



**Kaptutuk Farm Limited v Tunoi & another (Environment & Land Case
E039 of 2021) [2023] KEELC 17591 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E039 OF 2021**

JM ONYANGO, J

MAY 30, 2023

BETWEEN

KAPTUTUK FARM LIMITED PLAINTIFF

AND

PHILIP KIPTOO TUNOI 1ST DEFENDANT

JULIUS TIROP 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 19th October, 2022 the 1st Defendant/Applicant filed an application seeking the following orders:
 - a. That this suit be struck out for being *res judicata*
 - b. That in the alternative, the Plaintiff's suit be struck out for being an abuse of the process of the court.
 - c. That the Plaintiff be condemned to pay the costs of the suit.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant's supporting affidavit. The main ground raised in the Applicant's affidavit is that the Plaintiff filed suit vide Eldoret HCCC No. 34 of 1983 between the Plaintiff and the 1st Defendant/Applicant over the same subject matter which case was conclusively determined by the Honourable court vide an order dated 9th July 1985. A copy of the Plaintiff and the said order are annexed to the Applicant's affidavit. It is therefore his contention that this suit is both *res judicata* and an abuse of the court process as it offends the provisions of section 7 of the [Civil Procedure Act](#) Chapter 21 of the Laws of Kenya and Order 15 Rule 2 of the [Civil Procedure Rules](#).
3. In response to the application, the plaintiff filed Grounds of Opposition dated 20th February 2023 in which it raised the following grounds:



- i. That the application is an abuse of the court process.
 - ii. That the application was filed despite the defendant's advocates certifying before the Deputy Registrar on 7th September, 2022 that all the parties had complied and were ready for hearing.
 - iii. That despite filing the application on 19th October, 2022 the Defendant waited until February 2023 to serve the Plaintiff who is ready for hearing of the main suit.
 - iv. That the hearing date was given on 21st October 2022 even though the application seemingly had been filed on 19th October 2022 and thus the same should be deemed to have been overtaken by events.
 - v. That the suit herein was filed on 7th June 2021 and the Defence filed on 29th September, 2021 thus the filing of the present application is a ploy by the Defendant's counsel to seek an adjournment on 23rd February, 2023 when the matter coming up for hearing.
 - vi. That the suit herein is not *res judicata* since it is challenging the consent judgment in Eldoret HCCC No. 34 of 1983 on the grounds that it was obtained by fraud.
 - vii. That Eldoret HCCC No. 34 of 1983 is the subject matter of this suit.
 - viii. That the facts deponed in the plaintiff's pleadings are truthful.
 - ix. That one of the prayers (a) in the plaintiff's Plaint clearly addresses the issue of Eldoret HCCC No. 34 of 1983 thus the suit herein is not *res judicata*.
 - x. That the suit follows the discovery of fraud as particularized in the Plaint after the proceedings in Eldoret HCCC No. 34 of 1983 on the 28th February 2018.
 - xi. That there is clear jurisprudence and precedents from the Court of Appeal and the Supreme Court that a fraudulent judgment should be challenged through a fresh suit.
 - xii. That the application herein and the suit is devoid of merit and should be dismissed with costs to the Plaintiff (sic).
 - xiii. That the defendant will suffer no prejudice if the suit herein is heard and determined on merits.
 - xiv. That it is in the interest of justice that the suit herein should be heard on its merits.
4. The application was disposed of by way of written submissions and the 1st Defendant and Plaintiff filed their submissions. The 2nd Defendant neither responded to the application nor filed any submissions.

1st Defendant/Applicant's Submissions

5. In his submissions filed through the firm of Nyairo & Co Advocates the 1st Defendant submitted that the Plaintiff filed Eldoret HCCC No. 34 of 1983 claiming land parcel number 84091/1 and he had once again filed this suit seeking recovery of the said parcel of land. Learned counsel for the 1st Defendant identified two issues for determination namely; Whether this suit ought to be struck out for being *res judicata* and whether the plaintiff's suit ought to be struck out for being an abuse of the court process.
6. She submitted that this suit is *res judicata* as provided in section 7 [Civil Procedure Act](#).
7. It was her submission that in Eldoret HCCC No. 34 of 1983, the Plaintiff sought the following reliefs;



- a. An order that the defendant is a trespasser on a portion of 400 acres of land in L.R No. 84091/1 belonging to the plaintiff
 - b. An order of eviction of the defendant from the said piece of land
 - c. Mesne profits
 - d. Costs of this action and further or other relief as the court may deem fit to grant
8. The said suit was compromised through a consent order made on 9.7.1985 whereby it was agreed that 400 acres derived from land parcel number 84091/1 be transferred to the 1st defendant and the balance of 176 acres from the said parcel be transferred to the plaintiff. It was submitted that the parties complied with terms of the consent order.
9. Counsel submitted that the plaintiff has now filed suit seeking inter alia the following orders:
- a. An order declaring that the 1st defendant is illegally in occupation, use and possession of L.R No.84091/1 and ownership of the title by the 1st defendant is null and void
 - b. A declaratory order that the title deed(s) issued to the 1st defendant herein in respect of that parcel of land known as L.R No. 84091/1 and any resultant sub-divisions were procured through fraud, misrepresentation and unprocedurally and the same be cancelled forthwith and the status of the register be restored to the name of the Plaintiff.
 - c. A permanent injunction do issue restraining the 1st defendant, his servants, agents and/or representatives or persons acting on his behalf from re-entering, occupying and/or interfering with the plaintiff's use, occupation and possession of that parcel of land known as L.R No. 84091/1.
10. It is counsel's contention that both suits seek recovery of the parcel of land known as. L.R NO. 84091/1 owned by the 1st Defendant. It is her further contention that the order issued on 9th July, 1985 in Eldoret HCCC No. 83 of 1983 determined all the issues raised in the plaint and revisiting the same issues in this case would amount to the court sitting on appeal on its own decision. She is of the view that the plaintiff is trying to circumvent the legal hurdles he would face if he sought to set aside the consent order obtained in Eldoret HCCC No. 83 of 1983 by filing this suit and this suit is therefore *res judicata*.
11. Reliance was placed on the case of *E.T v Attorney General & Another* [2012] eKLR where the court held as follows:
- “A consent judgment is a judgment whose terms are settled and agreed to by the parties and having been sanctioned by the court, the consent has the effect of *res judicata* in respect of the matters dealt with.
12. It was further submitted that the suit should be struck out for being an abuse of the court process as the plaintiff initially filed Eldoret HCCC No. 34 of 1983 after which it filed a complaint before the National Land Commission Historical Injustice Committee. The decision of the National Land Commission was quashed by this Honourable court in Eldoret Judicial Review Miscellaneous Application No. 7 of 2019.



13. Counsel relied on the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* [2022] eKLR where the court held that:

“Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a scenario where a party is pursuing the same matter by two court processes. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.

The point to underscore is that a litigant has no right to pursue paripasu more than once processes which will have the same effect at the same time or at different times with a view to obtaining victory in one of the processes or both.

“.....Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of the right per se. The abuse consists in the intention, purpose and aim of the person exercising the right to harass, irritate and annoy the adversary and interfere with the administration of justice.”

14. Counsel took issue with the fact the Respondent had not filed a Replying Affidavit and had only filed Grounds of opposition which by law ought to be restricted to issues of law. It was counsel’s contention that the Respondent’s Grounds of Opposition contained mere facts whose source was not disclosed and they were therefore mere allegations from the bar.
15. Reliance was placed on the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Co. Limited* [2010] eKLR and *Africa Merchant Assurance Company Limited v Titus Kinyanjui Kienjoku* [2017] eKLR for the proposition that Grounds of opposition address only issues of law and do not constitute evidence that can suffice in rebutting the facts raised in the supporting affidavit.

Plaintiff/Respondent’s Submissions

16. The Plaintiffs’ submissions were filed through the firm of Bitok & Sambu Advocates. Learned counsel for the Plaintiff submitted that in this case the Plaintiff seeks to set aside the consent orders issued on 9th July 1985 by Justice V. V Patel in Eldoret High Court Civil Case No. 34 of 1983 on the grounds that the said orders are fraudulent and illegal as the 2nd Defendant was neither a shareholder nor a director of the Plaintiff company and thus had no powers to enter into a consent with the 1st Defendant on behalf of the company. He relied on the case of *Richard K. Bunei & 8 Others T/A Geo Estate Development Services v Lorien Ranching Company Limited & 799 Others (being sued on behalf of themselves and behalf of alleged 795 members)* [2017] eKLR where the Court of Appeal faced with a similar situation cited with approval the case of *Hip Foong v Neotia & Company* [1918] AC 888 where the Privy Council held as follows:

“A judgment that is tainted and affected by fraudulent conduct is tainted throughout... where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved and the better course such as case is to take independent proceedings to set aside the judgment on the ground of fraud, when the whole issue can be properly defined, fought out and determined though a motion for a new trial is also an available weapon and in some cases may be convenient.”



This court also referred to and accepted the earlier decision of the Queen’s Bench Division in *Cole v Langford* [1898] 2QB 36 which after considering the decisions of Jessel M.R in *Flower v Lloyd* 6 Ch D 297 and Lord justice Bagallay in *Baker v Wadsworth* [1898] 67 L.J. Q.B 301 held that;

“Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside.”

17. It was counsel’s submission that the facts in this case are similar to the ones in *Richard K. Bunei & Others T/A Geo- Estate Development Service* (*supra*). He submitted that the Plaintiff cannot be faulted for filing the present suit as this is the only acceptable way of assailing the alleged fraudulent judgment in HCCC No.34 of 1983. Regarding the delay in filing the suit, he opined that the same has been explained at paragraph 11 of the Plaint where he averred that the file had been missing from the registry until 2020 when the plaintiff obtained the proceedings in
18. In response to the 2nd Defendant’s criticism that he ought to have filed a Replying Affidavit instead of only filing Grounds of Opposition, counsel submitted that since the application is challenging the suit for being *res judicata* which is a pure point of law, the same ought to have been filed as a Preliminary Objection rather than an application.

Issues for Determination

19. Having considered the Notice of Motion, supporting affidavit, Grounds of Opposition and rival submission, the main issues for determination are twofold:
 - i. Whether the suit herein is *res judicata*
 - ii. Whether the suit is an abuse of the process of the court.

Analysis and Determination

20. The doctrine of *res judicata* is contained in section 7 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya which provides as follows:

“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.”

21. In Eldoret HCCC No. 34 of 1983, the Plaintiff sued the 1st Defendant herein claiming that he was a trespasser on land parcel number 84091/1. It thus sought an order that the defendant is a trespasser on a portion of 400 acres of land in L.R No. 84091/1 belonging to the plaintiff; an order of eviction against the defendant as well as mesne profits.
22. The said suit was compromised by a consent order dated 9th July 1985 between Julius Tirop Too (2nd Defendant) and most of the shareholders of the plaintiff company on one hand and the 1st Defendant on the other hand. According to the said consent order which is annexed to the 1st defendant’s supporting affidavit as annexure “PKT2,” the terms of the consent were as follows:

“By consent the following orders are made after bringing of the award to the notice of the parties:



1. The Defendant to be entitled to 400 acres of land parcel no. 84091/1 situated in the North East of Eldoret Municipality in Uasin Gishu District as the sole owner thereof.
2. The Defendant to transfer the residue of 176 acres from the above land parcel forthwith to the Plaintiff company or as directed by the said company and in default the Deputy Registrar of this court to execute all relevant documents for that purpose.
3. There are 251 shareholders in the plaintiff's company. The land parcel No. 9624 comprises 3043 acres of land which is adjacent to land parcel no. 84091 and 176 acres of the said parcel of land No. 84091 be divided forthwith between the 251 shareholders of the plaintiff Co. according to the share contributions.
4. The District Commissioner, U.G District to ask the Government Surveyor to carry out the survey and sub-division referred to in paragraph No. 3 hereinabove and each of the said shareholders to be issued with a separate title deed in his name or as directed by the shareholder concerned.
5. The costs of the transfer of the 176 acres from the defendant to the plaintiff Co. or as per the said Co.'s directions and the cost of the survey, sub-divisions and registrations in the names of individual shareholders be borne by the shareholders jointly.
6. Each Party to bear his own costs of this suit."

23. In the instant suit, the Plaintiff has alleged at paragraph 10 of the plaint as follows:

10. "That the Plaintiff avers that Eldoret High Court Civil Case No. 34 of 1983 between Kaptuktuk Farm Limited v Philip Kiptoo Tunoi was filed by a person who was neither a director nor shareholder of the Plaintiff. That the consent judgment which was subsequently was therefore marred by illegalities and fraudulent in every material respect" (sic)

24. The Plaintiff has listed the particulars of fraud at paragraph 10(a)-(f) of the Plaint as follows;

"Particulars of fraud and illegalities in the judgment recorded in Eldoret High Court Civil case No.34 of 1983 between Kaptutuk Farm Limited Vs. Philip Kiptoo Tunoi:

- a. The suit was filed by a stranger to Kaptutuk Farm Limited.
- b. That the directors and/or members of Kaptutuk Farm Limited never passed a resolution to institute suit against the 1st Defendant.
- c. The elders who purported to represent the Plaintiff during the alleged negotiations at the D.O's office Moiben were fronted by the Defendant.
- d. That the Defendants concealed a material fact that the Plaintiff had paid the entire consideration in respect of the suit parcel of land.
- e. That the Defendants failed to disclose the fact that the 1st Defendant was not a member of the Plaintiff and was therefore not entitled to the suit land.



- f. That the Plaintiff failed to disclose the material fact to the court that the 1st Defendant had no agreement with the Plaintiff to purchase the suit land and that no consideration passed between the 1st Defendant and the Plaintiff.”

25. The Plaintiff seeks the following reliefs:

- a. That the consent orders obtained in favour of the 1st defendant against the Plaintiff in ELD HCCC NO. 34 of 1983 between Kaptuktuk Farm Limited v P.K Tunoi and in any other case relating to the Plaintiff and the 1st defendant be set aside as they are fraudulent orders.
- b. This Honourable court declares that the 1st defendant is illegally in occupation, use and possession of L.R No.84091/1 and ownership of the title by the 1st defendant is null and void
- c. A declaratory order that the title deed(s) issued to the 1st defendant herein in respect of that parcel of land known as L.R No. 84091/1 and any resultant subdivisions were procured through fraud, misrepresentation and unprocedurally and the same be cancelled forthwith and the status of the register be restored to the name of the Plaintiff.
- d. A permanent injunction do issue restraining the 1st defendant, his servants, agents and/or representatives or persons acting on his behalf from re-entering, occupying and/or interfering with the plaintiff’s use, occupation and possession of that parcel of land known as L.R No. 84091/1.
- e. An eviction order do issue against the 1st defendant from that parcel of land known as L.R No. 84091/1.
- f. General damages for trespass and mesne profits.
- g. The defendants be condemned to pay costs of this suit.
- h. Any other relief this court may deem fit.

26. It is clear from paragraph 10 of the Plaint and the reliefs sought in the plaint that even though the suit touches on the same subject matter, being land parcel No. 84091/1 between the plaintiff and the 1st Defendant, the main relief sought in this suit is that the consent order dated 9th July 1985 be set aside as it was obtained by fraud. The said consent order has never been challenged by the parties and this aspect of the suit is not *res judicata*. That being the position, the proper way for the plaintiff to challenge the impugned judgment is by way of a new action to set aside the said judgment.

