



Jepkemboi & another (Both Suing as Personal Representatives of the Estate of the Late Esther Jelel – Deceased) v Kipkemboi (Suing as the Administrator of the Estate of the Late Kibet Arap Ngisirei) (Environment & Land Case E004 of 2023) [2024] KEELC 6495 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2023**

MN MWANYALE, J

OCTOBER 3, 2024

BETWEEN

JANE JEPKEMBOI 1ST PLAINTIFF

BETHWEL KIBICHI LIMO 2ND PLAINTIFF

**BOTH SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE
LATE ESTHER JELEL – DECEASED**

AND

**JULIUS KIPKEMBOI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE KIBET ARAP NGISIREI) DEFENDANT**

JUDGMENT

Background

1. Jane Jepkemboi and Bethwel Kibichii Limo the Plaintiffs herein both suing as personal representatives of the Estate of the late Esther Jelel filed this suit against Kibet Arap Ngisirei seeking for judgment against the Defendant for:-
 - a. A declaration that the subdivision and transfer of Nandi/Lelmokwo/123 into two portions and subsequent registration of the same in the name of the Defendant herein Kibet Arap Ngisirei and the deceased Ester Jelel, Nandi/Lelmokwo/789, measuring approximately 6.071Ha and Nandi/Lelmokwo/790 measuring approximately 1.21Ha respectively was irregular, unlawful and fraudulent and therefore null and void abintio.
 - b. An order for cancellation of the said registration of the two parcels in the name of the Defendant herein Kibet Arap Ngisirei and the deceased Esther Jelel of Land Parcel number



Nandi/Lelmokwo/789 and Nandi/Lelmokwo/790 respectively and the same to revert to Nandi/Lelmokwo/123

- c. A declaration that the Estate of the deceased herein Esther Jeel is entitled to 12 acres of the land parcel Nandi/Lelmokwo/123 and the Land Registrar Nandi County be ordered to transfer and register the said 12-acre portion in the name of the deceased.
 - d. A permanent injunction to prevent the Defendant, by himself, his servants' agents or anyone claiming under him from any form of dealing or interference with 12 acres of the Land parcel Nandi/Lelmokwo/123 belonging to the deceased Esther Jeel.
 - e. Costs of the suit.
2. In his Defence dated 16/3/2023, the Defendant at paragraph 8 pleaded that the suit was resjudicata and at paragraph 9 thereof raised a Notice of Preliminary Objection based on Resjudicata.
 3. The Court heard and determined the Notice of Preliminary Objection and rendered a Ruling on 25th September 2023, dismissing the same as not raising pure of law and as the same required ascertainment of facts which could only be done during evidence at trial.
 4. Having dismissed the Preliminary Objection, the matter proceeded for trial, the Plaintiff called 2 witnesses (PW1 and PW2) while the Defendant called 3 witnesses, himself included.
 5. The Court directed a Surveyor to file a survey report on the occupation of the parties and parties to file submissions on the said survey report.
 6. After the Defendant testified as DW1 he unfortunately passed on, necessitating his substitution by his Administrator Ad Litem Julius Kipkemboi, the defence was thus amended to reflect the said substitution hence the change in the title of the this suit.

Plaintiff's Case: -

7. It is the Plaintiffs case that Esther Jeel on whose Estate they had sued has a protracted legal tussle over Nandi/Lelmokwo/123 which dispute was referred to the Nandi Lands District Tribunal which returned a verdict in her favour allocating her 12 acres and the original Defendant Kibet Arap Ngisirei herein 6 acres.
8. That the said tribunal decision was adopted by the Senior Resident Magistrate Court at Kapsabet SRMCC NO. 29 of 1995 as a judgment of the Court and a decree issued.
9. That aggrieved with the Tribunal verdict the original Defendant moved to the High Court in Eldoret in MISC Application No. 209 of 1996 which sought orders of certiorari but the said Misc. Application was dismissed.
10. It is the Plaintiff's further case that Kibet Arap Ngisirei filed Eldoret High Court Civil Suit No. 36/2005 which had sought to challenge the Kapsabet SRMCC No. 29/1995, but the said suit was similarly dismissed on 28/7/2005.
11. It is the Plaintiff's further case that the subdivision and transfers effected on Nandi/Lelmokwo/123 were thus illegal and fraudulent, and towards this end the Plaintiff particularized the fraud and illegality on the part of the Defendant, and sought for the prayers set out at paragraph of this judgment.



