



REPUBLIC OF KENYA



KENYA LAW
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**Ogwom v Oruoch (Environmental and Land Originating Summons
E011 of 2023) [2025] KEELC 194 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 194 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023

E ASATI, J

JANUARY 30, 2025

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF LAND PARCEL NUMBER KISUMU/WANG'AYA 1/2625

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE
APPLICANT HAS OBTAINED OWNERSHIP OF A PORTION OF THE SUBJECT
LAND MEASURING 0.93 HECTARES BY WAY OF ADVERSE POSSESSION**

BETWEEN

GILBERT OMENYA OGWOM PLAINTIFF

AND

LAWRENCE OMARI ORUOCH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 23rd March, 2024 brought under the provisions of sections 1A, 1B, 3, 3A and Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 51 Rule 1 Civil Procedure Rules 2010.
2. The application seeks for orders that the suit be dismissed for being res judicata and that costs of the application be provided for. The application is based on the grounds shown on the Notice of Motion and the Supporting Affidavit sworn by Lawrence Omari Oruoch and the annexures thereto.
3. The application was opposed vide the Grounds of Opposition dated 24th September, 2014.
4. The Applicant's case is that the issue regarding the Plaintiff's occupancy of the suit land have litigated by a court of competent jurisdiction vide NYANDO SPM ELC NO.45 OF 2020 (herein the former



- suit) and the same was fully determined. That the suit was strenuously defended on behalf of the Plaintiff herein by his present Advocates.
5. That the present suit offends the provisions of Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya. That the suit is an abuse of the process of the court and should be struck out forthwith.
 6. That the court lacks the jurisdiction to hear the matter the same being res judicata, that the court has no option but to down its tools.
 7. The case of the Respondent/Plaintiff is that the application as presented is incurably defective, misconceived and hinged on the wrong provisions of the law and procedure, that it is a wanton abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the court and the legal process. That the application is not legally or equitably tenable. That the application is an afterthought and that the court should hear the present suit to its full merit so as to make a fair and just determination.
 8. The application was argued by way of written submissions. It was submitted on behalf of the Applicant that it is clear from the copy of the plaint and defence attached to the Supporting Affidavit that the parcel of land in issue in the previous case was L.R. NO. KISUMU/WANG'AYA 1/5809 which is a parcel of land that the Plaintiff in the present suit had illegally carved out of the suit land.
 9. That by its judgement dated 28th March, 2023, the trial court in the former suit found that the action of creation of L.R. NO. KISUMU/WANG'AYA 1/5809 was illegal null and void. That the court further ordered rectification of the register of the suit property by deleting of parcel No. KISUMU/WANG'AYA 1/5809.
 10. That the Plaintiff has now filed the present suit claiming a portion of the suit property as having been purchased by him from the Defendant's father.
 11. Counsel submitted that it is the same claim made in the defence in the former suit. That the dispute between the parties herein over the suit land has thus been heard and determined by a court of competent jurisdiction. That this court now lacks the jurisdiction by operation of section 7 of the *Civil Procedure Act*.
 12. Counsel referred the court to the pleadings in the former suit, the green card and certificate of official search for parcel No. KISUMU/WANG'AYA 1/5809 which show that that land measures 0.93 Ha which is the same portion of land that the Plaintiff claims in the present suit.
 13. Counsel relied on the case of Benard Mugo Ndegwa -vs- James Nderitu Githae & 2 Others (2010)eKLR for the test of determining whether the suit is res judicata which is that;
 - i. the matters in dispute are identical in both suits
 - ii. the parties in the suits are the same
 - iii. sameness of the title/claim
 - iv. concurrence of jurisdiction.
 - v. Finality of the previous decision.
 14. Counsel also relied on other authorities including the case of John Florence Maritime Services Ltd & Another -vs- Cabinet Secretary for Transport and Infrastructure & Others [2015]eKLR where the court explained the rationale behind the doctrine of res judicata. Counsel urged the court to allow the application.



15. On behalf of the Plaintiff/Respondent, it was submitted that substantive orders cannot be issued in a miscellaneous application. Counsel relied on the case of *Witmore Investment Limited -vs- County Government of Kirinyaga & 3 Others (2016)eKLR* and *Nairobi West Hospital Limited -vs- Joseph Kariha & Another [2018]eKLR* to support this submission.
16. Counsel submitted further that this being a land matter it would be prudent for the court to hear all the parties including on whether the matter before court is *res judicata*. Counsel urged the court to dismiss the application.
17. I have considered the application, the contents of the Supporting Affidavit and annexures thereto. I have also considered the grounds advanced in opposition to the application. I have read and considered the written submissions filed by the parties.
18. The doctrine of *res judicata* is provided for in Section 7 of the [Civil Procedure Act](#) 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.

Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question, whether or not it was instituted before it.

Explanation (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other.

Explanation (4) – Any matter which might and ought to have been made 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.

Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purpose of this section be deemed to have been refused.

Explanation (6) – where persons litigate *bona fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall for the purpose of this section, be deemed to claim under the persons so litigating.”
19. Existence of the former suit is not denied by the Plaintiff. I have read the copies of plaintiff and defence in respect of the former suit annexed to the Supporting Affidavit.
20. The plaint dated 15th September, 2020 shows that the suit No. SPM C ELC CASE NO.45 OF 2020 was between Lawrence Omari Oruoch as the Plaintiff and Gilbert Omenya Ogwom as the Defendant. These are the parties in the present suit. The plaintiff herein was the Defendant and the Defendant the Plaintiff.
21. The plaint also reveals that the suit land was a parcel of land known as KISUMU/WANG’AYA 1/2625 which is the suit land in the Originating Summons in the present suit.
22. A further reading of the plaint shows that the claim in the former suit was that the Defendant in that suit (the Plaintiff herein) had encroached onto the suit land, curved out a portion thereof, ploughed and planted sugar cane thereon.



23. The plaint shows further that the Defendant in that suit had claimed that the disputed portion of land was a portion that had been hived off the suit land herein parcel No KISUMU/WANG'AYA 1/2625 and registered in his name as KISUMU/WANG'AYA 1/5809.
24. The plaint further shows that the Plaintiff in former suit sought for orders, inter alia, that creation of land parcel No. KISUMU/WANG'AYA 1/5809 be declared illegal null and void and be cancelled. The Plaintiff also sought for an order of rectification of register and map of the suit property by cancelling the creation and registration of land parcel No. KISUMU/WANG'AYA 1/5809.
25. Also attached to the Supporting Affidavit was a copy of the statement of Defence filed by the Defendant (Plaintiff herein). The statement of defence was dated 19th May, 2021 in which the Defendant in the former suit denied the claim in the Plaint.
26. Attached to the Supporting Affidavit was a copy of decree dated 28th March, 2023 showing the outcome of the former suit. The decree shows that the claim was allowed. Among the reliefs granted was a declaration that the creation of parcel number KISUMU/WANG'AYA 1/5809 from the suit property herein was illegal null and void and that the same should be cancelled and the land register rectified.
27. The green card and certificate of official search attached to the Supporting Affidavit showed that the portion of land that had been registered as KISUMU/WANG'AYA 1/5809 measured 0.93 Ha.
28. In the present suit, the Plaintiff claims to be entitled to a portion of land measuring 0.92Ha out of the suit land parcel number KISUMU/WANG'AYA 1/2625. The Defendant's case is that this is the same portion that was the subject matter in the former suit. The Plaintiff did not deny this contention.
29. Considering the provisions of the section 7 of the *Civil Procedure Act*, I find that all the elements of res judicata have been proved. The issue of adverse possession is a matter which might and ought to have been raised in the former suit and is considered as a matter directly and substantially in issue in the former suit.
30. It was submitted on behalf of the plaintiff/Respondent that because the subject matter of this suit is land, the court should hear the parties and decide the suit on merit. I have considered the submission. Land matters are no exception to the doctrine of res judicata. The rationale for the doctrine of res judicata is to bring finality to litigation and stop parties from bringing the same issues before court repeatedly, to bring closure to disputes thereby establish a single definitive decision on a matter. Under section 1A of the *Civil Procedure Act*, the court is under a duty to use judicial time as an available resource efficiently. The parties herein were given time and opportunity to be heard in the former suit.
31. The submission by the plaintiff/Respondent that substantive orders cannot issue on miscellaneous application is not sustainable as the miscellaneous application herein was initiated by the plaintiff/Respondent seeking for recovery of the land in dispute.
32. Regarding costs, under the provisions of section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter or issue shall follow the event.
33. The upshot is that the application has merit and is hereby allowed and the following orders made-
 - i. The plaintiff's suit herein commenced vide the Originating Summons dated 22nd September 2024 is hereby struck out for being res judicata.
 - ii. Costs of the suit are awarded to the Defendant/applicant.Orders accordingly.



RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30 DAY OF JANUARY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Plaintiff/ Respondent.

C. Onyango for Defendant/Applicant.

