Langat (Suing as a personal representative of the Estate of Kiplangat Arap Bartaa) v Chepkwony & 4 others (Environment & Land Case 50 of 2014) [2022] KEELC 14448 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14448 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 50 OF 2014

MC OUNDO, J

OCTOBER 27, 2022

BETWEEN

SIMON KIMUTAI LANGAT ..... PLAINTIFF

SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF KIPLANGAT ARAP BARTAA

AND

JAMES KIPTOO A CHEPKWONY ..... 1ST DEFENDANT

LANGAT K GODFREY ..... 2ND DEFENDANT

DAVIS KIPNGENO KORIR ..... 3RD DEFENDANT

KIPRONO ARAP MARITIM ..... 4TH DEFENDANT

BHAVIN ASHWIN GUDKA ..... 5TH DEFENDANT

RULING

1. Before me for determination is a Notice of Preliminary Objection dated the November 19, 2019 and filed by the 5th Defendant herein to the effect that the present suit was premature, misconceived bad in law incompetent and illegally untenable for a number of reasons. Firstly that the suit was sub Judice an Appeal filed by the Plaintiff against the adoption of the proceedings and the resultant Decree, secondly that the suit was *res judicata*, third that the transfer pertaining the original suit land, having taken place on the June 5, 2000, the suit was statute barred, and lastly that the claim against the 5th Defendant was barred pursuant to the provisions of Section 99 of the *Land Act*.

2. Orders were to the effect that the said Preliminary Objection be disposed of by way of written submissions. Despite there having been no response from the Plaintiff, yet the court has to interrogate the said Preliminary Objection on merit. There was also no response from the 4th Respondent either.

3. The 2nd Defendant, in his man made response dated December 23, 2021, concurred with the 5th Defendants' Notice of Preliminary Objection to the effect that the suit was time barred and biased as the matter had already been judged (sic) and executed. That the issues raised by the Plaintiff were indirectly or impliedly challenging the court's decision, Decree and process. That the Plaintiff's grievance could only be addressed in a suit for adverse possession. That the Plaintiff was aware of the proceedings before and after the sale of the suit property wherein he had been a witness to the same but had raised no complaint. That the suit against him (2nd Defendant) was unwarranted and the same ought to be dismissed with costs.

4. The 1st and 3rd Defendant's response dated February 10, 2022 which concurred with the 5th Defendant's Notice of Preliminary Objection and was combined with their written submissions was to the effect that the Plaintiff's suit was fatally defective, frivolous and vexatious and an abuse of the court process.

5. That the case had been determined by a competent court in Kericho Misc Application No. 12 of 1990 and therefore the present suit was *res judicata*. That further, the Plaintiff had no locus to bring suit seeking for cancellation of the title deeds to the suit land given that the suit property was registered to the 1st Defendant's mother one Catherine Tabutany Kerio now deceased.

6. That the Plaintiff had no cause of action against the 1st and 3rd Defendants to warrant the cancellation of the titles. That the verdict of Konoin Land Dispute Tribunal had been quashed by the High Court over 20 years ago wherein no Appeal had been filed. The 1st and 3rd Defendants sought for the Plaintiff's suit to be struck out with costs, and for the Notice of Preliminary Objection to be allowed.

7. The 5th Defendant in his submissions dated March 22, 2022, framed his issues for determination as follows wit;

    i. Whether the instant suit is *sub Judice*.

    ii. Whether the instant suit is *res judicata*.

    iii. Whether the instant suit is statute barred.

8. The 5th Defendant's submission was that LR No Kericho/Mogogosiek/655 being the original parcel of land herein had since been subdivided into several portions. That on March 21, 1990, a council of Elders had returned its verdict in which the deceased Catherine Tabutany was awarded three (3) acres of land from the Plaintiff's portion. The Plaintiff being dissatisfied with the award filed an Appeal at the Kericho Law Courts which Appeal is still pending and therefore the current suit herein is sub Judice that Appeal.

