of the said



parcels of land. The suit was dismissed vide a judgment delivered on 10<sup>th</sup> September 2019 against which no appeal was filed. This suit is therefore res judicata Busia Elc Case No 163 of 2014 and the claim of adverse possession does not rise at all. This Court therefore lacks the jurisdiction to determine this case.

5. The following documents are annexed to the replying affidavit:

1. Copy of the plaint in Busia Elc Case No 163 Of 2014 Daniel Okasisi Olgerera & Munyatta Ojuretti -v- Barasa Ekapolon Auku.
2. Copy of the defence in Busia Elc Case No 163 Of 2014 Daniel Okasisi Olgerera & Munyatta Ojuretti -v- Barasa Ekapolon Auku.
3. Copies of land certificates for the land parcels No South-teso/Angoromo/673, 674 and 675 all in the name of Barasa Kapoloni Auku.
4. Copy of sale agreement dated 8<sup>th</sup> November 1980.
5. Copy of Summons addressed to the Plaintiff by the Land Registrar dated 4<sup>th</sup> December 1985.
6. Copy of letter from the Land Registrar Busia dated 16<sup>th</sup> April 1987.
7. Copy of letter from the Land Registrar Busia dated 9<sup>th</sup> December 2013.
8. Miscellaneous Application NO 11 of 1987, 12 of 1987 and 13 of 1987.
9. Receipts.
10. Copy of judgment in Busia Elc Case No 163 Of 2014 Daniel Okasisi Olgerera & Munyatta Ojuretti -v- Barasa Ekapolon Auku Delivered On 10<sup>th</sup> September 2019 By A. K. Kaniaru J.

In addition to the replying affidavit, the Defendants also filed a Preliminary Objection dated 29<sup>th</sup> September 2013 on the following grounds:

1. The suit is res judicata Busia Elc Case No 163 Of 2014 – Daniel Okasisi Olgerera & Munyatta Ojuretti -v- Barasa Ekapolon Auku in which the ownership and possession of the land parcels No South-teso/Angoromo/673, 674 and 675 were determined.
2. The Applicant has neither been in occupation nor enjoyed quiet notorious possession of the land parcel No South-teso/Angoromo/673.
3. That the Court in Busia Elc Case No 163 of 2014 confirmed that the Respondents were in active possession of the land parcel No South-teso/Angoromo/637 from 1980 and their claim for adverse possession does not arise.
4. The Court has no jurisdiction to admit and determine the Applicants' claim for adverse possession over the land parcel No South-teso/Angoromo/673.

6. The Plaintiff filed grounds of opposition to the Preliminary Objection on the following grounds:

1. That Busia Elc Case No 163 Of 2014 Daniel Okasisi Olegerera & Anor. -v- Barasa Ekapolon was a claim relating to the land parcel No South-teso/Angoromo/675 and 674 which the present suit relates to land parcel No South-teso/Angoromo/673.
2. That the claim in Busia Elc Case No 163 of 2014 was based on fraudulent acquisition of the land parcels No South-teso/Angoromo/675 and 674 while the claim herein is based on the acquisition at the land parcel No South-teso/Angoromo/673 by operation of the law.



3. That the cause of actions in Busia Elc Case No 163 of 2014 was based on transfer and registration of the Respondents as the registered proprietors of the land parcels No South-teso/Angoromo/675 and 674 while the cause of action in this suit is based on continuous occupation and use of the land parcel No South-teso/Angoromo/673.
4. The two suits are therefore not res judicata as they relate to different causes of action over different parcels of land.
5. That the other issues raised in the Preliminary Objection are issues of fact which can only be determined at the trial and do not amount to a Preliminary Objection as held in the case of Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributor Ltd 1969 EA 696.
6. This Court therefore has the jurisdiction to hear and determine this suit pursuant to Article 165(1) of *the Constitution* read with Order 37 Rule 7 of the Civil Procedure Rules.
7. That Preliminary Objection is the subject of this ruling. It has been canvassed by way of written submissions filed both by MR OMOITI instructed by the firm of Omoiti & Partners Advocates for the Respondents and by MR OKEYO instructed by the firm of Okeyo Ochiel & Company Advocates for the Applicant.
8. I must start by clarifying that contrary to what is raised in ground NO 3 of the Grounds of opposition, this suit relates to the claim of adverse possession of the land parcel No South-teso/Angoromo/675 and not 673. Further, contrary to what has been submitted by counsel for the Applicant in the penultimate paragraph of his submissions, the Respondents did file a replying affidavit sworn by the 1<sup>st</sup> Defendant and dated 24<sup>th</sup> September 2023 in response to the Originating Summons to which several documents already enumerated above were annexed. It is not therefore factually correct for counsel for the Applicant to submit that:

“It is therefore our humble submission that in the absence of a Replying Affidavit and any other documents filed by the Defendants which would give this Honourable Court a clear picture as held by the superior Courts in the foregoing authorities and further that the same raises factual issues, the Preliminary Objection falls short of the legal requirements of a valid Preliminary Objection. To allow the objection and strike out the suit in the absence of a defence asking for specific prayer of dismissal from this Honourable Court would be unjust to the Plaintiff.”

Counsel for the Applicant is however correct when he submits that some of the issues raised in the Preliminary Objection are issues that need to be canvassed at the trial. The Respondents’ Preliminary Objection specifically in paragraph 2(1) and (2) dwells on issues as to whether the Plaintiff has been in quiet and notorious occupation of the land parcel No South-teso/Angoromo/673 since 1980. That is a matter to be determined during the trial and I must again also remind counsel for the Respondents that the subject matter as this suit, as per the Originating Summons is land parcel No South-teso/Angoromo/675 and not 673.

9. The only point of law raised by the Respondents in their Preliminary Objection is in paragraph (1) where it is pleaded that this suit is res judicata BUSIA ELC CASE NO 163 of 2014 and in paragraph (3) where the jurisdiction of this Court is questioned. I will therefore ignore the issues raised in paragraph (2) thereof.
10. A Preliminary Objection, as properly submitted by counsel for both parties, must raise a pure point of law. The locus classicus on what qualifies as a Preliminary Objection and which the Courts have



continued to apply is the case of MUKISA BISCUIT MANUFACTURING COMPANY LTD -V- WEST END DISTRIBUTORS 1969 EA 696 where LAW JA said:

“...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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, SIR CHARLES NEWBOLD P. added thus:

“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 facts have to be ascertained or if what is sought is the exercise of judicial discretion.”

There is no doubt that a plea of res judicata raises a pure point of law and goes to the jurisdiction of this Court to determine this dispute. Section 7 of the [Civil Procedure Act](#) provides for it in the following terms:

“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.”

In the case of INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION -V- MAINA KIAI & 5 OTHERS 2017 eKLR, the Court of Appeal stated that:

“The rule of doctrine of res judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

Before the doctrine of res judicata can be successfully invoked, the party raising it must prove the following:

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.
2. That the former suit must have been between the same parties or parties under whom they or any of them claim.
3. The parties must have litigated under the same title.
4. The Court which decided the former suit must have been a competent Court.
5. The former suit must have been heard and finally decided by the Court.



The parties are in agreement that there was a previous suit being BUSIA ELC CASE NO 163 of 2014 which involved the Plaintiff herein and one MUNYATTA OJURETI -V- BARASA EKAPOLON AUKU. However, while the Respondent have pleaded in paragraph 1 of their Preliminary Objection that the said suit involved the land parcels No South-teso/Angoromo/673, 674 and 675, the Respondents in this case have stated in ground NO 2 of their Grounds of opposition that the claim in BUSIA ELC CASE NO 163 of 2014 was based “on fraudulent acquisition of the L.R No South-teso/Angoromo/674 while the claim herein is based on acquisition of L.R NO SOUTH-TESO/ANGOROM/673 by operation of law.” I have perused the judgment in BUSIA ELC CASE NO 163 of 2014 annexed to the Replying affidavit and it is clear that it was in respect to two consolidated suits being BUSIA ELC CASE NO 163 of 2014 and BUSIA ELC CASE NO 56 of 2015. The lead file was BUSIA ELC CASE NO 163 of 2014 and in his judgment delivered on 10<sup>th</sup> September 2019, KANIARU J has clarified that and commences as follows:

“This judgment relates to two suits – this one, which is ELC No. 163 of 2014, and ELC No. 56 of 2015 – which were consolidated by consent on 6/2/2017. ELC No. 163 of 2014 has two Plaintiffs – DANIEL OLKASISI OLGERRERA and MUNYATTA OJURETTI – who are claiming ownership of land parcel No. SOUTH TESO/ANGOROMO/675 from the Defendant – BARASA EKAPOLONI AUKU. ELC No. 56 of 2015 has DANIEL OKASI OLGERRERA as the only Plaintiff while BARASA EKAPOLONI AUKA is the Defendant. In the suit the Plaintiff is claiming land parcel No. SOUTH TESO/ANGOROMO/674 from the Defendant. In both suits the Defendant is accused of acquiring the parcels of land fraudulently. Particulars of fraud were given.”

