**Seventh Day Adventist (EA) Limited v Children Welfare Society of Kenya & 4 others (Environment & Land Case 09 of 2021) [2022] KEELC 14698 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14698 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT & LAND CASE 09 OF 2021**

**JM ONYANGO, J**

**NOVEMBER 9, 2022**

**BETWEEN**

**SEVENTH DAY ADVENTIST (EA) LIMITED ..... PLAINTIFF**

**AND**

**CHILDREN WELFARE SOCIETY OF KENYA ..... 1ST DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2ND DEFENDANT**

**DIRECTOR OF SURVEYS ..... 3RD DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4TH DEFENDANT**

**ATTORNEY GENERAL ..... 5TH DEFENDANT**

## RULING

1. The Plaintiff filed this suit against the Defendants vide a Plaint dated March 21, 2021 seeking the following orders;

    a. A declaration that the allocation of land parcel, LR No Kisii Municipality/Block 3/649 to the 1st defendant vide a grant issued on 14/11/2018 was irregular, illegal and a nullity ab initio.

    b. The grant issued to the 1st defendant with respect to land parcel LR No Kisii Municipality/ Block 3/649 be revoked.

    c. A permanent injunction be and is hereby issued to restrain the 1st defendant, her agents, assigns, authority derivatives and/or any other person acting under and/or direction of the 1st Defendant from evicting the plaintiff (Millennium Church) from their occupied portion of land parcel LR No Municipality/Block 3/649 measuring 0.132 hectares or from howsoever dealing with land parcel LR No Kisii Municipality/Bloc 3/649.

d. A declaration that the plaintiff (Millennium Church) has lawful rights over a portion of land measuring 0.132 hectares as allotted vide letter of allotment dated 25/06/2001 which subsumed in land parcel LR No Kisii Municipality/Block 3/649 which merit recognition.

e. Costs of and incidental to the suit.

2. Contemporaneously with the Plaint, the Plaintiff filed a Notice of Motion seeking a temporary injunction against the 1st Defendant restraining her from evicting the Plaintiff (Millennium Church) from a portion of land parcel LR No Municipality/Block 3/649 measuring 0.132 hectares occupied by the Applicant or from howsoever dealing with the said portion pending the hearing and determination of the suit.

3. In response to application the 1st defendant filed a Replying Affidavit sworn by its Executive Director, one Irene Mureithi on April 26, 2021 wherein she deponed that the suit was an abuse of the court process in so far as the claim by Millenium SDA Church, an associate of the Plaintiff had already been heard and determined all the way to the court of Appeal vide Kisii ELC No 220 of 2017 and Civil Appeal No 152 of 2019 and thus the suit was Res Judicata.

4. The 2nd and, 3rd and 5th Respondent equally opposed the suit and the application through Grounds of Opposition dated May 17, 2021.

5. In the said Grounds of Opposition they claimed that;

a. The suit and application offended the provisions of Order 45 of the *Civil Procedure Rules*;

b. The Plaintiff lacked locus standi to institute the suit and the Application;

c. The suit and application were *res-judicata*;

d. The suit and application were against Article 40 of the *Constitution of Kenya*; and

e. This Honourable court lacked jurisdiction to determine this application and the main suit.

6. The 4th Respondent opposed the suit and application by filing a Notice of Preliminary Objection that was based on the grounds that the matter was res judicata contrary to section 7 of the *Civil Procedure Act* since the issues therein had substantially been heard and decided in Kisii ELC Case No 220 of 2017 and Civil Appeal No 152 of 2019.

7. On May 18, 2021, the 1st Defendant filed a Notice of Motion application seeking to have the Plaintiff's suit struck out together with all pleadings inclusive of the Notice of Motion seeking injunctive orders on the grounds that the same was res judicata since the issues therein had been heard and determined by both the ELC Court and the Court of Appeal. In his application the Applicant claimed that the Plaintiff lacked locus standi to file this suit.

8. The application was opposed by the Plaintiff vide a Replying Affidavit sworn on July 27, 2021 by its Executive Secretary one Tom Miyienda.

9. The court directed that for expediency both the Preliminary Objection filed by the 4th Defendant and the application filed by the 1st Defendant seeking to strike out the suit be heard concurrently. The Court further directed that both the application and the Preliminary Objection be disposed of by way of written submissions and both parties filed their submissions.