9. That further, the suit was not only sub Judice but was also res judicata, courts of competent jurisdiction having pronounced themselves on this issue in Kericho Misc Application No. 6 of 1991, Kericho Civil Application No. 12 of 1990 and Kericho P&A No. 67 of 2003 wherein the matter involved the same parties, the same property and the same cause of action.

10. That the Plaintiff's cause of action is said to have risen from an alleged fraud. The transfer pertaining to the original suit land having taken place on June 5, 2000, the instant suit was lodged and/or filed and served outside the statutory time lines and therefore the Plaintiff's claim was ousted by the provisions of Section 4 of the *Limitation of Actions Act*. That further the Plaintiff was non- suited, the suit was premature misconceived, bad in law, devoid of merit and the same ought to be struck out with costs

Determination.

11. I have considered the matter in issue, the law, the submissions herein as well as the authorities herein cited. I find that the matters arising for determination as being;

    i. Whether the instant suit is sub judice.

    ii. Whether the instant suit is res judicata.

    iii. Whether the instant suit is statute barred.

    iv. Whether the Preliminary Objection raised is sustainable.

12. A Preliminary Objection according to the decided case by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited* (1969) EA. 696 was stated to be thus:-

> " So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

13. In *Avtar Singh Bhamra & Another vs. Oriental Commercial Bank*, Kisumu High Court Civil Case No. 53 of 2004, the Court held that:

> " A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

14. From the above holding, it is clear that a Preliminary Objection must be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect, a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amounts to an abuse of Court process.

15. In this proceedings, it is the 5th Defendant's case *inter alia* that this suit should be struck out with costs for being sub Judice a pending Appeal (whose details were not provided), that secondly, the matter was *res judicata* by virtue of the proceedings in the Konoin Land Dispute Tribunal, Kericho Misc application No. 6 of 1991, Kericho Civil Application No. 12 of 1990 and Kericho P&A No. 67 of 2003. It must be noted that the 5th Defendant was joined to the suit by virtue of a ruling of April 29, 2017 because he had purchased and had been registered as proprietor to one of the properties in dispute.

16. A party shall be bound by its pleadings. From the proceedings herein it is not in dispute that this suit was instituted via a plaint dated September 17, 2014 as between the original Plaintiff and the 1st to 4th Defendants, wherein it had been consolidated with ELC No 282 of 2014 on May 24, 2018 where the subject matter was parcel LR No Kericho/Mogogosiek/655 registered to the original Plaintiff. The Plaint was first amended on July 26, 2016 to join the 5th Defendant to the suit and subsequently on the July 26, 2021 to substitute the original Plaintiff.

17. It is further not in dispute that a dispute had been filed and heard in the Konoin Land Dispute Tribunal between Catherine Tabutany Kerio (the 1st Defendant's mother) and Kiplangat arap Bartaa, (the original Plaintiff) wherein the Tribunal had rendered its verdict on April 2, 1990 to the effect that Catherine Tabutany Kerio (now deceased) be given three (3) acres of land from the said suit land. The Tribunal award was adopted as a judgment of the court on July 3, 1991 in Kericho Civil Application No. 12 of 1990 in a matter between Catherine Tabutany Kerio and Kiplangat arap Bartaa.

18. Being dissatisfied with the award, Kiplangat arap Bartaa, filed an Appeal before the Kericho High Court in Kericho Misc Application No. 6 of 1991 where stay of execution orders had been issued, and pending the hearing and determination of the Appeal. No evidence has been tendered of there having been any Appeal filed or prosecuted and therefore the interim orders lapsed pursuant to the provisions of Order 40, Rule 6 of the Civil Procedure Rules which are clear to the effect that;

> " ''Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise''.

19. The provisions of Section 6 of the *Civil Procedure Act* provide as follows:

> " 'No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.'

20. To this effect thereof, the Tribunal having rendered its award in favour of the 1st Defendants mother, the only two routes open to the Plaintiff was either to exhaust the appellate process under the Act, or seek, by certiorari, to quash the decision of the Tribunal. This was not done and therefor the issue on *sub Judice* is displaced as there is no Appeal pending.

