



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC CASE NO. 33 OF 2020**

**CHEPTANUI SINYEI ROTICH.....PLAINTIFF**

**VERSUS**

**CHESRESEK CHELANG'A KIPROTICH.....1<sup>ST</sup> DEFENDANT**

**WILLIAM CHESAN ROTICH.....2<sup>ND</sup> DEFENDANT**

**JOEL KIPLEI.....3<sup>RD</sup> DEFENDANT**

**EMILY RUTO.....4<sup>TH</sup> DEFENDANT**

**JOSHUA KIPKEMEI BARTENGE.....5<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR,**

**ELGEYO MARAKWET COUNTY.....6<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND SURVEYOR,**

**ELGEYO MARAKWET COUNTY.....7<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is in respect of the 3<sup>rd</sup> defendant's Notice of preliminary objection dated 22<sup>nd</sup> July 2020 on the grounds that;

a) The matters pleaded by the plaintiff/applicant herein are res judicata and this court has no jurisdiction to try the same having been directly and substantially in issue in **Eldoret HCC No. 203 of 2004 – Kobilo Chesontin and Cheptanui Sinyei Rotich vs Cheserek Chelanga Kiprotich** and there is clearly a prevailing judgment issued by a competent court the suit is incompetent as it offends the mandatory provisions of Section 7 of the Civil Procedure Act.

Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

**3<sup>RD</sup> DEFENDANT/APPLICANT'S CASE**

Counsel also relied on the provisions of section 7 of the Civil Procedure Act 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 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.”*

Counsel cited the case of **North West Water Ltd V Binnie & Partners [1990] 3 ALL E.R.547**, where the court held:

*“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for*

*the issue to be re-litigated.”*

Ms. Bett submitted that an applicant alleging res judicata must show that :

- a) The matter in issue is identical in both suits.
- b) That the parties in the suit are substantially the same.
- c) There is a concurrence of the jurisdiction of the court
- d) That the subject matter is the same
- e) That there is a final determination as far as the previous decision is concerned

On the first issue on whether the parties are substantially the same counsel submitted that in **ELDORET CIVIL CASE NO.203 OF 1992**, the parties therein were **KOBILLO CHESONTIN AND CHEPTANUI SINYEI ROTICH -VS- CHESEREK CHELANGA KIPROTICH** while in this case the parties are **CHEPTANUI SINYEI ROTICH** as the Plaintiff and **CHERESEK CHELANG'A KIPROTICH, WILLIAM CHESAN ROTICH, JOEL KIPLEL, EMILY RUTO, JOSHUA KIPKEMEI BARTENGE, THE COUNTY LAND REGISTRAR, ELGEYO/MARAKWET COUNTY and THE COUNTY LAND SURVEYOR,**

**ELGEYO MARAKWET COUNTY** thus the parties are substantially the same in both suits save for a face lift and introduction of a few more.

On the second issue as to whether the issues are identical in both suits, it was counsel's submission that in Eldoret Civil case No. 203 of 1992, the relief sought was for a declaration that LR No. Cherangany/Kapcherop/44 belongs to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff while the current suit seeks that a declaration be made that the plaintiff is the absolute owner of LR No. Cherangany/Kapcherop/44. That the issue of the plaintiff being declared the absolute owner of the suit land was duly determined by the court in its judgment delivered on 22<sup>nd</sup> August 2012.

Counsel relied on the case of Attorney General & Another ET vs (2012). eKLR where it was 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 inform of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBI & 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, (as he then was) in the case of Njanju vs Wambugu and another Nairobi I-ICC 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 in every occasion he comes to court, then I do not see the use of doctrine of res judicata**

Counsel further submitted the court in delivering judgment in Eldoret Civil Case No. 203 of 1992 was of concurrent jurisdiction as this honourable court hence the plaintiff should not be allowed to re-litigate on the same issues which have been adjudicated upon by a competent court. Counsel therefore urged the court to uphold the preliminary objection and dismiss the case.

## **2<sup>ND</sup> AND 4<sup>TH</sup> DEFENDANTS CASE**

The 2<sup>nd</sup> and 4<sup>th</sup> defendants supported the preliminary objection and reiterated the submissions of the 3<sup>rd</sup> defendant and urged the court to uphold the objection. Counsel cited the case of **Fresia Wanjiku Mbugua v Agnes Muthoni Mbugua & 6 others [2017] eKLR** where this court held that:

