



**Makori v Kebati & another (Miscellaneous Application 6 of 2022)
[2023] KEELC 16655 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION 6 OF 2022**

M SILA, J

MARCH 29, 2023

BETWEEN

NDEGE MAKORI PLAINTIFF

AND

ROSE KEBATI 1ST DEFENDANT

BENARD KEBATI 2ND DEFENDANT

RULING

1. What is before this court is a Miscellaneous Notice of Motion dated 20 April 2022 and filed on 27 April 2022. The motion seeks to set aside the judgment delivered in Kisii ELC No. 128 of 2016, and for orders that the applicant be granted an order of adverse possession for the property West Kitutu/Bogusero/2551 (the suit land) where he claimed he has lived for 37 years. The application is supported by the affidavit of the applicant. It is a difficult affidavit to comprehend. He avers that he filed the suit Kisii ELC No. 128 of 2016 seeking adverse possession of the suit land and appears to claim that he succeeded in the suit. A copy of the said judgment is annexed. In his address in court, the applicant relied on what he has filed and asserted that the suit land belongs to him.
2. In opposing the motion, Mr. Arati, learned counsel for the respondent, pointed out that there has already been a previous case and from the judgment annexed, the applicant's case was dismissed with costs. He submitted that the orders the applicant is now seeking cannot be granted. He pointed out that the applicant may file an appeal or review but not a miscellaneous cause such as this.
3. I have considered the application and I have to agree with the submissions of Mr. Arati. It is apparent to me that the applicant filed the suit Kisii ELC No. 128 of 2016 seeking orders that he has acquired title, by way of adverse possession, to the land parcel West Kitutu/Bogusero/2551. He sued the same respondent that he has sued in this application. The case was heard on merits and dismissed by Onyango J in a judgment delivered on 22 March 2022. The applicant cannot purport or claim to assert



that he succeeded. That judgment is as clear as day; the applicant's case was dismissed with costs. In other words, the court was not persuaded that he has made out a case for adverse possession so as to acquire title to the suit land. The applicant cannot now be allowed to re-litigate the issue of adverse possession through a miscellaneous cause. In fact, the law bars him from re-litigating the issue, through any other originating process, pursuant to the res judicata rule as set out in Section 7 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya

7. Res judicata

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.

4. The suit by the plaintiff seeking adverse possession to the suit land has already been heard and determined and this court cannot attempt to try that dispute afresh. If the applicant is so inclined, and subject to the law allowing him, he can appeal or attempt a review of the judgment which is not what he has done here.
5. There is clearly no merit in this application and it is hereby dismissed with costs.
6. Orders accordingly.

DATED AND DELIVERED THIS 29 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