21. It had been pleaded by the Plaintiff in his plaint that on June 5, 2000, Catherine Tabutany Kerio caused herself to be registered as proprietor of the whole suit land LR No Kericho/Mogogosiek/655, wherein after her death, *vide* Kericho Succession Cause No. 67 of 2003 the 1st Defendant, on May 15, 2013, registered himself as the sole beneficiary and proprietor of the said parcel of land wherein he had caused its subdivisions into parcels LR No Kericho/Mogogosiek/2202, 2203, 2204, 2205, 2206, and 2207 and had proceeded to transfer the resultant parcels of land to himself and the 2nd -4th Defendants herein. That the cause of action being fraud, was committed when Catherine Tabutany Kerio caused herself to be registered as proprietor of the whole suit land LR No Kericho/Mogogosiek/655.

22. The 5th Defendant's contention is that the suit is *res judicata* virtue of the proceedings in the Konoin Land Dispute Tribunal, Kericho Misc application No. 6 of 1991, Kericho Civil Application No. 12 of 1990 and Kericho P&A No. 67 of 2003

23. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " 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 issue has been subsequently raised, and has been heard and finally decided by such court"

24. The doctrine of res judicata is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

25. In order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. What issues were really determined in the previous case;

ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

26. The test in determining whether a matter is res judicata as stated was summarized in *Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others* (2010) eKLR, as follows that:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

27. Looking at the circumstance of the present suit and pursuant to the adoption of the Award of the Konoin Land Dispute as a judgment and decree, of the court in Kericho Civil Application No. 12 of 1990, this suit is *res judicata* the said proceedings and the Plaintiff and the 1st Defendant herein being children of the parties to the Konoin Land Dispute are thus estopped from litigating under the provisions on Section 7 of the *Civil Procedure Act*.

28. Indeed it was held in *E.T vs Attorney General & Another* (2012) eKLR that:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the

court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, 'parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of *Njangu vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....."

29. The upshot of the foregoing is that the suit herein was conclusively decided with the adoption of the Award of the Konoin Land Dispute in Kericho Civil Application No. 12 of 1990 which award was never appealed against and therefore the Plaintiff's suit herein is res judicata and an abuse of the court process. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and procedure to be adhered to.

30. In case I am wrong, then I shall look at the next issue for determination which is whether the suit is time barred by virtue of the provisions of Section 26 of the *Limitation of Actions Act*. It is not in contention that pursuant to the adoption of the award Award of the Konoin Land Dispute in Kericho Civil Application No. 12 of 1990, it is alleged by the Plaintiff that the 1st Defendant's mother Catherine Tabutany Kerio fraudulently caused herself to be registered as proprietor of the whole suit land LR No Kericho/Mogogosiek/655 on June 5, 2000.

31. Section 26 of the *Limitation of Actions Act* provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

32. From the Plaintiff's pleadings it is clear that he had discovered the fraud on the June 5, 2000 as stated in paragraph 13 of his Plaint. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit. According to Section 26 of the *Limitation of Actions Act* the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the June 5, 2000 and a period of three years ended on June 5, 2003. These proceedings were filed on the September 19, 2014 which period was beyond the 3 years from the date the fraud was discovered.

33. Section 7 of the *Limitation of Actions Act* provides as follows:

" An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

34. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the 1st Defendant's mother having registered the suit land in her name in the year 2000, the Plaintiff herein could only seek to recover it from her or her legal administrator, but only if he did so within twelve years after the said registration.

35. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the original Plaintiff filed this suit, his claim was statute barred.

36. In the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.

37. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows

> " 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

38. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The Preliminary Objection dated the November 19, 2019 herein succeeds in its entirety with the result that the Plaintiff's suit is herein struck out with costs to the 1st, 2nd, 3rd and 5th Defendants.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF OCTOBER, 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE