



**Kemei & another v Kiobe (Environment and Land Appeal
14 of 2022) [2023] KEELC 19207 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 14 OF 2022**

EO OBAGA, J

JULY 26, 2023

BETWEEN

JAMES KEMEI 1ST APPELLANT

CHRISTINE CHEPKEMBOI 2ND APPELLANT

AND

EMILY JERONO KIOBE RESPONDENT

*(Being an Appeal against the ruling of Hon. B. Kiptoo (R.M) delivered on the 24th
November, 2021 in Eldoret Chief Magistrate's Court E&L Case No. 72 of 2020))*

JUDGMENT

Background;

1. The appeal herein can be traced from a dispute between a couple whose union was later dissolved around 2002. The dispute touched on what later became as LR. No. Moi's Bridge Block 8 (Natwana ADC) 68 (suit property). Emily Jerono Kiombe went to Soy Land Disputes Tribunal where she filed a complaint against her former husband Jamin Kiombe Lidodo. The Tribunal ruled in favour of Emily Jerono Kiombe. The Tribunal award was adopted as a judgement of the court vide Eldoret Chief Magistrate's Award No 58 of 2002.
2. Jamin Kiombe Lidodo (Lidodo) did not file an appeal to the Provincial Appeals Committee as was provided in the Land Disputes Tribunal Act (Now repealed) or file Judicial Review Proceedings seeking to quash the Tribunal verdict. Lidodo instead filed Eldoret HCCC No. 80 of 2005 which later became ELC Case No. 218 of 2012 whereby he sought a declaration that the Tribunal verdict was null and void. Emily Jerono Kiombe (Jerono) filed a counter-claim in which she sought to be declared as owner of the suit property.



3. In a judgement delivered by Justice Ombwayo on 20/12/2018, the Judge observed that Lidodo should have pursued the openings available to him under the Land Disputes Tribunal Act (Now repealed). The Judge stopped at that observing that he would not delve into the other issues as there was a valid judgment arising from Eldoret Chief Magistrates Award No. 5 of 2002. He however went ahead to find in favour of Jerono and ordered that Lidodo and his servants or agents be evicted from the suit property within 60 days.
4. Armed with the decree in Eldoret E&L case No. 218 of 2012, Jerono moved to the suit property and evicted all those who were on the suit property including the Appellants who were not parties to E & L case No 218 of 2012 who had purchased land from her and from a third party who had also purchased land from her.
5. The suit which resulted in this appeal was filed against Jerono to forestall a threatened eviction which was nevertheless carried through and the Appellants are now not in the suit property. The Respondent (Jerono) moved to court and filed an application seeking to have the Appellants' suit strike out for being statute barred but the application was dismissed in a ruling delivered on 23/2/2021.
6. The Respondent then went back to the court and filed application dated 2/7/2021 in which she sought to have the Appellants' suit struck out on grounds that it was res judicata. In a ruling delivered on 24/11/2021, the trial magistrate upheld the preliminary objection and struck out the Appellants' suit.

Grounds of Appeal ;

7. It is the striking out of the Appellants' suit which prompted them to file this appeal in which they have raised the following grounds:-
 1. That the learned magistrate erred in law and fact by failing to appreciate that the Appellants were not primary parties before the Environment & Land Court Case No. 218 of 2012.
 2. That the learned magistrate erred in law and fact by failing to appreciate that the matter in issue could not operate as res Judicata owing to the fact that the dispute between parties herein had not been heard and decided on merit.
 3. That the learned magistrate erred in law and fact in holding that the lower court suit No. E & L 72 of 2020 was res judicata without appreciating its nature and/or verifying the disputed signatures by the Appellants in the alleged Application in ELC No. 218 of 2012.
 4. That the learned magistrate erred in law and fact by failing to appreciate that the Appellants had demonstrated supporting documents in their pleadings in proof that they were innocent purchasers who ought to have been given a chance to be heard on merits as provided for under Article 50 of *the constitution*.

Submissions of parties ;

8. The parties were directed to file written submissions. The Appellants filed their submissions on 27/4/2023. The Respondent filed her submissions on 3/5/2023. There was no highlighting of submissions.
9. The Appellants submitted that they were not parties in E & L case No. 218 of 2022 and that the issues they were raising in the dismissed suit were not dealt with in E & L case No. 218 of 2012. The



Appellants relied on the case of *Uhuru Highway Development Ltd – vs- Central Bank of Kenya* (1999) eKLR where elements of res judicata were stated to be as follows: -

- a. The former judgment or order must be final;
 - b. The judgement or order must be on merit;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of parties of subject matter and cause of action;
10. The Appellants also relied on the case of *The Independent Electoral & Boundaries Commission – vs- Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 (2017) eKLR, where it was stated as that for the bar or res-judicata to be operate, the following elements must be proved: -
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That the former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
11. The Respondent submitted that litigation has to come to an end and a party cannot come to court and give a cosmetic face lift to another case which had already been determined. She relied on the case of *Njangu vs. Wambugu and Another* Nairobi HCC No. 2340 of 1991 (unreported) held that:-
- “If parties were allowed to go on litigating forever over the same issue with the same opponent before court of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine or res judicata...”

Analysis and determination;

12. I have carefully considered the grounds of appeal as well as the submissions by the parties. My duty as a first Appellate court is to evaluate the evidence and reach my own conclusion. There is only one issue for determination and this is whether the Appellants’ suit was res judicata.
13. The principle of res judicata is predicated on section 7 of the *Civil Procedure Act* which states 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”



14. In the instant case, the Appellants were not primary parties in E & L case No. 218 of 2012. They only filed an application in that suit in which they sought a declaration that they were not bound to be evicted from their respective portions as they were not parties to that case. Their application was dismissed as they were not primary parties in a case which had been heard and concluded.
15. The case between Lidodo and Jerono was not determined on merits as the Judge found that Lidodo had not followed the procedure which was provided under the Land Disputes Tribunal Act (Now repealed). The issues in the counter-claim was on who was the owner of the suit property as between Lidodo and Jerono. The issues which the Appellants were raising in the suit which the trial magistrate struck out were never dealt with in E & L No. 218 of 2012.
16. The trial magistrate simply observed that the suit property in E & L 218 of 2012 was the same as in E & L 72 of 2020. He further observed that the superior court had already dealt with ownership of the suit property. The Appellants had purchased their portions from the Respondent and from a third party who had purchased her portion from the Respondent. This issues was never in issue in E & L case No. 218 of 2012. The trial magistrate was therefore wrong in making a finding that the Appellants issues had been dealt with in E & L case No. 218 of 2012.

Disposition;

17. From the above analysis, I find that the trial magistrate erred in holding that the suit was res judicata. I allow the appeal with the result that the ruling of 24/11/2021 is set aside and the struck out suit is hereby reinstated for hearing before a magistrate other than Hon. B. Kiptoo. The Appellant shall have costs of this appeal as well as the two applications which preceded the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual absence of parties who were aware of the date of the delivery of judgement.

Court Assistant –Laban

E. O. OBAGA

JUDGE

26TH JULY, 2023

