



**REPUBLIC OF KENYA.**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**ENVIRONMENT & LAND COURT.**  
**LAND CASE NO. 139 OF 2014.**  
**EMMANUEL SICHANGI CHONGE**  
**DAVID TIABA WEKESA.....APPLICANTS**  
**JOSEPH WANYONYI WATAKA**  
**VERSUS**  
**FANUEL WALEKHWA**  
**WILSON WALUNYA SIMWENYI.....RESPONDENTS.**

**R U L I N G.**

1. The applicants filed a notice of motion dated 3/9/2014 in which they sought orders of injunction restraining the respondents from evicting them from LR. No. 5335/24 Endebess within Trans Nzoia County. At the hearing of the motion, a preliminary objection was taken on behalf of the defendant/respondent on the following grounds:-

(a) **That the suit is *res judicata*.**

(b) **That the plaintiffs have no *locus standi* to sue on behalf of Endebess Investment Company Ltd. or on behalf of their deceased father Samson Sichangi.**

2. Mr. Omboto for the defendants submitted that this case is *res judicata* because the issues being raised herein were litigated in Eldoret High Court Civil Case No. 141 of 1991 and determined. The matter even went to the Court of Appeal at Nakuru vide Civil Appeal No. 164 of 1995. The appeal court overturned the judgment of the High Court which had allowed the defendant Samson Sichangi in the High Court to remain on part of the land as owner. Mr. Omboto submitted that the first plaintiff is son of Samson Sichangi who was the defendant in the Eldoret High Court case. He further submitted that what the plaintiffs have done is to bring in additional parties into the suit and that this is not acceptable. He relied on Nairobi Civil Appeal No. 100 & 106 of 2010 between **Kenya Commercial Bank Limited Vs. Muiri Coffee Estate Limited & 3 others.**

3. On the second point, Mr. Omboto submitted that the first defendant Emmanuel Sichangi Chonge had not obtained letters of administration in respect of the estate of his late father Samson Sichangi and therefore he has no capacity to bring this suit against the defendants. Mr. Omboto further argued that the

plaintiffs have brought this suit on behalf of Endebess Investment Co. Ltd. Which is a legal entity on its own and that in any case, the said company was dissolved way back in 1979 and therefore the plaintiffs cannot purport to bring a suit on behalf of a defunct company.

4. Mr. Karani for the plaintiff in response to the submissions by Mr. Omboto argued that the suit herein is not **res-judicata** as the parties in the Eldoret High Court case are not the same as in this case. He further argued that the reliefs which were sought in Eldoret High Court Civil case No. 141 of 1991 are different from the ones being sought herein. Mr. Karani submitted that the defendant in the Eldoret case was claiming a share from the plaintiffs'. He further argued that the plaintiffs in this case are bringing this case on behalf of themselves and members of Endebess Investment Company Ltd which is defunct. Mr. Karani submitted that the plaintiffs who had been evicted from the suit land went back to the land on the strength of an award given in their favour by a panel of elders which award was adopted as judgment of the court vide Kitale Land case No. 14 of 2003.

He argued that there was no appeal preferred against the elders award and that the defendants are seeking to appeal against the elders award through the back door by opposing this suit.

5. I have carefully gone through the submissions by counsel for the parties herein as well as the cases cited by them. The issues which emerge for determination are the following:-

(a) **Whether this suit herein is *res-judicata*.**

(b) **Whether the plaintiffs have *locus standi* to bring this suit.**

### **RES JUDICATA.**

6. The principle of **res-judicata** is founded on section 7 of the Civil Procedure Rules 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 issues has been subsequently raised and has been heard and finally decided by such court.”***

***“Explanation (4) any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”***

7. Where a party wishes to raise preliminary objection based on **res-judicata**, it is important that that point be taken when all pleadings necessary to enable the court address the issue are on record. This can be best done through an application in which the pleadings are annexed to the affidavit. However, there is nothing wrong if a preliminary objection on that ground is raised if the party raising it is sure that all necessary pleadings in the former suit are on record for the benefit of the court. In the present case, the preliminary objection was raised based on only a judgment of the of the Court of Appeal which settled the issues in question. It would have been better if the pleadings in the High Court case were in the file. There is only a decree from the High Court which was introduced in the file by the plaintiffs. The defendants only introduced an eviction order in respect of the High Court. However, be that as it may, the judgment by the Court of Appeal is exhaustive and has addressed the issues which arose in the High Court.

8. In High Court Civil Case No. 141 of 1991 which I shall hereinafter refer to as “the former suit”, the plaintiffs were **M/s. Richard Satia & Partners (first plaintiff) and Jestimore Simwenyi (second plaintiff).** The defendant was Samson Sichangi. The second plaintiff in the former suit is the father of second defendant in the present suit. The second plaintiff in the former suit has since died and the second defendant in the present suit is his legal representative. The defendant in the former suit is the father of

the first plaintiff in the present suit.

9. The subject of litigation in the former suit was LR. No. 5335/24. The plaintiffs in that suit were seeking the following reliefs.

**(a) An order that the defendant is not a share holder in LR. No. 5335/24 Endebess, in Trans Nzoia District.**

**(b) An order that the defendant's occupation of the suit land is unlawful and asks for general damages.**

**c. An order that his (defendant's) occupation is illegal and the defendant should be evicted there from together with all his servants/agents/and or any one else occupying the land by virtue of his association or relationship to the defendant.**

**(d) General damages for loss of use of the suit land.**

**(e) Any other relief that the Honourable Court may deem fit and just to grant.**

7. Though the plaintiffs suit was dismissed by the High court and the defendant granted the land he and his family were occupying, the plaintiff's appealed to the Court of Appeal which overturned the judgment of the High court. The defendant had testified in the High Court that he had paid Ksh. 10,000/= to the first plaintiff and that he had become a shareholder by virtue of the said payment. The Court of Appeal found that the defendant had not produced any evidence to prove that he had paid the 10,000/= and therefore could not be a member or shareholder of the first plaintiff.

The High Court had also found that even though the defendant had not proved that he paid Ksh. 10,000/= to the first plaintiff, he had become entitled to the land he was occupying by way of adverse possession. The Court of Appeal faulted the finding of the judge holding that that was not an issue for him to determine as it was never pleaded and in any case the defendant had been in occupation of the land for 9 years and not 12 years as the judge found. There was therefore no basis upon which adverse possession could be founded .

8. The defendant in the former suit was arguing that he paid Ksh. 10,000/= to the Agricultural Finance Corporation which monies were used to offset the loan which the first plaintiff owed Agricultural Finance corporation. The same argument is being raised by the plaintiffs in the present suit in which they are claiming that their parents contributed money which was paid to Agricultural Finance Corporation to offset the loans which the defendants owed to the Agricultural Finance Corporation [see paragraph 4 and 5 of the plaint in the present suit.]

9. When the former suit was filed it was only the defendant (Samson Sichangi) and his family who were on the suit land. The plaintiffs in the present suit have conceded that they were evicted from the suit land following the decision of the court and that they only went back based on an award by elders in 2003. It is therefore clear that the issues in the former suit are the same as the ones in the present suit. The plaintiffs in the present suit are seeking to be declared as owners of 80 acres out of LR. 5335/24. The ownership of the suit land has already been determined. Some of the parties in the former suit are the same as in the present suit. The fact that some new faces have emerged in the present suit as plaintiffs does not change the position. What the plaintiffs in the present case are raising ought to have been made ground of defence in the former suit as explanation No. 4 of section 7 of the Civil Procedure Rules indicates. The present plaintiffs had a common interest in the litigation in the former suit. The Court of Appeal judges in the case of Kenya Commercial Bank Ltd. (supra) quoted the following passage in relation to the doctrine of *res judicata* from a Tanzanian Court of Appeal decision in *Lotta vs. Tanaki & Others* [2003] 2 EA 556 (CAT).

***“Its object, is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a***

***court of competent jurisdiction in the subject matter of the suit.”***

***Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.”***

13. The common interest in both the former suit and the present suit is that the defendant and the plaintiffs in the former suit and present suit respectively were laying a stake to the suit land by virtue of making payments to Agricultural Finance Corporation to offset the loan owed by the first plaintiff in the former suit. The suit regarding the common interest has been settled and the plaintiffs cannot be allowed to re-open it through a different group of parties. If this kind of practice were to be allowed, litigation will never end. Courts will have been taken in circles where a party loses a case only to come back through a different person to re-open the same case. I therefore find that this present case is ***res-judicata***. This is enough to dispose off the entire suit as well as the notice of motion of 3/9/2014 but I will go on to address the second issue.

#### **LOCUS STANDI.**

14. It was conceded by the plaintiffs advocate that the first plaintiff is son of the late Samson Sichangi and that he has not taken out letters of administration in respect of his late father's estate. As he is claiming part of the suit land which his father allegedly bought in the 70's his claim cannot be sustained because he has no capacity to bring a suit on behalf of his father's estate without first obtaining letters of administration.

15. That plaintiffs have brought this suit on behalf of Endebess Investments Company Limited. This was a limited liability company which had its capacity to sue but then we are informed that the company was dissolved in 1979. The company was dissolved vide Gazette Notice Vol. LXXX1 – No. 30 of 6/7/1979. By virtue of the provisions of section 340 of the Companies Act Cap 486 all property and rights vested in or held in trust for the company immediately before the dissolution was deemed to be ***bona vacantia*** and accordingly belonged to the Government.

16. Under section 338 of the companies Act, any person interested was at liberty to apply to court within 2 years asking the court to declare the dissolution void. There is no evidence to show whether any of the members of Endebess Investment Company Limited moved the court to declare that dissolution void. The company instead proceeded to act as if it had not been dissolved. It therefore follows that anything done in the name of the company is null and void and of no consequence. I therefore find that the plaintiffs had no locus standi to bring the present suit on behalf of a company which had been dissolved and was therefore non existent and had no capacity to enter into any transactions. For the reasons given above, I find that the preliminary objection by the defendants is well founded. The same is hereby upheld with the result that the suit herein as well as the notice of motion dated 3/9/2014 are hereby dismissed with costs to the defendants.

It is so ordered.

**[Dated, signed and delivered at Kitale on this 11th day of December, 2014.]**

**E. OBAGA.**

**JUDGE.**

**In the presence of Mr. Karani for plaintiffs.**

**Court Clerk – Isabellah.**

**E. OBAGA.**

**JUDGE.**

**11/12/2014.**