



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ENVIRONMENT AND LAND CASE NO.63 OF 2021

(FORMERLY ELDORET ELC CASE NO.357 OF 2017 AND HCCCN.156 OF 2012)

BY WAY OF ORIGINAL ACTION

JOSHUA KIPKEMEI CHUMO.....1ST PLAINTIFF

WILSON CHUMO.....2ND PLAINTIFF

DAVID CHUMO.....3RD PLAINTIFF

-VERSUS-

JAPHETH KIBIWOTT LELEI.....DEFENDANT

BY WAY OF COUNTERCLAIM

JAPHETH KIBIWOTT LELE.....PLAINTIFF

-VERSUS-

JOSHUA KIPKEMEI CHUMO.....1ST DEFENDANT

WILSON CHUMO.....2ND DEFENDANT

DAVID CHUMO.....3RD DEFENDANT

MARY JEPNEGETICH.....4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. Vide a Notice of Motion Application dated 22nd April 2021 the Plaintiffs/Applicants in the Original Action seek that the Counter- Claim introduced by way of the Amended Defence on 11th July 2018 be struck out. The Application is founded on grounds inter alia that;

2. a) The counterclaim is premised on the proceedings in Eldoret MCC No. 164 of 1998.

b) An application seeking the reliefs the defendant seeks was unsuccessfully made in the Subordinate Court.

c) Under section 91 of the Civil Procedure Act the avenue available to challenge the decision of the Subordinate Court is through an appeal.

d) The counterclaim is an abuse of the Court process as it seeks to challenge what the Subordinate Court has declined to grant without pursuing an appeal.

3. The Application is supported by the supporting affidavit of the 1st Plaintiff in the original action who depones that the orders sought in the counterclaim could only be sought in Eldoret CMCC No.164 of 1998 which was unsuccessful done and that they could only file an appeal and not introduce the same in the counterclaim. And that the decision in the Subordinate Court in so far as was not challenged by way of an appeal remains and that by virtue of section 91 of the Civil Procedure Act is that the same cannot possibly be introduced in the counterclaim.

BACKGROUND

4. For purposes of clarity a brief history of this suit (Original Action and Counterclaim) is necessary. The Plaintiff filed this suit on 25th July 2012 seeking for judgment against the Defendant for a declaration that the decision in Kapsabet PMCC No. 129 of 1997 is unenforceable by dint of Limitation of Actions Act as well as costs of the suit.

5. The Defendant on the other hand filed a Defence and later Defence and counterclaim dated 11th July 2018 denying the allegations in the Plaintiff while averring that he is the beneficial owner of the suit property.

6. In the counterclaim the Plaintiff seeks cancellation of the names of the 1st to 4th defendants in the title numbers **NANDI/CHEPTIL /463** and **464** and that the original number **NANDI/CHEPTIL /246** be restored and that he be restored as the original owner thereof.

7. Hitherto there were two suits between the 1st Plaintiff and the Defendant to wit, **Kapsabet PMCC No. 129 of 1997**, and **Eldoret CMCC No. 164 of 1998**.

8. In **Kapsabet PMCC No. 129 of 1997**, the same was filed by the Defendant herein seeking for orders that the Plaintiffs herein were in illegal occupation of the suit land being Nandi/Cheptil/246 and should give vacant possession.

9. The matter proceeded ex-parte since the Plaintiffs herein deliberately failed to attend Court as noted by the Court vide ruling dated 13th October 2011. Upon hearing the Defendant herein in the matter, the Court found that the Defendant herein had proved his case and was entitled to the prayers sought. An eviction order was issued against the Plaintiff's herein.

10. The Plaintiff's being dissatisfied with this decision filed an appeal to the High Court, Eldoret Civil Appeal No. 102 of 1997 which was dismissed on 20th September 2005. They proceeded to the Court of Appeal vide Eldoret CACA No. 281 of 2006 whereupon the same abated on 5th March 2012 after death of the Appellant.

11. While **Eldoret CMCC No. 164 of 1998**, The 1st Plaintiff herein filed this suit in Eldoret vide Plaintiff dated 5th February 1998 seeking for among other reliefs that the suit property being Nandi/Cheptil/246 vests in the name of the Plaintiff, notwithstanding that an earlier suit had been filed over the same parcel of land.

