



**Barchok (Suing the legal representative of the Estate of Taputany Cherotich Barer) v Chepkwony & 16 others (Environment & Land Case 16 of 2015) [2023] KEELC 16663 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16663 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 16 OF 2015  
MC OUNDO, J  
MARCH 23, 2023**

**BETWEEN**

**WILSON KIPKORIR BARCHOK (SUING THE LEGAL REPRESENTATIVE OF THE ESTATE OF TAPUTANY CHEROTICH BARER) ..... PLAINTIFF**

**AND**

**WELDON KIMUTAI CHEPKWONY & 16 OTHERS ..... DEFENDANT**

**RULING**

1. Before me for determination is a Notice of Preliminary Objection dated September 26, 2022 and filed by the defendants in which they seek that the suit herein be dismissed for being *res judicata* the issues having been determined by a court of competent Jurisdiction in Kericho High Court Misc Application No 23 of 2011(JR) being Philip Kirui Korir, David Langat Barchok and Wilson Kipkorir Barchok versus The Chairman Bureti Land Dispute Tribunal, The Principal Magistrate's Court Sotik, Ludia Matui and Wilson Langat Bomet Principle Magistrates ELC No 21 of 2019.
2. There was no response to the application.
3. Parties took direction that the said application takes precedence and be disposed of in the first instance by way of written submissions.

**Defendant/applicant's submissions.**

4. The defendant relied on the decision in the case of *Mukisa Biscuits Manufacturing Limited v the West Distributors Limited* (sic) to submit that the jurisdiction of the court had been brought to question. That parties are bound by their pleadings which include Plaintiff, list of Documents, Witness Statements, Defence, Counter-Claim etc.



5. That order 3 & 4 the *Civil Procedure Rules* provides provisions for institution of suits while order 7 of the *Civil Procedure Rules* provides for defending of suits. That the preliminary objection was founded on the provisions of order 7 of the Civil Procedure Rules which was explicit and clear. That the court only needed to look for items in both parties pleadings and supporting documents that may qualify under this provisions of the law which include;
  - i. A Suit
  - ii. Matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties
  - iii. Or between parties under whom they or any of them claim
  - iv. Litigating under the same title
  - v. Competent Court
  - vi. Has been finally decided.
6. That cases were distinct from one another and there were certain cases where not all the outlined areas could be found but specific singular areas where scrutiny with a microscopic eye was required.
7. That determination had already been made in Kericho High Court Misc Application No 23 of 2011(JR) being Philip Kirui Korir, David Langat Barchok and Wilson Kipkorir Barchok versus The Chairman Bureti Land Dispute Tribunal, The Principal Magistrate's Court Sotik, Ludia Matui and Wilson Langat, which had concluded the rights of the parties. That although the Defendants are different, yet the cause of action related to a subject matter in which the current Defendants in Kericho ELC No 16 of 2016; Wilson Kipkorir Barchok (Suing as legal representative of the estate of Taputany Cherotich Berer verses Weldon Kimutai Chepkwony & 16 Others claim against the previous Defendants over the same subject matter had already been adjudicated by this Honorable Court thus bringing this matter to bed.
8. That any attempt to revive a cause of action in relation to the same subject matter despite having different Defendants that had already been adjudicated and determined to it finality would qualify to be *res judicata* and thus assume the analogy of waking a sleeping dog which would bite. In this context, the Plaintiff would be bitten by costs when the suit is dismissed.
9. That the rule of *res judicata* served the salutary aim of bringing finality to litigation so as to afford parties closure and respite from the spectra of being vexed, haunted and hounded by issues that had already been determined by a competent court. That it was designed as pragmatic and common sensical protection against wastage of time and resource in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits to obtain at last, outcomes favorable to themselves.
10. The Defendant submitted that paragraphs 3, 4 and 5 of the Plaint dated March 30, 2015 and prayers (a), (b), (c) and (d) was evident that the Plaintiffs were seeking ownership or legal proprietorship over the land parcel No Kericho/Kaitet/213 from the Defendants whom they were calling trespassers hence seeking an eviction order over them. On the other hand, the Defendants had refuted the Plaintiffs' allegations in their defence dated October 9, 2015 stating that they were *bona fide* purchasers for value and consideration over said land parcel.
11. That in a previous case, The Plaintiff had lodged a complaint before the Land Disputes Tribunal in Bureti where he had lost and moved to the High Court at Kericho challenging the decision of the Land Dispute Tribunal where he had lost again. That he has now moved the Court to challenge the



occupation of the bonafide purchasers for value for which the land parcel No Kericho/Kaitet/213 ceased to exist. That a ruling delivered on March 10, 2020, by this court was in relation to the current Preliminary Objection.