27. In arriving at this conclusion I am guided by the case of *Richard K. Bunei & 8 Others T/A Geo Estate Development Services v Lorien Ranching Company Limited & 799 Others (being sued on behalf of themselves and behalf of alleged 795 members)* [2017] eKLR where the Court of Appeal held as follows:

“At the commencement of the hearing of this suit, counsel for one of the defendants took up a preliminary objection to the effect that this suit is incompetent. If the plaintiff seeks to set aside orders in those earlier cases, then the application should have been brought in those earlier cases, and not to file a new case. The other objection is that the suit is *res judicata*.

It would appear that counsel did not understand the import of this case. If I got what counsel for the plaintiff was arguing about, it is to the effect that the defendants, purporting to be



duly authorized agents of the plaintiff filed suits against other parties. The present suit is by the “legal” plaintiff against those who misused its name. This is a complete new case with a new cause of action and parties are clearly different.

As to whether applications in earlier cases (sic) to set the judgments or rulings aside, the position was well covered by the decision of the Privy Council in *Hip Foong Hong v H. Neotia And Company*[1918] AC 888 where the Privy Council held that when it is alleged that a judgment has been obtained by fraud an independent action to set aside the judgment is a more convenient mode of procedure than a motion for a new trial supported by affidavit.”

28. I will now proceed to consider whether the suit is an abuse of the court process. It has been submitted that the plaintiff’s suit is an abuse of the court process as the plaintiff filed Eldoret HCCC No. 34 of 1983 followed by complaint before the Land Commission Historical Injustice Committee whose decision was quashed by this court in a determination made in Eldoret ELC Judicial Review Misc Application No. 7 of 2019. According to the 1st defendant, all the issues raised by the Plaintiff have been determined.

29. In *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] KLR 229, the Court of Appeal held that:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

30. Granted that the Plaintiff has filed other cases relating to land parcel number 84091/1 against the 1st Defendant, can it be said that this suit is frivolous, vexatious, oppressive and wanting in bona fides? I have already held that the cause of action in this suit is different from Eldoret HCCC No. 34 of 1983 as it seeks to set aside the judgment in the said case on grounds of fraud. It is not clear what the complaint before the National Land Commission was but it appears that the plaintiff was complaining about the manner in which the 1st defendant acquired the suit property. Although the process before the



National Land Commission was not a judicial process, the matter found itself before this court when the 1st defendant challenged the decision of the National Land Commission by way of Judicial Review.

31. This is therefore the third time that the court is being asked to adjudicate over the dispute between the plaintiff and the 1st defendant relating to land parcel No. 84091/ after a period of 36 years. However, in view of the fact that the plaintiff has raised the issue that the consent judgment dated 9th July 1983 was obtained by fraud, this court cannot dismiss this suit as being frivolous. I am of the view that the interest of justice would be served if the plaintiff is given the opportunity to prove the serious allegations he has raised in the plaint subject to any other legal hurdles that it may be required to overcome.
32. Before I conclude, it would be remiss of me not to touch on the question of adequacy of plaintiff's Grounds of Opposition in responding to the issues raised in the supporting affidavit. It is trite that Grounds of Opposition should be confined to points of law rather than facts. See the cases of *Kennedy Otieno Odiyo & 12 Others* (*supra*) and *Africa Merchant Assurance Company Ltd v Titus K. Kienjeku* (*supra*). The thrust of this application being that the suit is *res judicata*, ground 6 has addressed the same by stating that the suit is not *res judicata* since it is challenging the judgment in Eldoret HCCC No. 34 of 1983. This being a point of law, no evidence was required to rebut this assertion as it can be discerned from the pleadings.
33. The upshot is that the application lacks merit and it is hereby dismissed.
34. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF MAY 2023.

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J.M ONYANGO

JUDGE.

In the presence of;

1. Mr. Sambu for the Plaintiff/Respoendent
2. Ms. Cherotich for the 1st Defendant/Applicant

Court Assistant: A. Oniala