12. The 1st Plaintiff proceeded to request for judgment on 12th March, 1998 and interlocutory judgement was entered against the Defendant. Consequently the 1st Plaintiff registered the suit property in his name and sub-divided the same into Nandi/Cheptil/463 and 464. He went further to transfer property number Nandi/Cheptil/464 to Mary Jepng'etich the 4th Defendant, in the counterclaim.

13. The Defendant herein filed an application dated 10th June 2003 to set aside the Interlocutory judgment. The said application was heard in presence of both parties in the year 2009 and allowed on 15th April 2011 to the effect that;

1. "The undated interlocutory judgment and all the consequent order against the 1st and 2nd Defendant be and is hereby set aside.

2. The judgement entered against the 1st and 2nd Defendants on 20th November 1998 be and is hereby set aside.

14. However the subdivision and the transfer effected to the 4th Defendant in the counterclaim that had been occasioned by the interlocutory judgment that was set aside still stands and it is this subdivision and the transfer that is being challenged in the counterclaim sought to be struck out, by the present application subject of this ruling.

APPLICANTS SUBMISSION

15. It is the applicant's submission that the counterclaim is based on proceedings in Eldoret CMCC no. 164 of 1998 and that section 91 of the Civil Procedure Act the only way to challenge the decision of the subordinate court was by way of an appeal. The Applicant submits that the Respondent ought to have made the application for restitution within Eldoret CMCC No. 164 of 1998 and that since the application was made and dismissed the respondent ought to have appealed and not sought the said reliefs in the present counterclaim.

16. The Applicant further states that cause of action is time barred in so far as the subdivisions sought to be cancelled by the counterclaim were made on 2/9/1999 and the counterclaim filed on 18.7.2018, the Applicant further submits that since a similar application was filed in Eldoret CMCC No. 164 of 1998 the reliefs sought in the counterclaim are thus Res judicata hence for those reasons the application ought to be allowed

RESPONDENTS SUBMISSIONS

17. The Respondent submits that the counterclaim is properly before Court as although he had filed a similar application in Eldoret CMCC

No.164 of 1998 the said application was dismissed as the suit had been dismissed for want of prosecution. Hence the application was not decided on merits.

18. The Respondents further submits that the interlocutory judgment in Eldoret CMCC NO.164 of 1998 was set aside on 15/4/2011. And the suit was dismissed for want of prosecution on 20.09.2013 hence the application to impugn the titles was not predicated upon a substantive suit and its dismissal having been not on merits the reliefs sought in the counterclaim were not resjudicata and the respondent places reliance on the decision in **Suleiman Said Shabhal vs Independent Electoral and Boundaries Commission and 3 others (2014) eKLR** where the Court held.

‘To constitute resjudicata there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy’

19. It is the Respondents further submission that the interlocutory orders that gave rise to the subdivision and subsequent transfer to the 4th Defendant were vacated on 15.04.2011, the said orders basically cancelled the subdivisions and thus the Court can determine the counterclaim on the relief’s sought therein as filed as the issue of cancellation of the titles was not determined in the earlier application.

20. The Respondent places reliance in the decision **In Bilha Njeri Kbiru Vs Onesmus Karina and 3 Others (2017 eKLR)** and **in County Government of Kilifi vs Mombasa Cement Limited (2017) eKLR** on the character of a counterclaim

21. The Respondent further submits that the counterclaim is not time barred for the reason that the transfer and the subdivision were made pursuant to exparte orders in **ELDORET CMCC No. 164 of 2018** and the subdivision were done in 30.9.1999. The said interlocutory orders were vacated on 15.4.2011 and 12 years had not lapsed. That the counterclaim was filed on 18.07.2018 and the 12 years equally had not lapsed. For the above reasons the Respondent seeks that the application be dismissed.

ANALYSIS AND DETERMINATION

22. The Gravamen of the Applicants case is that Section 91 of the Civil Procedure Act prohibits a new suit to be filed based on restitution upon variation or reversal of a decree and that the counterclaim filed herein constitutes anew suit hence it ought to be struck out and that the issues raised in the counterclaim are in any event time barred and res judicata. The Respondent thinks otherwise and submits that the counterclaim is not time barred and res judicata.