As is clear from that judgment in which the Applicant’s claim to the suit land and filed against the Respondents’ father BARASA EKAPOLONI AUKU was dismissed in the consolidated suits, the Applicant is still pursuing the same claim this time against the Respondents although this time under adverse possession. Counsel for the Applicant has submitted that res judicata cannot apply because apart from the parcels of land being different, BUSIA ELC CASE NO 163 of 2014 was based on fraudulent acquisition of the land parcel No South-teso/Angoromo/675 while this suit is based on acquisition of the land parcel No South-teso/Angoromo/673. As I have already stated above, this Originating Summons is a claim for adverse possession over the land parcel No South-teso/Angoromo/675 and not No South-teso/Angoromo/673. And so long as the subject matter of two suits is the same, it does not make any difference that in the previous suit, the claim was based on fraudulent acquisition of land while in the subsequent suit, the claim is founded on adverse possession unless the Court which heard the previous suit was not competent to do so. This is because, under explanation NO 4 of Section 7 of the Civil Procedure Rules, it is provided that:

“ Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”



In the case of MBURU KINYUA -V- GACHINI TUTU 1978 KLR 69 MADAN J (as he then was) quoted with approval the words of WIGRAM V. C. in HENDERSON -V- HENDERSON (1843) 77 E.R 313 that:

“Where a given matter becomes the subject of litigation in, and of adjudication by a Court of Competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The Plea of Res judicata applies except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but to every point which property belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at the time.” Emphasis mine.

It is instructive to note from paragraph 3 of the defence of BARASA EKAPOLONI AUKU in BUSIA ELC CASE NO 163 of 2014 and which is also annexed to the replying affidavit of the Defendants that it was pleaded as follows:

“The Defendant admits the contents of paragraph 3 of the plaint and states that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs together with their brothers INDEKE OJURETI and ONGARADUSI OJURETI occupied L.R No South-teso/Angoromo/673, 674 and 675 from the year 1973 upto 1980 when they voluntarily sold the said parcel of land to the Defendant at a consideration.”

And in paragraph 8 of his judgment in BUSIA ELC CASE NO 163 of 2014, KANIARU J had the following to say:

“Summons were issued for the Plaintiffs to appear before the District Land Registrar and explain why they had executed a sale agreement but reneged on their obligation to transfer the property. The Plaintiffs failed to do so. Consequently the Defendant was assisted by the Registrar to obtain the consent to transfer all three properties. In addition, the Defendant approached the Court vide three Applications Nos 11, 12 and 13 of 1987 for orders that the three parcels be registered in his name. Once the registration was complete, he remained in actual uninterrupted possession of the parcels for three decades save for one incident when the Plaintiffs attempted to bury the late ONGARAPUSI OJURETI on one parcel. He reiterated that he was the legal and rightful owner of SOUTH TESO/ANGOROMO/673, 674 and 675.”

This Court is of course not determining the main Originating Summons at this stage. Rather, I am considering the Preliminary Objection invoking the doctrine of res judicata. However, whichever way one looks at it, it is obvious that this suit is clearly res judicata BUSIA CASE NO 163 of 2014. This Court must therefore down it's tools.

11. The up-shot of all the above is that this Court up-holds the Preliminary Objection and makes the following orders:
  1. This suit is res judicata Busia ELC Case No 163 of 2014. It is hereby struck out.
  2. The Plaintiff shall meet the Defendants' costs.



**BOAZ N. OLAO**

**JUDGE**

**10<sup>TH</sup> DECEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 10<sup>TH</sup> DAY OF DECEMBER 2024 BY  
WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

**10<sup>TH</sup> DECEMBER 2024**