12. That the rights of the Plaintiff in Kericho/Kaitet/213 had been decided against the persons who sold to the Defendants Kericho/Kaitet/1219 which was a subdivision from Kericho/Kaitet/213 which had been subdivided into Kericho/Kaitet/660 then Kericho/Kaitet/1219 which chronology of acts demonstrated that the instant case was truly *res judicata*.
13. That for someone to challenge a person who has obtained rights in Kericho/Kaitet/1219 and secured the same under the law as bonafide purchaser for valuable consideration, then one ought to first fault the parties who had been involved in Kericho/Kaitet/213 and Kericho/Kaitet/660. That if the parties in the two parcels were vindicated in any proceedings, then the parties in Kericho/Kaitet/1219 were innocent and should not be vilified. The Defendants relied on the decision in [\*Geoffrey Ndichu Muiruri v Joseph Ndura Mbuchiri\* \[2017\]eKLR](#) in support of their submissions,

#### **Plaintiff's submissions.**

14. The Plaintiff in opposition of the Preliminary Objection herein raised, framed his issue for determination as to whether the matter before the court was *res judicata*.
15. The Plaintiff then relied on the provisions of Section 7 of the [\*Civil Procedure Act\*](#) to submit that for the doctrine herein to be applicable, the issues at hand must be identical to those that were previously in dispute between the same parties and that the issue ought to have had been decided on the merits by a competent court. That since a court could not handle a case or matter that had already been brought up in a previous suit, it was thus necessary to determine whether a Judicial Review was to be considered as a suit, and whether the issues discussed in a Judicial Review, could be raised again in a civil case to make the case barred by the principle of *res judicata*.
16. His submission was that a Judicial Review was not a suit within the meaning of either the [\*Civil Procedure Act\*](#) or the [\*Interpretation & General Provisions Act\*](#). That a Judicial review was a special procedure which was neither civil nor criminal and therefor the [\*Civil Procedure Act\*](#) did not apply since it was governed by Sections 8 and 9 of the [\*Law Reform Act\*](#) being the substantive law and Order 53 of the [\*Civil Procedure Rules\*](#) being the procedural law.
17. That a Judicial review was concerned not with private rights, or the merits of the decision being challenged but with the decision-making process. Its purpose therefore was to ensure that the individual was given fair treatment by the authority to which he had been subjected. Reliance was placed on the decision by the Court of Appeal in the case of [\*Commissioner of Lands v Kunste Hotel Limited\* \[1995-1998\] 1 E.A.](#)
18. That Section 2 of the [\*Civil Procedure Act\*](#) gave a definition to a suit as  
“All civil proceedings commenced in any manner prescribed.”
19. While the [\*Interpretation and General Provisions Act\*](#) defined a civil action as  
“Any civil proceedings in a court and includes any suit as defined in Section 2 of the [\*Civil Procedure Act\*](#)”
20. That Judicial review proceedings were unique processes that the court invoked, and in such situations, the court was not exercising either civil or criminal jurisdiction as was held in [\*Welamondi v The Chairman, Electoral commission of Kenya\* \[2002\] 1KLR 480 at 487.](#)



21. That in in *Albert Ekirapa & 9 Others vs Aga Khan Foundation & Another* [2009] eKLR while quoting with approval the cases of *Commissioner of Lands vs Kunste Hotel Limited* [1995-1998] 1 E A and *Welamondi vs The Chairman, Electoral commission of Kenya* [2002] 1KLR 480 at 487, it had been held that the doctrine of *res judicata* could not apply as a Judicial Review was not a suit within the meaning ascribed by Section 2 of the *Civil Procedure Act* and therefore a suit could not be said to have been conclusively decided in the Judicial Review.
22. That this matter therefore was not *res judicata* because in a Judicial Review, the court places greater emphasis on the process of decision-making rather than on the outcome of the decision itself.
23. That in arguing that the present matter was *res judicata*, the Defendant had relied on two Judicial Review rulings, both in a manner that was fascinating and unprecedented, emanating from the same Application being No 23 of 2011 to wit rulings dated January 30, 2018 and March 10, 2020 had been delivered by different Judges.
24. That the ruling dated January 30, 2018, had quashed the decision of Principal Magistrate Court Sotik dated May 19, 2011 together with the entire proceedings arising therefrom and/or connected with the award by the Bureti Land Dispute Tribunal dated April 12, 2011, which award had been adopted as the judgment of the court in Sotik Principal Magistrate's Court Misc Civil Application No 5 of 2011.
25. That in the ruling of March 10, 2020, it would appear that the Applicants had wanted to quash the decision by the Chairman Bureti Land Dispute Tribunal wherein the Tribunal had upheld the ruling dated July 17, 2003 by the Registrar, the issue therein being on a boundary dispute.
26. That the present suit before the Honorable court was one on trespass into parcel No Kericho/Kaitet/213 land which belonged to the Plaintiff and out of which he had sought for orders of eviction against the Defendants and a permanent injunction restraining them from doing anything prejudicial to his proprietary interest in the subject parcel of land.
27. The Plaintiff submitted that the parties in the present suit and those in the two Judicial Review referred to herein were totally different and clearly the issues in contention was different and therefore the suit herein was not *res judicata* as the matter had not been heard on merit.

