



**Kandie v Korir & another (Environment & Land Case
E064 of 2022) [2023] KEELC 18771 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E064 OF 2022**

**EO OBAGA, J
JULY 13, 2023**

BETWEEN

HILLARY KANGOGO KANDIE APPLICANT

AND

SALLY JEMELI KORIR 1ST RESPONDENT

EDWIN KIPROP KORIR 2ND RESPONDENT

RULING

1. The Applicant filed a notice of motion dated December 19, 2022 in which he sought the following orders:-
 1. Spent
 2. This Honourable court be pleased to confirm the eviction Notice dated June 20, 2022 and the Respondent be ordered to vacate and give possession of land parcel number Sergoit/Koiwoptaoi Block 12 (Katalel)/542 and Sergoit/Koitwoptaoi Block 12(Katalel)/557.
 3. Eshikon Auctioneers do effect and execute the above eviction orders.
 4. The Officer Commanding station (OCS) – Cherangany Police Station and/or the Deputy County Commissioner – Trans Nzoia County to ensure compliance.
 5. The cost of this application be provided for.
2. In response to the Applicant’s notice of motion, the Respondent filed a notice of motion dated February 9, 2023 in which they contend that this suit is *res judicata*.
3. It is the Applicant’s contention that his late father William Kandie Suter is the registered owner of LR No Sergoit/Koiwaptaoi Block 12 (Katalel)/557 and 542. The Applicant has since taken out grant of



letters of administration in respect of the Estate of his late father limited to pursuing a case touching on the two properties.

4. On June 22, 2022 an eviction notice was issued under section 152E of the Land Act requiring the Respondent to vacate from the two properties. The eviction notice was duly served as required upon the Deputy County Commissioner and the Officer Commanding Police Division.
5. The eviction notice was to take effect on September 20, 2022 but the Respondents have not heeded the same forcing the Applicant to file the present application.
6. The Respondents opposed the Applicants' application on the basis that the same is *res judicata* in that there was E&L case No 794 of 2012 between the same parties. The Respondents argue that the case was fully heard and a judgement given. They further argue that if the Applicant wants to execute, he should do so in E&L case No 794 of 2012. The Respondents further contend that the Applicant cannot move the court through a miscellaneous application and that he should have filed a fresh suit.
7. The Respondents further argue that the provisions under which the application is brought envisage a situation where there is illegal occupation where the issue of ownership is not an issue unlike in the present case where there is a judgment which has already been given.
8. The parties were directed to file written submissions. I have looked at the application by the Applicant as well as the objection to the same by the Respondents. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether this application is *res judicata*. Secondly, whether its proper to bring a miscellaneous application as opposed to a suit by way of plaint. Thirdly, does the court have jurisdiction to grant the orders sought. Fourthly, which orders should be made on costs.
9. The principle of *res judicata* is predicated on section 7 of the Civil Procedure Act 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.”

10. The Court of Appeal in the case of Independent Electoral & Boundaries Commission – Vs- Maina Kiai & 5 others (2017) eKLR states as follows: -

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- 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. I have looked at the judgement which was delivered on March 6, 2020 in E&L case No 794 of 2012 Sally Jemeli Korir & Another (suing as the administrators of the estate of Yusuf Kipkorir Chepkeitany) –Vs- William Suter & 2 others. The 1st Defendant in this case was the father to the Applicant. In this judgement, the Plaintiff’s suit was dismissed with costs to the Defendants.
12. There was no finding or determination made in respect of the counter-claim which had been filed by the 1st Defendant. This is because the judge had stated as follows: -
- “I have considered the pleadings, the evidence and the submissions by counsel and find that the issue for determination is whether this is the right forum for adjudication of this mater. If the same is answered in the negative then there would be no need to look at the other issues as to whether the Defendant acquired the title to the suit land fraudulently.”
13. The judge went on to state as follows:-
- “Having considered the issue whether this is the right forum to adjudicate this matter, and having found in the negative, I am persuaded by the decision above that the plaintiffs slept on their right to appeal in the correct forum as they cannot challenge the award of the Land Disputes Tribunal vide a declaratory suit.”
14. It is clear from the judgement that there was no determination made in the counter-claim. A counter-claim is in law considered as a separate suit. The application herein is therefore not *res judicata*.
15. On the second issue, there is no contention that the Applicant’s father is the registered owner of the two properties. The Respondent having failed to overturn the verdict of the Tribunal which was adopted as judgement of the court, the position remained that the Applicant’s father was the lawful owner of the two properties. This being the case, the Applicant was right in bringing a miscellaneous application pursuant to section 152 E of the *Land Act*.
16. Section 152E of the *Land Act* provides as follows:-
- 1 If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction. (2) The notice under subsection (1) shall –
- a. be in writing and in a national and official language;
 - b. in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.
17. By dint of section 152 F (2) of the *Land Act*, the Court is mandated to consider matters set out in section 152 C, 152D, and 152E. The said section states as follows: -



- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
- a. confirm the notice and order the person to vacate;
 - b. cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - c. suspend the operation of the notice for any period which the court shall determine; or
 - (d) order for compensation.
18. Section 152 F (2) does not prescribe the manner in which the court should be moved. It is clear that where there is no ownership dispute, a party can move the court by way of miscellaneous application. This was the procedure followed in *Lucy Ghati – Vs- Alex Wambura John & another* (2019) eKLR and [*James Mathura Makewa – Vs- Nzari Ngului*](#) (2021) eKLR.
19. Section 152 F (2) prescribes the remedies which the court may give after considering matters set out in section 152C, 152D and 152E. The court may confirm the notice and order the person to vacate, or order for compensation. In the instant case, the Applicant has sought for confirmation of the eviction notice and vacant possession.

I therefore find that the Applicant's application is well founded. I allow the same in terms of prayers 2, 3, 4 and 5 of the motion dated December 19, 2022. The Notice of motion dated February 9, 2023 is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JULY, 2023.

E O OBAGA

JUDGE

In the virtual presence of;

Mr Ogongo for Applicant.

Ms Tum for Respondent.

Court Assistant –Laban

E O OBAGA

JUDGE

13TH JULY, 2023