23. As pointed out Section 91 of the Civil Procedure Act provides;

(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).”

24. Based on the foregoing provisions the Applicant submits that the counterclaim then ought to be struck out as it seeks restitution which ideally should be filed by way of an application in the court of first instance in the case it ought to have been filed in the Eldoret CMCC no 164 of 1998 and not raised in a new suit. The Respondent did not make any submission of this issue.

25. However this Courts reading of the said section is that decree as defined in Section 2 of the Civil Procedure Act the said section does not apply to the Interlocutory Judgment as the one that was set aside in Eldoret CMCC No. 164 of 1998.

26. According to Section 2 of the Civil Procedure Act, a Decree excludes an adjudication that an appeal lies as an appeal from an order; a reading of Order 43 indicates that an appeal lies of right from Order 10 Rule 11. Order 10 Rule 11 provides for setting aside of an Interlocutory judgment, It is thus the Courts view therefore that Section 91 does not apply to an interlocutory judgment which can be set aside as of right under Order 43, but rather that the section applies to decrees in appeals as was held in the case of **Njeru Kirumbi v Justa Ngai Nyaga & another [2020] eKLR** where the Court observed that;

“The Court is of the opinion that filing a fresh suit for restitution is not permissible under the law since there are adequate mechanisms for recovery of such property in the event of reversal of a decree on appeal.

The Courts finds it strange that the 2nd Defendant had to file a counter claim for the purpose of reclaiming the suit property which had been sold in execution of a decree which she claimed was ultimately reversed on appeal. The court is of the view that a party who has succeeded an appeal should make an application for restitution to the court which passed the decree under Section 91 of the Civil Procedure Act.”

27. Having found that Section 91 does not apply to interlocutory judgments it follows therefrom that there is no bar to the filing of the counterclaim as has been filed.

28. It is common ground from the background of this suit that two previous suits existed filed in different Courts. That vide Eldoret CMCC No. 164 of 1998 and interlocutory orders made therein the property to wit NANDI/ CHEPTALIL/ 246 was registered in the name of the 1st

plaintiff who subsequently subdivided the same to NANDI/CHEPTALIL 463 and 464 and thereafter transferred the same to the 4th Defendant in the counterclaim.

29. Thereafter the interlocutory orders were set aside on 15.4.2011. The effect of setting aside of the interlocutory orders was that the Respondent was restored to the position before the orders were made. In this regard the Court is guided by the decision in **Omar Said Mwatayari v Vipinkumar Nathalal Shah & another; Coastland Properties Limited (Necessary Party) [2020] eKLR** as well as the decision of **Clement Wekesa Muuyi & another v Patrick Wekesa Okumu (sued as representative of the Estate of Okumu Masai (Deceased) [2019] eKLR**

30. Consequently, therefore on 15.4.2011 upon setting aside the interlocutory orders the Respondent had a new course of action to pursue the properties and by the time he filed the counterclaim on 18.7. 2018, 12 years had not lapsed and I agree with the Respondents that the counterclaim is not time barred.

31. The Applicant submits that the counterclaim is Resjudicata, and thus it ought to be struck out. The principles on Resjudicata were recently restated by the supreme court in the decision in in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR** laid out the following elements that must be demonstrated when a party invokes the doctrine of *res judicata* in civil cases;

“[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.”**

32. The Applicant submits that an identical application with issues similar to the ones in the counterclaim was heard and dismissed. The Respondent in response confirms that indeed the application was filed but it was not heard and determined on merit as it was dismissed on the grounds that the suit upon which the application had been filed on had been dismissed for want of prosecution hence there was no proper suit to ventilate the issue.

33. I am persuaded by the Respondent submissions and indeed the application having not been determined on its merits as required in the test in the **John Florence Maritime** case above, the counterclaim is therefore not Res judicata.

34. For the above reasons the application lacks merit and it is hereby dismissed with costs to the Respondent.

35. Orders accordingly.

DATED AT KAPSABET THIS 25TH DAY OF JANUARY, 2022

HON. M. N. MWANYALE

JUDGE