



REPUBLIC OF KENYA



**Tuwei v Land Dispute Tribunal, Nandi, Kapsabet & 3 others (Environment & Land
Petition E001 of 2022) [2023] KEELC 16601 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION E001 OF 2022
MN MWANYALE, J
MARCH 22, 2023**

BETWEEN

WILLIAM KITUR TUWEI PETITIONER

AND

LAND DISPUTE TRIBUNAL, NANDI, KAPSABET 1ST RESPONDENT

KIPTANUI NGOSOSEI 2ND RESPONDENT

NANDI LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. William Kitur Tuwei the Petitioner, by his petition dated May 12, 2022 seeks the following reliefs;
 - a. A declaration that the Petitioner’s protected right to property has been violated by the Respondents acts of illegal cancellation and subdivision of land parcel Mogobich/Cheptililik Block 2/58.
 - b. An order for immediate restriction to the Petitioner of Land comprised in title Mogobich/Cheptililik Block 2/58.
 - c. A permanent order of injunction restraining the Respondents, their agents, servants or any person acting under their direction from interfering with the Petitioner’s ownership possession and use of all that parcel of land No Mogobich/Cheptililik Block 2/58.
 - d. An order for compensation for the violation of the Petitioners property right over land parcel No Mogobich/Cheptililik Block 2/58.
 - e. Any other relief the Court may deem fit to grant in redress to the clear violation of the Petitioners right to property.



- f. An order for payment of costs of this petition by the Respondents.
2. Simultaneous with filing of the petition the Petitioner sought conservatory orders vide the Notice of Motion dated May 12, 2022.

One Replying Affidavit in respect of both the petition and the Notice of Motion application was filed on behalf of the 2nd Respondent Kiptanui Ngosorei as well as one on behalf of the 3rd Respondent by the Nandi County Registrar, Ms Judith Cherutich; in opposition to both the petition and the application. With regard to the notice of motion application, the same was comprised on 25/7/2021 with an order of maintenance of the current *status quo* pending hearing and determination of the petition.

The Petition: -

3. The facts giving rise to the petition are summarised as follows;
 - i. That in the 1970's and 1980's, the Petitioner together with other original occupants of the Mogobich/Cheptililik Block were allocated the said block by Nandi Tea farm having been employees herein, and squatters within the said farm.
 - ii. The said block was a forest area and the allottees were each required to clear the bushes within their allocated portion of land.
 - iii. The Petitioner was allocated a portion of land within the block now known as Mogobich/Cheptililik Block 2/58.
 - iv. That he was issued with a title deed on 11/8/1995, but the 2nd Respondent. Subsequently claimed ownership of part of the said parcel of land, to wit, Mogobich/Cheptililik Block 2/58 and registered a caution against the said parcel of land.
 - v. The 2nd Respondent then instituted a claim with the Kapsabet Lands Disputes Tribunal and claimed ownership of part of the Petitioners property which dispute was determined in favour of the 2nd Respondent.
 - vi. The award of Kapsabet Lands Dispute case was adopted under Land Dispute Case No 57/2007, and part of the property was transferred to in the name of the 2nd Respondent.
 - vii. The Petitioner was thus deprived of his property, illegally, unlawfully and unconstitutionally hence he sought for the orders enumerated in paragraph 1 of this judgment.
4. The petition is founded on Articles 3 (i), 19, 20, 22, 40, 162 (2) (b) and 258 of the Constitution. It is further founded on Sections 24, 25 and 26 of the Land Registration Act, Section 3 (1) of the Land Disputes Tribunal, and Section 159 of the Registered Land Act (now repealed).
5. The Petitioner further pleaded the particulars of violations by the Respondents as follows;
 - i. Depriving the Petitioner his constitutional right to own property contrary to Article 40 (2) (a) of the Constitution.
 - ii. Limiting and/or restricting the right of the Petitioner to use, occupy, possession and own property contrary to Article 40 (2) (b).
 - iii. Acquiring the Petitioners land without following due process as prescribed under Article 40 (3) of the Constitution.



