



REPUBLIC OF KENYA

HIGH COURT OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC PETITION CASE NO. 3 OF 2021

(FORMERLY ELDORET PETITION NO 14 OF 2019)

PAUL KIBII CHERIRO.....PLAINTIFF/APPLICANT

-VERSUS-

BETTHWEL KIPKEMBOI KEMEL.....1ST DEFENDANT/1ST RESPONDENT

ALEXANDER ISIYA SAISI.....1ST DEFENDANT/2ND RESPONDENT

JACKLINE GALO.....1ST DEFENDANT/3RD RESPONDENT

RULING

1. On 8/11/2021, Counsels appearing in this Petition brought to the attention of the Court of the existence of a pending and related suit to with Eldoret ELC Case No. 169 of 2013 which was pending for judgment, judgment having been reserved for 10/11/2021.
2. The parties present then agreed that this suit be stayed pending the delivery of the judgment in Eldoret ELC No. 169 of 2013 and accordingly the Court fixed the matter for mention on 23/11/2021.
3. On 23/11/2021, Mr. Chepkwony learned Counsel for the Petitioner, notified the Court that he had filed a copy of the judgment delivered in Eldoret ELC No. 169 of 2013, so as the Court could familiarize itself with the same. Mr. Chepkwony was recorded as saying that the parcels of land in litigation were the same but the parties were not the same.
4. On her part Ms. Odeyo learned Counsel representing the Attorney General indicated that she had not seen a copy of the said judgment. The Court allowed parties to familiarize themselves on the judgment delivered on 10/11/2021 in Eldoret ELC No. 169 of 2013 and submit on the same on 15/12/2021.
5. The purposes of the submissions by parties was for the Court to confirm whether or not this suit is *Resjudicata* in view of the judgment in Eldoret ELC No. 169 of 2013.
6. The submissions that the parties were to make were ordered to be done under the inherent powers of the Court under Section 3A of the Civil Procedure Act. The said section provides ***“nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”***
7. It is to be noted that the issue of whether this suit is related to Eldoret ELC No. 169 of 2013, was initially raised by the parties, but the directions to submit on the judgment delivered in Eldoret ELC no. 169 of 2013 was raised *suo moto* by this Court.
8. In issuing the directions above this Court was guided by the Court of Appeal decision in **Henry Njagi Muruania vs A. O Okello District Commissioner Mbeere District and Another (2014) Eklr.** Where the learned judges observed ***“that a judge of coordinate jurisdiction cannot without hearing the parties suo moto set aside leave that has already been granted, or exercise the power of an appellate Court..... the proper procedure would have been for he learned Judge to invite the parties to make submissions on the legality or otherwise of the leave already granted.”***
9. The case of **Accounting Officer Kenya Ports Authority (exparte) vs Public Procurement and Administrative Review Board and 3**

others (Interested Parties) eKLR quoted the decision of the case in **Habig Nig Bank Limited vs Nashtex International Big Ltd Nigeria Court of Appeal of Appeal Kaduna Division CA/K/13/04 and playing God**. A critical look at *sua sponte* decisions by Appellate Courts. The case dealt with *sua moto* procedure extensively as follows;

“the term suo moto is a latin term meaning “ on its own motion”in matters suo moto the Court usually on perusing he file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Than that is considered by the Judge who rules on it. The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the Advocates do uncover and present more useful information and arguments to the decision maker that would be developed by a judicial officer acting in an inquisitorial system.....”

10. Having given a background to the facts leading to the ruling, the Court therefore looks at the submission made on 15/12/2021.

11. On 15/12/2021, Mr. Otieno learned Counsel for the 1st and 2nd Respondent appeared and submitted that the judgment in Eldoret ELC No. 169 of 2013 declares the suit property as belonging to Sirgoi Tea Estate Limited the 2nd Respondent in this petition and the 1st Respondent is a Director of the 2nd Respondent. It was his submission thus that the said judgment renders this suit *Resjudicata*.

12. On his part Mr. Kuria learned Counsel for the 3rd and 4th Respondent represented by the Attorney General Associated himself fully with Mr. Otieno’s submission. He further submitted that the judgment in Eldoret ELC Case No. 169 of 2013 addresses the issues raised in this petition.

13. On behalf of the Petitioner, Mr. Chepkwony learned Counsel submitted that they are new parties in this petition, that were not involved in the previous suit which involved the petitioner and the 2nd Respondent because of the new parties, the suit is not *Resjudicata*. He further submitted that he had filed an appeal against the decision and prayed that the suit be held in abeyance.