**Issues for Determination**

10. From my analysis of the application by the 1st Defendant, the Preliminary Objection by the 4th Respondent, the response by the Plaintiff and the written submissions filed by all the parties, I deduce that the issues for determination are;

    a. Whether the Plaintiff has locus standi to file this suit

    b. whether the Suit by the Plaintiff is res judicata.

**Analysis And Determination of the Issues**

**Whether the plaintiff has locus standi to institute this suit**

11. Learned counsel for the 1st Defendant submitted that the Plaintiff has no locus standi to litigate over the suit property since the purported sole allottee of suit property (Millennium SDA Church) had litigated over the same up to the court of Appeal on its own account and has now retreated to the background and handed over the baton to the current Plaintiff.

12. Counsel argued that Millennium SDA Church having been unable to convince this court and the Court of Appeal that it had been allotted part of the suit property cannot re-package itself and appear in court through its proxy in bid to litigate again over the same subject matter.

13. Counsel submitted that purported allotment letter with respect to the suit property which the Plaintiff is claiming does not feature the Plaintiff as the head lessee nor does the same indicate the two as joint allottees. Thus he argues that the Plaintiff has no capacity to institute any claim on behalf of the Millennium SDA Church regarding any rights that could accrue from the purported allotment letter.

14. The Learned Counsel for the Plaintiff on his part argued that the Plaintiff filed the suit since Millennium SDA Church was its branch and could not originate the suit by itself.

15. With all due respect to learned counsel for the Respondent, the argument that the Plaintiff filed the suit on behalf of Millennium SDA Church for reasons that Millennium SDA Church did not have the capacity to file suit does not hold water at all. This is because the main issue in the suit as demonstrated in the Plaint and in all the supporting documents, is a claim for ownership of an unsurveyed parcel of land solely registered in the name of Millennium SDA Church.

16. It is inconceivable that, a party that has an allotment letter in its own name can be said to lack capacity to file a suit claiming an interest therein. Sections 24, 25 and 26 of the *Land Registration Act* no 3 of 2012 envisage the vesting of absolute ownership of land in the person in whose name the property is registered together with all rights and privileges appurtenant thereto. This includes the right to sue. Therefore, if indeed the Millennium SDA Church had a valid allotment letter issued to it in 2001, there is nothing that could prevent it from suing any person interfering with interests therein.

17. The above notwithstanding, the Plaintiff has also demonstrated that it was fully aware of the previous suit filed against its branch through its trustees concerning or relating to the suit property herein. In fact, the Plaintiff has displayed deep knowledge of the case by it's branch in all its documents. One would therefore wonder why it never applied to be made a party to the matter or advised its branch to apply for the matter to be dismissed for lack of capacity if at all it believed its branch was incapable of being sued.

18. From the foregoing therefore, I find that the Plaintiff lacks *locus standi* to claim any interest over the suit property on behalf of Millennium SDA Church.

**Whether the suit is res judicata.**

19. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 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 can 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."

20. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others* [2017] eKLR set out the elements that that court needs to consider when determining the issue of res judicata. The court stated that;

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> (a) The subject matter or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

21. In order to establish whether this suit before me is res judicata, it is important to analyze whether the aforementioned elements have been established by both the 1st and 4th Defendants to warrant rendering this suit res judicata. I shall summarize the elements into two.

**a. Whether the subject matter or the issues in the current issue were directly and substantially in issue in the former suit whether the same were determined by a court of competent jurisdiction.**

22. In support of the application to strike the suit on the ground that it is Res –judicata counsel for the 1st Defendant submitted that the Plaintiff in this suit just like in the former suit (Kisii ELC Case No 220 of 2017) claimed that Millennium SDA Church was an allottee of an unsurveyed plot and has been in occupation of the said plot. Counsel for the 1st Defendant contended that said issue had conclusively been determined by this court and upheld by the Court of Appeal. The Courts held that there was no unsurveyed plot that abutted the suit property which belong to the 1st defendant nor was there a Part Development Plan (PDP) to show its location. Learned counsel for the 4th Defendant in his submissions concurred with submissions of the 1st Defendant.

23. Counsel for the plaintiff on his part submitted the subject matter in Kisii ELC Case No 220 oF 2017 was not the same as the subject matter in this suit in so far as the Applicant in the said suit had pleaded trespass and sought eviction of Millennium SDA Church whereas in this suit the cause of action was the fraudulent acquisition of what is now parcel 649 to defeat Millennium SDA Church's interest as an allottee.

24. Counsel further submitted the judgement in Kisii ELC Case No 220 of 2017 cannot be said to be a judgment which resolves the issues disclosed before this court. He argued that the facts upon which this suit is founded disclose the creation of land parcel Kisii/ Municipality/ Block III/649 with an acreage greater than that of Kisii/ Municipality/ Block III/153. He contended that the main question in this suit was therefore whether the Millennium SDA Church was in occupation of Kisii/ Municipality/ Block III/649 which is a question that could not be resolved by Kisii ELC Case No 220 of 2017.

25. From my analysis of the submissions on the element whether the subject matter and issues of determination are similar, two arguments arise. The first argument is whether the issue concerning the alleged unsurveyed plot bordering the land owned by the 1st Defendant and the allotment letter purportedly issued to Millennium SDA Church with respect to said unsurveyed are subject matter of both suits. As correctly submitted by counsel for the 1st Defendant I find that this Court and the Court of Appeal determined this issue and the same cannot be the subject of further litigation. In its judgement this Court held that;

> " The report has identified all and features bordering land Parcel Kisii Municipality Block III/53 and there is no identification of any unsurveyed plot that abuts the suit land. The alleged letter of allotment annexed in the Defendant's Replying Affidavit as "SDC5" is incomplete. The unsurveyed plot is not identified and no Part Development Plan (PDP) is attached to show it location. The rates demand notice marked "SDC6" does not assist. No plot is identified. It only indicates that the plot is unsurveyed."

26. The second argument is the allegation by the Plaintiff that there is discovery of new evidence that the officials of Millennium SDA Church were not privy to that litigation in the previous suit. The Plaintiff in the Plaint alleges that the said officials were alerted in June 2019 that the 1st defendant had, vide a lease dated November 14, 2018 been granted a new lease with respect Kisii/ Municipality/ Block III/649. According to the Plaintiff this subsumed the suit property in the previous suit and its alleged unsurveyed plot hence the increased acreage.

27. Counsel for the plaintiff argued that the discovery of an alteration of the subject matter being the suit property in the previous suit having been made after the delivery of the judgment in Kisii ELC Case No 220 of 2017 gave rise to a new cause of action which cannot be said to have been resolved by the said judgment. With all due respect to learned counsel for the Plaintiff, Order 45 of the *Civil Procedure Rules 201*0 provides for review by a party upon discovery of new and important evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when Judgment was delivered. It is therefore not true that the court having entered a judgment could not be moved to change its decision leading to the filing of this suit.

28. Order 45, rule 1 Sub rule one provides;

> " 1. (1) any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any

> other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

29. The representatives of Millennium SDA Church having made such discovery in June, 2021 had sufficient time to seek a review based on the discovery of the new evidence. However, they decided to waive their right to apply for review and opted to file an Appeal on July 31, 2020 which was dismissed. The Appeal having been dismissed, meant that they were to be evicted from the land that this Court and the Court of Appeal had determined to belong to the 1st Defendant.

30. The Plaintiff having made the discovery of the new evidence and waved their right to apply for a review by opting to appeal cannot be allowed to seek a review of the Judgment of this court under the guise of new suit.

31. From the foregoing therefore it is my finding that the issues in this suit are directly and substantially the same as the ones determined by this Court and Court of Appeal.

**b. Whether the former suit was between the same parties or parties under whom they or any of them claim.**

32. It is common ground that the Plaintiff together with the 2nd to 5th Respondents in this suit were not in ELC 220 of 2017 and the Appeal case. Does this make this suit different from previous suit? Both Counsel for the 1st and 4th Respondents have submitted in the negative. Specifically, Counsel for the 1st Defendant contended that the suit was filed through a new Plaintiff together with different Defendants as a decoy by the former Plaintiff to cunningly seek its day in court once again over similar issues which were conclusively determined by this Court and the Court of Appeal.

33. Having established hereinabove that the subject matter and the issues in ELC 220 of 2017 were conclusively determined by both this Court and the Court of Appeal the use of different parties does not imply that the suit is not res judicata. I make reference to the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR where the court faced with similar circumstances 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 res judicata. 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."

34. I am equally persuaded by the decision in the case of *ET vs Attorney General & Another* (2012) eKLR where the court held 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....”

**Conclusion**

35. From the foregoing the I find that the suit is devoid of merit for lack of *locus standi* on the part of the Plaintiff and on an account of the same being res judicata. Accordingly, I uphold the Preliminary Objection dismiss the application and strike out the suit with costs to the 1st and 4th Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2022.**

**.....**

**J.M ONYANGO**

**JUDGE**