



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ENVIRONMENT AND LAND CIVIL CASE NO.87 OF 2021

(FORMERLY ELDORET ELC CIVIL CASE NO ELC 046. OF 2021)

KIBUTUK NGELECHEI.....1ST PLAINTIFF

ANNA JEROP RONGET.....2ND PLAINTIFF

-VERSUS-

PHILEMON SINGOEI.....DEFENDANT

RULING

1. This Ruling is in respect of two applications that were heard simultaneously by way of written submissions. The first application is the Chamber summons filed by the Plaintiffs on 17.8.2021 and which sought injunctive orders (Herein after be referred to as ‘the injunction application’).
2. The Second application being the Chambers Summons application dated 22.9.2021 which sought to strike out the suit for offending the provisions of section 7 of the Civil Procedure Act (Hereinafter referred to the *Res judicata* application). Each party filed a replying affidavit to the respective application.
3. Given that the *Res judicata* application seeks to strike out the whole suit the court shall therefore consider the said application first as findings on it will have a direct bearing on the injunction application.

BACKGROUND

4. The *Res judicata* application is premised on grounds inter alia that

- i) The subject matter in this suit was equally the subject matter in **Eldoret ELC No.281 of 2014 between Philemon Singoei vs Daniel Butuk and Michael Kemboi**
- ii) That the parties in both suits are the same in that Daniel Butuk the 1st Defendant in the former suit is the son to the 1st Plaintiff / Applicant in this suit while Michael Kemboi is a son to the person who bought the land from the husband of the 2nd Applicant/Applicant.
- iii) That the Honourable Court rendered its judgment in the former suit on 17th September 2020 and no appeal has been preferred against the judgment.
- iv) The subject matter in the suit to wit L.R. No. **Nandi/Kurgung/290** was also the subject matter in **Eldoret resident Magistrates court civil case no. 413 of 1980** between **Philemon Singoei vs Kibutuk Ngelechei**.
- v) That by consent of the parties herein, the Defendant became the owner of L.R.NO. NANDI/KURGUNG/290.
- vi) That no appeal has been preferred against the two judgments, hence the same are final judgments

5. In support of the application the Applicant has filed a supporting affidavit and annexures thereto including the pleadings and judgment in ELDORET ELC NO. 281 OF 2014.

6. The Application is opposed by a replying affidavit of KIBUTUK NGELECHEI deponed on 7th October 2021 together with the annexures thereto as well as a further affidavit by the said KIBUTUK NGELECHEI. It is the Respondents view that the in Eldoret ELC 281 of 2014 the Defendants therein were different parties to wit Daniel Bituk and Michael Kemboi who are not the same parties in this case the Plaintiffs in this case being KIBUTUK NGELECHEI and ANN JEROP RONGOEI. Both parties filed their respective submissions in support and in opposition to the *Res judicata* application.

APPLICANTS SUBMISSION.

7. In addition to the grounds in support of the Application and the depositions in the supporting affidavit as well as the annexures thereto the Applicant submits that the suit offends the mandatory provisions of section of Section 7 of the Civil Procedure Act as well as section 28 of the Environment and Land Act.

8. That the suit property matter herein to wit L.R.NO. NANDI/KURUNG/290 was also the subject matter in Eldoret ELC no. 281 of 2014 between **PHILEMON SINGOEI VS DANIELBITUK AND MICHAEL KEMBOI.**

9. it is thus the Applicants submission that the parties are the actually the same and since the issues and subject matter are the same and there being a judgment in case no 281 of 2014 this suit is *Res judicata*.

10 In support of this submissions the Applicant has cited the decision in **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others (2017)** eklr and the case of **ETV vs Attorney General and Another 2012eklr.**

11. The applicant therefore prays that this suit be declared to be *Res judicata* and accordingly be dismissed.

RESPONDENT'S SUBMISSION.

12.The Respondent is on its part submits that the parties in the concluded case to wit the Eldoret ELC no. 281 of 2014 between **PHILEMON SINGOEI VS DANIEL BITUK AND MICHAEL KEMBOI** are different from the parties herein hence the matter is not *Res judicata*.

13.The Respondent submits that the parties herein are new and are not representatives of the other parties in the concluded case hence the suit is not *Res judicata*. The Respondent places reliance on the decision in **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others (2017)** the same case that the Applicant has cited in support of his case and urges the court to dismiss the application.

ANALYSIS ND DETERMINATION

14.Both parties agree on the principles of *Res judicata* as set out in the Court of Appeal decision in **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others (2017)** case as each party has placed reliance in the said case. The principles stated there in are that

“Thus for the bar of Resjudicata to be effectively raised and upheld on account of a former suit, the following elements must 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 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 heard and finally determined the issue was competent to try the subsequent suit in which the issue is raised.**

15.THE above principles were recently restated by the Supreme Court in the decision in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR** which summarized the same in civil cases as here follows”

“[59] for *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) **There is a former Judgment or order which was final;**
- b) **The Judgment or order was on merit;**
- c) **The Judgment or order was 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 identical parties, subject matter and cause of action.”**

16. Having set out the principles to be followed in Res judicata, and as the parties herein agree that the subject matter is the same, to wit, NANDI/KURUGUNG/290 and that there is a final judgment rendered by a Court of competent jurisdiction in ELDORET ELC CASE no. 281 of 2014 between PHILEMON SINGOEI VS DANIEL BITUK AND MICHAEL KEMBOI and that the issues are the same as was deposed by the Respondent in paragraph 13 of his replying affidavit when he confirms the parties are not the same despite the issues being the same.

17. The only divergent view by the parties is that the Respondent indicates that the parties herein are new parties while the Applicant indicates that the parties are the same and they are litigating under the same title for the same reliefs.

18. In order to resolve this issue as to whether the parties are the same or not, the court has looked at the pleadings in this suit and the previous suit to wit ELDORET ELC CASE No. 281 of 2014 between PHILEMON SINGOEI VS DANIEL BITUK AND MICHAEL KEMBOI and has noted that in paragraph 14 of the Plaint herein, the Respondent pleads as follows;

“The judgement delivered in Eldoret Environment and Land case no.281 of 2014 on 17th September 2020 by M.A Odeny was issued against Daniel Butuk who is the son of the 1st Plaintiff herein. The said Daniel Butuk is in possession of 3 acres which belong to the 1st Plaintiff. The same was also issued against one Michael Kemboi the son to Issac Kipkemboi (deceased) who had rightfully purchased the same property from EDWARD KIPTARUS RONGOEI (deceased) the 2nd Plaintiff’s husband herein” this paragraph in the Plaint confirms that the new parties herein are litigating on behalf of the parties in the concluded case a scenario that is well captured under Explanation 6 of section 7 of the Civil Procedure Act which provides;

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. ”

19 It follows therefrom that Daniel Butuk and Michael Kemboi as defendants in ELDORET ELC CASE no. 281 of 2014 between PHILEMON SINGOEI VS DANIEL BITUK AND MICHAEL KEMBOI were by application of Explanation 6 of section 7 of the Civil Procedure Act, litigating for the 1st Plaintiff and 2nd Plaintiff herein and hence for all intents and purposes they are by virtue of the said explanation the same parties.

20 *The issue of new litigants been added to the same cause was also considered and addressed in the case of Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR where faced with similar circumstances of addition of new parties the court held that;*

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.’

23. In light of the foregoing and the fact that addition of new parties herein will not sanitize a new cause of action the inevitable conclusion is that this suit is thus Res judicata.

24. Having found that the suit is Res judicata it follows that the same ought to be dismissed hence the second application for an injunction is equally dismissed as the main suit is hereby struck out with costs to the Defendant.

25. The interim orders that had initially been issued at the ex- parte stage and extended on two occasions are hereby vacated.

16. Orders accordingly.

DATED AT KAPSABET THIS 31ST DAY OF JANUARY, 2022.

HON. M. N. MWANYALE

JUDGE.

In the presence of;

Ms. Maiyo holding brief for Mr. Wabomba

Mr. Rotich holding brief for Mr. Murgor