14. It is common ground that the parcels of land in this suit and Eldoret ELC No. 169 of 2013 are the same. Paragraph 2a and (e) of the judgment in Eldoret ELC No. 169 of 2013 reveals the land parcels as No. NANDI/KAIBOI/857/NANDI KAIBOI/858, NANDI KAIBOI/859 and NANDI/KAIBOI/858, NANDI KAIBOI/861, these are the same parcels of land pleaded at paragraphs 6 and 9 of the petition. The subject matter in dispute is therefore the same.

15. The Petitioner in this matter was the Defendant in the Eldoret Case. The 2nd Respondent in this matter was the Plaintiff in the Eldoret case. In this matter, Mr. Bethwel Kipkemboi Kemei, is sued as the 1st Respondent and his Counsel Mr. Otieno confirms that he is a Director of the 2nd Respondent while in this petition, the Land Registrar, Registrar of Titles and the National Land Commission have been sued, and these are the new parties that Mr. Chepkwony learned counsel for the Petitioner alluded to, as being differed parties.

16. The law on *resjudicata* has now been settled by the Supreme Court in the case of **John Maritim Florence vs Cabinet Secretary – Transport**. Where the Court held that for an successful plea on *resjudicata* in Civil Cases the following elements must exists.

- a) There is final judgments or order which is 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 he parties.
- d) There must be between the first and the second action identical parties, subject matter and cause of action.

17. Having set out the principles to be followed in *Resjudicata*, and as parties herein agree, the subject matters in the cases are the same, to list NANDI KAIBOI/857, NANDI/KAIBOI 858/NANDI KAIBOI/859 and NANDI/KAIBOI/861.

18. There is a judgment rendered in respect of the subject matter by a Court of competent jurisdiction over an identical cause of action.

19. The question arising is whether the judgment in Eldoret ELC No. 169 of 2013 is a final judgment or not?

20. Mr. Chepkwony learned Counsel for the Petitioner has submitted from the bar that he has preferred an appeal against the said decision, but he did not file and copy of the Notice of Appeal at the time of the submissions or thereafter.

21. This Court recently in the case of **David Bisem vs Jerotich Tabarno Sang** and **Estate of Joseph Arap Leting** was faced with a similar situation, where a judgment had been rendered in a Succession Cause and the parties submitted the issue of *Resjudicata*.

23. In the case however, unlike the present case, a Notice of Appeal and a copy of the front page of the Record of Appeal were exhibited before Court and the Court found that the Judgment in the succession Cause was not a final judgment and the matter was thus not *Resjudicata*. In the present case however, other than the submission from the Bar by Mr. Chepkwony, learned Counsel for the Petitioner, the Notice of appeal has not been exhibited before Court. It follows there from that the judgment in Eldoret ELC no. 169 of 2013 is a final judgment.

24. Mr. Chepkwony learned Counsel for the Petitioner, submitted that the subject matter is the same, but the parties are different. Indeed the

1st, 3rd and 4th Respondent are new parties.

25. The 1st Respondent however is a Director of the 2nd Respondent, as submitted by Mr. C. F. Otieno, and the 2nd Respondent was the Plaintiff in Eldoret ELC No. 169 of 2013. The 3rd, 4th and 5th Respondents are Government Agencies.

26. This is indeed an issue of new litigants been added to the same cause of actions. This issue was addressed in the case of **Diocese of Eldoret Trustees (Registered) vs Attorney General** (on behalf of the Principal Secretary Treasury) and another 2020 eKLR where the Court faced with similar circumstances of addition of new parties held that.

“Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of Resjudicata. 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.”

27. With the above views an addition of new parties, the Court views the addition of the 1st, 3rd, 4th and 5th Respondents as an attempt to sanitize a new suit while the subject matter is the same.

28. The inevitable conclusion is that this suit has not passed to test in the John **Maritime Florence Case**. As all the tenets of Resjudicata as explained in the above case, exist in this matter, it is therefore Resjudicata and it s hereby struck out with costs to Respondents.

RULING DELIVERED, DATED AT KAPSABET THIS 16TH DAY OF FEBRUARY, 2022.

Hon. M. N. Mwanyale.

JUDGE

In the presence of;

1. Mr. Otieno for the 1ST AND 2nd Respondent

Ms. Odeyo for the 3rd, 4th and 5th Respondent

Mr. Chepkwony for the Petitioner