



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ENVIRONMENT AND LAND CASE NO.19 OF 2021**

**(FORMERLY ELDORET ELC CASE. NO. 967 OF 2012)**

**DAVID BISEM.....PLAINTIFF**

**-VERSUS-**

**JEROTICH TABARNO SANG.....1<sup>ST</sup> DEFENDANT**

**ESTATE OF JOSEPH ARAP LETING.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Court is called upon to determine the Notice of Motion application dated 15<sup>th</sup> October, 2021 filed by the Plaintiff through his Advocates Messrs Anassi Momanyi (hereinafter referred to as ‘the Notice of Motion Application’ and to determine the 2<sup>nd</sup> Defendants Notice of Preliminary Objection equally dated 15<sup>th</sup> October, 2021 (Hereinafter referred to as “the P.O” filed through the firm of A.H. Malik and Co. Advocates.

2.The Notice of Motion application seeks for a stay of proceedings of this suit pending hearing and determination of Eldoret Court of Appeal Civil Appeal no.46 of 2019 whilst the P.O. seeks to declare this present suit **Res judicata** as the issues raised in this suit were directly in issue in ELDORET P & A NO.120 OF 2010 in RE. ESTATE OF JOSIAH KIBISEM SANG where the parties were the same and the issues and cause of action similar.

3. By way of Background, this suit had been stayed by court orders issued on 25.7.2013 pending the outcome of ELDORET P & A NO.120 OF 2010 RE. ESTATE OF JOSIAH KIBISEM SANG whose Ruling on an application for revocation and annulment of deeds filed by the Plaintiff in this case was delivered on 10.01.2019.

4This suit was thereafter transferred to this Court from Eldoret ELC for hearing and determination. Mr. Momanyi for the Plaintiff conceded that the decision in the Succession Cause had indeed been delivered but that the Plaintiff herein had appealed against the said decision through Eldoret Court of Appeal Civil Application No. 146 OF 2019 and that the suit should thus be stayed pending hearing and determination of the said Appeal.

5. Parties were then directed to move the court appropriately, where after the Plaintiff filed the notice of motion application and the 2<sup>nd</sup> Defendant filed the P.O. The suit against the 1<sup>st</sup> defendant is said to have abated as the she is now deceased and no substitution in respect thereof had been made.

6. Written Submission by both parties were filed and now this ruling.

**THE NOTICE OF MOTION APPLICATION vs THE PRELIMINARY OBJECTION**

7. The Notice of Motion Application seeks that this suit be stayed pending hearing and determination of Eldoret Court of Appeal Civil Appeal no.46 of 2019, the application is supported by the affidavit of the Plaintiff who has annexed a copy of the front page of the Record of Appeal including the Memorandum of Appeal in Eldoret Court of Appeal Civil Appeal no. 46 of 2019.

8. No Replying affidavit in respect of the application was filed however a Preliminary Objection to the suit was filed and shall be deemed as the Grounds of Opposition. In support of the Application the Plaintiff has filed submissions where in he submits that he ought only to demonstrate that there is a pending appeal and that the appeal is related to the suit herein. The plaintiff has demonstrated the above by annexing a copy of the record of appeal as well as the Memorandum of Appeal.

9. In opposition to the application the 2<sup>nd</sup> Defendant through the P.O which has been deemed to be Grounds of opposition has raised the issue that this suit is Resjudicata as the decision in Eldoret in ELDORET P&A 120 of 2010 relates to the same issues and same parties.

10. In support of this position the 2<sup>nd</sup> Defendant has Placed reliance on the decision in Eldoret P & A NO.120 OF 2010 **Re: Estate of JOSIAH KIBISEM SANG** as well as the Court of Appeal decision in **CIVIL APPEAL NO.36 OF 1996 UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA and KENYA COMMERCIAL BANK LIMITED VS BENJOH AMALGAMATED LIMITED CIVIL APPEAL NO.107 OF 2010** on the proposition that this suit is Res judicata mainly on the grounds as stated in section 7 of the Civil Procedure Act in that the parties in the Succession cause are the same, the cause of action and the subject matter including the fraudulent transfers of titles are the same hence in view of the decision in the succession cause this suit is thus **Resjudicata** .

11. Whereas the two Court of Appeal decisions were the leading decisions on the doctrine of Res judicata, the Plaintiff has however placed reliance on the Supreme Court decision in **JOHN FLORENCE MARITIME SERVICES LIMITED VS CABINET SECRETARY TRANSPORT & INFRASTRUCTURE AND 3 OTHERS (2021) EKLK** which provides, inter alia that;

12. “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.’**

13. The above summation is therefore the leading principles on the doctrine of Res judicata. Whereas there is indeed a former judgment on merit in a former suit between the parties herein, over the same subject matter and cause of action, there is pending an appeal in the Court of Appeal over the said decision, hence the decision in ELDORET P&A 120 OF 2020 is not a final decision.

14. For the above reason and until the Court of Appeal renders its decision on the appeal, this suit shall be stayed., the Notice of Motion application dated 15.10.2021 is therefore allowed and the P.O is hereby dismissed.

15. Orders accordingly.

**DATED AT KAPSABET THIS 18TH DAY OF JANUARY, 2022.**

**M. N. MWANYALE**

**JUDGE.**

Ruling delivered in the presence of: -

**Mr. Otieno for 1<sup>st</sup> Defendant**

**No appearance for Mr. Momanyi for Plaintiff**

**No appearance for Mr. Orina for 2<sup>nd</sup> Defendant**