#### **Determination.**

28. A Preliminary Objection according to the decided case by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* [1969] EA 696 was stated to be thus:-
 

“So far as I am aware, a Preliminary Objection 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.”
29. In this proceedings, it is the Defendant/Applicant's case *inter alia* that this suit should be dismissed with costs as the same was *res judicata* by virtue of the proceedings in Kericho High Court Misc Application No 23 of 2011(JR) being Philip Kirui Korir, David Langat Barchok and Wilson Kipkorir Barchok versus The Chairman Bureti Land Dispute Tribunal, The Principal Magistrate's Court Sotik, Ludia Matui and Wilson Langat, which had concluded the rights of the parties.
30. I find the matters for determination as being;
  - i. Whether the present suit is *res judicata*.



- ii. Whether the Preliminary Objection raised is sustainable
31. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 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”
32. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;
- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
  - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
33. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
  - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
  - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
34. The test in determining whether a matter is *res judicata* as stated was summarized in [Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others](#) [2010] eKLR, as follows that:
35. The matter in issue is identical in both suits;
- i. The parties in the suit are the same;
  - ii. Sameness of the title/claim;
  - iii. Concurrence of jurisdiction; and
  - iv. Finality of the previous decision.
36. I have looked at the impugned ruling in Kericho High Court Misc Application No 23 of 2011 (JR) dated January 30, 2018 which was reported as [Philip Kirui Korir & 2 others v Chairman Bureti Land Dispute Tribunal & 3 others](#) [2018] eKLR, and I find that the court had quashed the Sotik Principal Magistrates’ order dated May 19, 2011 together with the entire proceedings arising therefrom and/or connected therewith pursuant to the Chairman Bureti Land Dispute Tribunal’s award dated April 12, 2011 which award had been read and adopted as a judgment of the court in Sotik Principal Magistrate’s Court Misc Civil Application No 5 of 2011.



37. I have also looked at the award dated April 12, 2011 which had been issued by the Bureti Land Dispute Tribunal and the same was as follows:

“We the elders of tribunal hereby uphold the ruling of July 17, 2003 by the registrar which was not contested. The survey records be adjusted to reflect the ruling and the deliberation of the registrar’s meeting. This will clearly Show that Wilson Langat And Ludia Matuitake over the boundary across the road and administer on behalf of the beneficiaries namely, family and buyers alike”.

38. On the other hand, in the ruling in Kericho High Court Misc Application No 23 of 2011 (JR) dated March 10, 2018, the court had found that the Applicant was challenging the decision made in the award dated April 12, 2011 herein above captioned, which decision was as follows: (see para 15 of its ruling)

“My position is therefore clear: the decision made related to boundary and not ownership or title. That decision therefore was perfectly within the mandate granted to the *Land Disputes Tribunal* under Section 3(1)(a) of the Land Disputes Tribunals Act (Cap 3 2A). It follows also that the legal position is as explicated by counsel for the interested parties in his submissions”

39. Clearly from the above captioned holdings in the impugned rulings we cannot say that this matter is *Res judicata* Kericho High Court Misc Application No 23 of 2011(JR) for reasons that the ruling dated January 30, 2018, had quashed the decision of Principal Magistrate Court Sotik dated May 19, 2011 together with the entire proceedings arising therefrom and/or connected with the award by the Bureti Land Dispute Tribunal dated April 12, 2011, which award had been adopted as the judgment of the court in Sotik Principal Magistrate’s Court Misc Civil Application No. 5 of 2011.

40. Secondly, the ruling of March 10, 2020, had found that the decision made by the Land Disputes Tribunal which had upheld the findings by the Land Registrar was in relation to boundary dispute and not ownership or title to land.

41. The current suit is one on trespass to which the Plaintiff in his Complaint dated March 30 2015 seeks for the following orders;

- i. An eviction order against the Defendants by themselves, agents, servants, employees or otherwise from encroaching onto, interfering with, building on or doing any other act which is prejudicial to the Plaintiff’s proprietary interest in land parcel No Kericho/Kaitet/213.
- ii. A permanent injunction against the Defendants by themselves, agents, servants, employees or otherwise from encroaching onto, trespassing on, building on or doing any other act which is prejudicial to the Plaintiff’s proprietary interest in land parcel No Kericho/Kaitet /213.
- iii. Costs of the suit and interest
- iv. Any other relief that the court may deem fit and just to grant.

42. Clearly, the parties in the present suit and those in the two Judicial Reviews referred to herein above were totally different where the issues in contention were different and the decisions made in the said impugned Kericho High Court Misc Application No 23 of 2011(JR) had not finally determined the issue at hand.



43. The upshot thereof is that the Notice of Preliminary Objection dated September 26, 2022, by the Defendant is unsustainable herein having failed the test as is stipulated in Section 7 of the *Civil Procedure Act* and the above captioned authorities and the same is dismissed with costs to the Plaintiff.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**M C OUNDO**

**ENVIRONMENT & LAND – JUDGE**