*"I notice that the parties in the previous suit being CMCC No 914 of 2001 are similar apart from the 6<sup>th</sup> and 7<sup>th</sup> defendants who were added and an omission of James Thuku Ndirangu. The subject property is also similar in both suits being LAINGUSE/KIPTENGA BLOCK 2 (KAMUYU 217 which was subdivided to form parcel Nos. LAINGUSE BLOCK 2 (KAMUYU) 374,375,376,377, and 378. This can be found on the attached previous plaint and the current plaint. A judgement and decree attached is also evident that this matter was determined by a competent court.*

*It is surprising that counsel for the respondent submitted that the plaintiff/ respondent added the 6<sup>th</sup> and 7<sup>th</sup> respondents in the new suit because they discovered that there was fraud in 2016. In essence counsel admitted that the current suit is res judicata, only that the plaintiff did not include the claim of fraud. Order 3 Rule 4 of the Civil Procedure Rules is very clear about suits including the whole claim. The order provides that:*

4. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.
- (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits,

except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

*The plaintiff had an opportunity to file a defence and counterclaim in the previous suit where she was a defendant. She chose not to include her claim so that the matter could be determined once and for all. If she was not satisfied with the judgement of the court she could have filed an appeal or a review of the same. Litigation must come to an end and parties should not be allowed to abuse the court process by taking the court and parties in circles.*

*Courts should be slow at striking out pleadings but they also must guard against abuse by litigants of the court process. When the abuse is glaring, then courts should not hesitate to uphold the integrity as it were and strike out the offending proceedings.*

*With that I find that the application is merited and the same is allowed. This suit is hereby struck out with costs to the defendants.”*

Counsel urged the court to allow the preliminary objection as prayed with costs

#### **PLAINTIFF/ RESPONDENT’S CASE**

Counsel for the plaintiff submitted that the preliminary objection does not meet the threshold of what a preliminary objection is on the grounds that the objection is premised on facts which require evidence to be tendered before this court for the court to determine the issues raised therein.

Counsel submitted that the defendant ought to have filed an application supported by an affidavit and attached to it the documents to demonstrate their points of law. That the plaintiff in this case sought for the following reliefs against the defendant jointly and severally:

- a) The survey plan, subdivision, creation of Plot Nos.2469,2470,2471,2472 and 2473 out of land parcel known as L.R CHERANGANY/KAPCHEROP/44 is illegal, null and void.
- b) A declaration that the Plaintiff is the absolute owner of all that parcel of land known as L.R CHERANGANY/KAPCHEROP/44
- c) An order directing the 6<sup>th</sup> Defendant to rectify the land register to reflect the Plaintiff as the legal owner of the suit land and/or register the Plaintiff as the of land parcel L.R CHERANGANY/KAPCHEROP/44
- d) An order directing the 6<sup>th</sup> Defendant to amend the land register to reflect the Plaintiff as the legal owner of all that parcel of land known as L.R CHERANGANY/KAPCHEROP/44 and cancel the newly created parcel numbers
  - i. CHERANGANY/KAPCHEROP/2469
  - ii. CHERANGANY/KAPCHEROP/2470
  - iii. CHERANGANY/KAPCHEROP/2471
  - iv. CHERANGANY/KAPCHEROP/2472
  - v. CHERANGANY/KAPCHEROP/2473
- e) An order directing the 7<sup>th</sup> Defendant to rectify and/or amend the area map and/or survey plan to reflect the Plaintiffs parcel of land as a whole and delete the purported newly created numbers
  - i. CHERANGANY/KAPCHEROP/2469
  - ii. CHERANGANY/KAPCHEROP/2470
  - iii. CHERANGANY/KAPCHEROP/2471
  - iv. CHERANGANY/KAPCHEROP/2472
  - v. CHERANGANY/KAPCHEROP/2473
- f) A permanent injunction restraining the Defendants, their agents and/or servants from entering into, constructing on, ploughing, fencing, wasting, selling, alienating, subdividing, leasing, demarcating, surveying, charging/offering as security and/or in any other manner whatsoever dealing with and/or interfering with the Plaintiffs land parcel known as L.R CHERANGANY/KAPCHEROP/44
- g) Costs and interest.

Counsel submitted that a look at the prayers sought in the former suit and those in the instant suit show clearly that the matter is not res judicata. That in the instant suit, the issues in dispute are the illegal subdivisions of the plaintiff’s parcel of and by the 1<sup>st</sup> defendant and the creation of plot Nos. 2469,2470,2471,2472 and 2473 done in total disregard to the plaintiff’s right.

Further that the judgment of this court delivered on 26<sup>th</sup> September 2012 decreed that the suit land belonged to the plaintiffs whereby the plaintiff herein was the 2<sup>nd</sup> plaintiff. The issue in dispute in the previous suit was the determination of who was the beneficial owner of the suit land.