- iv. Disregarding the Petitioner's proof of ownership of their land through title deeds issued by the Government Contrary to Section 24 and 25 of the [Land Registration Act 2012](#).
- v. Illegally subdividing the Petitioner's land.
- vi. Acquiring the Petitioners property without following due process as prescribed by Section 159 of the [Registered Land Act](#) Cap 300 Laws of Kenya.
- vii. Acquiring the Petitioner's property contrary to the provision of Section 3 of the [Land Disputes Tribunal Act](#).

1st, 3rd and 4th Respondent's Response: -

- 6. In response to the petition, a Replying Affidavit by County Land Registrar Nandi County Judith Cherutich was filed.
- 7. It was her deposition that the first registered owner of Nandi/Mogobich/Cheptililik Block 2/58 measuring 1.805Ha was William Gituri, and register was opened on 20/7/1995.
- 8. The title was issued on 11/8/1995 and a restriction was registered thereon on 29/8/1995. An order was registered on 3/5/2001 awarding Plaintiff 2.7 acres and Defendant 2 acres.
- 9. A decree was registered where there was ELC Misc Civil application was dismissed. Caution placed by Wabomba Masinde Advocates stating that there was a pending appeal in E002/2022.
- 10. On 15/6/2022, there was a Court Order directing County Commander to provide security to the County Surveyor during survey and subdivision.
- 11. An order of maintenance of *status quo* was registered as issued in ELC Petition No E001 of 2022.

2nd Respondents Case: -

- 12. The 2nd Respondent filed a replying affidavit in opposition to the petition. He deposed that the petition was filed in total disregard to the previous concluded proceedings and is thus subjudice.
That the Petitioner did not disclose that the issues pertaining the subject parcels have been heard and determined by the Court. That the order of the Court have been executed by creation of subdivisions and decree has thus been executed.
- 13. That the same issues raised in the petition were raised in his another case in Eldoret ELC 35/2022; and an appeal had been lodged against the orders issued before the subordinate Court.
The 2nd Respondent thus asked the Court to dismiss the petition.
- 14. Parties were directed to file written submissions on the petition. The Petitioner filed the submissions on 16th December were filed on 18th January 2023. The 1st, 3rd and 4th Respondents opted to rely on the affidavits and not to file any submissions in the matter.

Petitioner's Submissions: -

- 15. The Petitioner in his submission framed 6 issues for determination as here follows;
 - i. Whether the petition here in is property before Court or it is subjudice.
 - ii. Whether the Petitioners right to property has been violated by the Respondents actions of illegal cancellation and subdivision of Mogobich/Cheptililik Block 2/58.



- iii. Whether an order should issue for immediate restriction to the Petitioner of land comprised in title no Mogobich/Cheptililik Block 2/58.
- iv. Whether the Court should issue an order for a permanent injunction restraining the Respondents, their agents, servants or any person acting under their direction from interfering with the Petitioner's ownership, possession and use of all that parcel of land Mogobich/Cheptililik Block 2/58.
- v. Whether the Court should issue an order for compensation for the violation of the Petitioner's right over land parcel No Mogobich/Cheptililik Block 2/58.
- vi. Whether the Respondents should bear the costs of this petition.

On resjudicata, the Petitioner relying on the decision in the case of *Wensley Barasa* which quoted decision in *Michael Bett Sibor vs Jackson Koech* Civil Appeal No 83 of 2016 (2019) eKLR where the Court held as follows;

“we accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment; however such a judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the Court, but the judgment is the result of what may be described as a technical knockout..... A suit that has been dismissed or struck out for non-attendance of a party for want of jurisdiction or on account of Limitation can hardly be said to have been heard and finally decided which is a requirement of Section 7 of the Civil Procedure Act.”

- 16. On subjudice the Petitioner submits that the same only applied where there is another suit or proceeding is pending in another Court, and hence does not apply in this case.
- 17. The Petitioner submits that the Land Disputes Tribunal did not have jurisdiction to determine the ownership and places reliance on the case of *Mary Kerubo Ogoti vs Chief Magistrate Court, Kisii Law Courts*, (2017), eKLR, thus the decision was a nullity and the Petitioner should be restituted, and on the strength of the said submissions, the Petitioner prayed that his case be allowed.

2nd Respondents Submission: -

- 18. On his part the 2nd Respondent has framed two issues for determination.
 - i. Whether the Petitioner's rights over the parcel of land known as Mogobich/Cheptililik Block 2/58 have been violated by the award of 2.7 acre thereof to the 2nd Petitioner and whether the same should be restricted back and an award for compensation.
 - ii. Whether the issues herein have been heard and determined?
- 19. The 2nd Respondent submits that the issues raised herein were heard and determined in Eldoret ELC 35/2020 between William Kitur Tuwei vs Kiptanui Ngososei which suit was dismissed and that this Court cannot re-open the said issues.
- 20. In support of this, the 2nd Respondent cites the case of *IEBC vs Maina Kiai and the others* and submits that the petition be dismissed for being resjudicata.

Issues For Determination: -

- 21. From the petition, the Replying Affidavits, and submissions filed by the parties, the Court frames the following issues for determination.



- i. Whether or not the issues raised in the petition were heard and determined making the petition res judicata
- ii. Whether the Petitioner's rights were violated.
- iii. What reliefs ought to issue?
- iv. Who bears the costs of the petition?

Analysis and Determination:-

22. With regard to issue number 1 whether the issues herein were heard and determined.
The 2nd Respondent in his Replying Affidavit and submission alluded to the fact that the Petitioner had filed before the Environment and Land Court at Eldoret case No 35/2020, William Kitur Tuwei vs Kiptanui Ngososei.
23. The 2nd Respondent submits that the Petitioner had challenged the decision of Kapsabet Land dispute Tribunal through Eldoret High Court Misc Civil Application No 91 of 2001. In the Replying Affidavit, the 2nd Respondent has annexed the order in respect of ELC No 35 of 2020 William Kitur Tuwei vs Kiptanui Ngososei where a preliminary objection was upheld.
24. The pleadings in the judicial review Application No 19/2001 have not been exhibited before Court. Section 7 of the *Civil Procedure Act* provides for the doctrine of Res judicata.
25. The said section prohibits Court's from "trying any suit or issue in which the matter directly or substantially in issue in a former suit between the same parties under who they claim, litigating under the same title in a Court competent to try the subsequent suit or he suit in which such an issue has been subsequently raised and has been heard and finally decided by such Court."
26. There was indeed a previous suit to wit ELC Case No 35/ 2020 William Kitur Tuwei vs Kiptanui Ngososei between the Petitioner as Plaintiff and the 2nd Respondent as a Defendant.
27. Annexure KNI shows a copy of an order where the suit was struck out. The judgment striking out the suit was no exhibited by the parties, and the Court did search for the same on kenyalaw.org and found that the same had been reported.
28. Under Section 90 of the *Evidence Act*, the Court shall presume the genuineness of every book purporting to be printed or published under the authority of the government of any country and to contain any of the laws of that country and of every book purporting to contain reports of decisions of the Courts of any country.
29. The publication of that decision therefore falls under section 90 and the Court shall presume the genuineness of the decision rendered in Case no ELC 35/2020 William Kitur Tuwei vs Kiptanui Ngososei; whereas the order annexed shows that there was a preliminary objection was upheld, the decision itself shows that the preliminary objection so upheld was based on res judicata.
30. The issues raised therein are the same issues raised in this matter and the issue of the jurisdiction of the tribunal under Section 3 (i) of the *Lands Disputes Tribunal* is deemed to have been raised and determined under the previous suit, under explanation (4) of Section 7 of the *Civil Procedure Act*.
31. The Court thus finds that the issues raised in this petition were already found to be res judicata in Eldoret ELC Case No 35/2020 and therefore are res judicata.



32. Having found that the petition is res judicata, the Court shall not determine the other issues for determination as it dismisses this petition with costs.
33. The orders of *status quo* earlier issued in this case are hereby vacated.
34. Judgement accordingly.

DELIVERED AND DATED AT KAPSABET THIS 22ND DAY OF MARCH, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Ouma for Petitioner

Ms. Tigoi for 1st, 3rd and 4th Respondent

Ms. Ledisha for 2nd Respondent

