



**Chweya v Maserea (Environment & Land Case 17 of 2022)
[2023] KEELC 17632 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 17 OF 2022
MN MWANYALE, J
MAY 18, 2023
(FORMERLY ELDORET ELC CASE E001 OF 2021)**

BETWEEN

MIKE CHWEYA PLAINTIFF

AND

ESSAU CHWEYA MASEREA DEFENDANT

RULING

1. Vide a notice of preliminary objection dated February 13, 2023 and filed on February 14, 2023 the defendant raised the issue that this suit was *resjudicata* the issues having been heard and determined in Eldoret Environment and Land No 245 A of 2016 between Felina Kabaya Andareya and John Andareya (suing as the Administrators of the Estate of Andrea Akiabara Chweya v Essau Cheveya Masera and 2 others.
2. The plaintiff herein being the grandson of the plaintiff in the Eldoret case. When the said preliminary objection was raised counsel for the plaintiff indicated that the preliminary objection has already been raised and determined before the transfer of this suit from Kisumu ELC to Kapsabet ELC.
3. The court did peruse the record and found that on February 8, 2022, the proceedings reflected that a preliminary objection had been filed and the same was orally withdrawn, and directed that the defendant was at liberty to reinstate the said preliminary objection which had been abandoned and the same be canvassed by way of written submissions; and time lines were given for filing of the submissions.
4. On March 9, 2023, the court confirmed that both sets of submissions were on record and reserved the ruling for today May 18, 2023.
5. From the notice of preliminary objection and the submissions on record the sole issue for determination is whether this suit filed by Mike Chweya Masera is *resjudicata* in view of Eldoret E & L



- No. 245 A of 2016 between Felina Kabaya Andareya and John Andareya (suing as the administrators of the Estate of Andrea Akiabara Chwenyi and Esau Chweya Maseru and 2 others.
6. Resjudicata is provided for under section 7 of the [Civil Procedure Act](#). The said section equally has 6 explanations which guide the court in interpretation of the doctrine of *resjudicata*.
 7. The courts have equally interpreted and laid down the principles of *resjudicata* and the leading case of [John Maritime Florence v Cabinet Secretary Transport](#) where the Supreme Court held that for a successful plea on res judicata in civil cases the following elements must exist.
 - i. There is a final judgment or order which is final
 - ii. The judgment or order was on merit.
 - iii. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
 - iv. There must be between the first and second action identical parties' subject matter and cause of action.
 8. The plaintiff submits that present case is not *resjudicata* since the parties in Eldoret E & L No 254A of 2016 are different and distinct persons from the plaintiff in this suit. The plaintiff further submits that the reliefs and orders ought in the previous case are not similar to be reliefs sought in the present case.
 9. That in the previous suit, the plaintiffs therein had sought for an order of nullification and revocation of title number Nandi/Kapsengere/473 issued to plaintiff herein by the Land Registrar Nandi county and the same be vested back to Andrea Akiabara Chweya and an order of permanent injunction; while the present suit is for adverse possession the plaintiff having been utilized the suit land and being in occupation thereof for a period exceeding 12 years.
 10. The plaintiff submits further that the judgment in Eldoret case only binds Felina Kabaga Andareya and John Andareya and not the plaintiff herein.
 11. On the strength of the above submissions the plaintiff submits for a dismissal of the notice of preliminary objection.
 12. In response the defendant submits that the suit is *resjudicata* as a final determination was made by a competent court and that the plaintiff herein is the grandson of Andrea Akiabara Chweya and a son to John Andareya Chweya.
 13. The defendant further submits that the subject matter is the same as it related to Nandi/Kapsengere/473 hence the suit is *resjudicata*.
 14. Vide paragraph 2 of the affidavit on support of originating summons, the plaintiff describes himself as the son one John Andareya Chweya and the grandson of Andrea Akiabara Chweya and that he is entitled to adverse possession having occupied Nandi/Kapsengere/473 from 2003.
 15. By his own admission the plaintiff is a son of John Andareya Chweya who was the co-plaintiff in the Eldoret case, and the issue is whether the plaintiff and his father are different person or the same parties for purpose of *resjudicata*.
 16. The answer is to be found at explanation number 6 of section 7, which provides as such “where person litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all person interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating.”



17. From the above, the plaintiffs in the Eldoret case were litigating for themselves and all person interested in such right were deemed to be so litigating under them.
18. It follows therefrom that the plaintiff herein is deemed to have been claiming under his father and the court finds and holds that for purposes of *resjudicata*, the plaintiff and John Chweya are the same parties.
19. The above finding finds resonance in the decision in the case of *Diocese of Eldoret Trustees (registered) v Attorney General on behalf of Principal Secretary and another* 2020 eKLR where the court observed as follows;-

“Court must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add other to circumcenter the doctrine of *resjudicata*. Adding or subtracting litigating in a suit that is substantially and directly related to a previous suit with the same subject matter does not sanitize the suit terminate prematurely *vide* a preliminary objection.”
20. The court shall now consider whether the reliefs sought in this suit are similar to reliefs sought in the previous suit.
21. The reliefs sought in this suit and the previous suit have been set out at paragraph 9 of this ruling. In the previous suit, the plaintiffs sought for nullification of the title to Nandi/Kapsangere/473, and this suit the plaintiff seeks adverse possession having entered the suit property Nandi/Kapsabgere/473 in 2003.
22. The previous suit was filed in 2016, and as has been held above the parties were same by dint of explanation 6, if indeed the plaintiff in the present suit entered and occupied the suit property in 2003 as deponed in paragraph 2 of his affidavit in support, then his right for adverse possession crystalized in 2015.
23. It follows therefrom that in 2016 when the previous suit was filed, the plaintiffs could have pleaded adverse possession but they did not plead adverse possession as a cause of action.
24. Explanation 4 of section 7 provides that “any matter which might and ought to have been made ground of defence of attack in such former suit shall be deemed to have been a matter directly and substantially in issue “in such suit”.
25. The issue of adverse possession now pleaded in this case, ought to have been pleaded in the previous suit as such a right may have accrued to the plaintiffs in 2015 and suit was filed in 2016, it is thus deemed by dint of explanation 4 to have been a matter directly and substantially in issue in such suit.
26. The judgment delivered in the previous suit thus binds the plaintiffs and all people who claim under them and having been issued by a court of competent jurisdiction, renders the present suit *resjudicata* and this suit is dismissed with costs.

DELIVERED AND DATED AT KAPSABET THIS 18TH DAY OF MAY 2023.

HON. M. N. MWANYALE,

JUDGE

Delivered in the presence of

Mr. Kiprono for Plaintiff

Ms. Athunga for Defendant.