It was Ms. Odwa's submission that the instant suit was necessitated by the fact that the 1<sup>st</sup> defendant herein without authority or right and in total disregard to the plaintiff's right to property illegally subdivided the plaintiff's parcel of land which issues arose after the High Court had rendered its judgment in the said suit.

Counsel also submitted that the issue in the current case is the fraudulent or illegal subdivision of the plaintiff's land which issue has not been determined by any court to warrant the court to find the matter as res judicata.

Counsel relied on the provisions of section 7 of the Civil Procedure Act upon which the doctrine of res judicata is anchored on. That a person who wishes to rely on the doctrine of res judicata must show that;

- a) Firstly, the suit or the issue in question is directly and substantially the same in the former suit.
- b) Secondly, the parties in the matter in question are the same parties in the former suit or matter.
- c) Thirdly, the matter/issue in question in the instant suit was determined in the former suit.

Ms. Odwa submitted that the elements set out above do not exist in the current suit and that the 3<sup>rd</sup> respondent has made no effort or demonstrated the existence of the above issues. Counsel therefore urged the court to find that the parties in this suit are distinct from the previous suit and the issues for determination have not been adjudicated upon by the court.

### **ANALYSIS AND DETERMINATION**

The single issue for determination is whether this suit is res judicata. The doctrine of res judicata is anchored on the provisions of section 7 of the Civil Procedure Act which bars courts from trying or entertaining matters that have substantially the same parties, subject matter litigating under same title in a court of competent jurisdiction which has previously been determined.

The principal of *res judicata* is found in Section 7 of the CPA 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.”

The plaintiff in this suit seeks for the nullification of the subdivision and creation of plot nos.2469,2470,2471,2472 and 2473 out of the land parcel known as L.R CHERANGANY/KAPCHEROP/44 and orders directing the rectification of the register to reflect the plaintiff as the owner of the suit land.

In Eldoret High Court Case No. 203 of 1992 the plaintiff herein sought a declaration that she was entitled to the suit land by way of adverse possession. The plaintiff was declared the absolute owner alongside the 1<sup>st</sup> defendant in the said suit. It is evident that there is the issue of fraudulent or illegal subdivision of the suit land which was not in issue in the previous suit. This does not amount to a matter that has been adjudicated and determined by the court.

On the issue whether the parties in this matter are similar to the previous suit, the parties in the present suit are Cheptanui Sinyei Rotich as the plaintiff and Cheserek Chelang'a Kiprotich, William Chesan Rotich, Joel Kiplei Emily Ruto, Joshua Kipkemei Bartenge, The County Land Registrar, Elgeyo Marakwet County, The County Land Surveyor, Elgeyo Marakwet County. The parties in Eldoret HCCC 203 of 1992 were Kobilo Chesontin and Cheptanui Sinyei Rotich as the plaintiffs vs Cheserek Chelang'a Kiprotich as the defendant.

This makes it clear that the parties are different and the orders they were seeking for are dissimilar. The additional parties have prayers sought against them with regards to the register and rectification of the same therefore the argument that the 6<sup>th</sup> & 7<sup>th</sup> defendants have been included to avoid the principle of res judicata is neither here nor there.

Counsel for the 2<sup>nd</sup> & 4<sup>th</sup> Defendants cited the case of **Fresia Wanjiku Mbugua v Agnes Muthoni Mbugua & 6 others [2017] eKLR** but this case is distinguishable in that the alleged issue of fraudulent subdivision arose after the previous suit had been determined. A party cannot be locked out of the seat of justice when new violations or causes of action occur in a subject matter that has been litigated on. For example, if a party has been declared an owner of a suit parcel of land then a party illegally sells or sub divides the suit land and transfers it to another party, would this amount to res judicata or a new cause of action? The party aggrieved is entitled to seek for remedy in a court of law to rectify the wrong doing.

In the case of **Oraro...Vs...Mbaja(2005) 1KLR 141**, it was where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

There are facts that are disputed hence evidence must be tendered to disprove them.

In the case of **Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) eKLR**, the Court held that:

*“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.*

The plaintiffs in this case have also referred to HCCC No 203 of 1992 in their pleadings, if they had anything to hide, then they would not have mentioned it. The case I suppose is part of what they will use in their evidence.

Preliminary objections should not be used as a shortcut to litigation or quick fix. There are certain cases which can be determined by preliminary objections those that are purely on points of law. The ones that require further facts to be proved do not fit the bill.

I have considered the pleadings, the submission by counsel and find that the preliminary objection is unmerited and is therefore dismissed with costs to the plaintiffs.

**DATED and DELIVERED at ELDORET this 26<sup>th</sup> DAY OF JANUARY, 2021**

**M. A. ODENY**

**JUDGE**