Defendant's Case: -

12. It is the Defendants case that Esther Jelel was awarded 12 acres and he was awarded 6 acres vide a decree dated 19th September 1995. That being aggrieved by the said decree, he initially filed Misc. Application 209/1996 and thereafter High Court Civil Suit No. 36/2005 which suits were dismissed on technicalities, and he preferred an appeal before the Court of Appeal in Civil Appeal No. 261/2005 which appeal was successful and the same reinstated Eldoret High Court Civil Suit No. 36/2005.
13. That after the reinstatement of Eldoret Civil Suit No. 36/2005, the parties Esther Jelel and himself entered into a consent dated 22/10/2012 setting aside the order of the tribunal and the decree of the Court dated 11/9/1995 and that he was awarded 15 acres while Esther Jelel was awarded 3 acres in of Nandi/Lelmokwo/123, through the said consent.
14. It is the Defendants further case that pursuant to the consent and the resultant decree he and Esther Jelel appeared before the Land Control Board and obtained consent for subdivision which resulted to the Defendant being registered as owner of Nandi/Lelmokwo/789 Measuring 6.071 Ha, and the late Esther Jelel being registered as owner of NANDI/LELMPKWO/790 measuring 1.214 Ha.
15. The Defendant thus denied the particulars of fraud and illegality against him and pleaded further that Eldoret High Court civil Suit No. 36/2005 was reinstated and a consent order was recorded therein and adopted as an order of the Court.
16. The Defendant pleaded resjudicata as well as raised a preliminary objection whose determination is captured at paragraph 3 of this judgment.
17. The Defendant thus prayed for the suit to be dismissed with costs.

Plaintiff's Evidence: -

18. As pointed out at paragraph 4, the Plaintiff call two witnesses. PW1, the 1st Plaintiff, Jane Jepkemboi testified and adopted her witness statement dated 27/01/2023 as part of her evidence in chief. In her further testimony that the Tribunal had given Esther Jelel 12 acres and the said award was adopted as a judgment of the Court and a decree was extracted. Kibet Ngisirei filed an appeal against the decision Ngisirei, but the same was dismissed and he filed a second appeal to the Court of Appeal but did not proceed with the same.
19. The witness produced P Exhibit 1 to 15 as listed in the list of documents dated 27/01/2023. The witness prayed for an order that her 12 acres be transferred back to her.
20. The witness stated that she was not aware that her mother Esther Jelel had on her own violation varied the decree issued on 11/9/1995 through the consent dated 22/10/2012, she further denied knowledge of the fingerprint in the consent dated 22/10/2012 as belonging to her late mother Esther Jelel.
21. On cross examination, the witness stated that she lived on the property which had been fenced, she could not tell whether the fences were the ones captured on the photographs she was shown.
22. On further cross- examination, she stated that she used to attend Court sessions with her mother but was sick when the case was finalized. That her mother did not inform her of the issue of the consents. She stated that she had not been married and lived with her mother all through.
23. On re-examination, she stated that the consent dated 22/10/2012 had been signed by Terer & Company Advocates, but her mother had at all times been represented by a State Counsel. She clarified that the property had no fence.



24. PW2, the 2nd Plaintiff, Bethwell Kibichii Limo also testified and adopted his witness statement as part of his evidence in chief.
25. The witness produced the proceedings of the LDT and the decree dated 11/9/1995 as P Exhibit 16. It was his testimony that the late Esther Jelel was his grandmother who had passed on in 2021. He was aware of the dispute between his late grandmother and Kibet Ngisirei.
26. It was his testimony that he had found through a search that Nandi/Lelmokwo/123 has been subdivided into two parcels, Nandi/Lelmokwo/789 and Nandi/Lelmokwo/790, and the Defendant was living in about $\frac{3}{4}$ of the said property. He stated that he was seeking justice so as to get their rightful share of 12 acres.
27. On cross – examination, the witness stated that the Lands Dispute Tribunal's is decree dated 11/9/1995, he knew the late Esther Jelel, as his grandmother but he was not aware of the consent dated 22/11/2012 that she had executed. He was aware of the DCI thumb print verification report, but his grandmother did not tell him about the consent. There was a partition of the suit property with a fence of barbed wire and posts. Their house was one portion A and their neighbour was on portion B, he stated that the fence did not divide Nandi/Lelmokwo/789 and Nandi/Lelmokwo/780. He did not know the acreage the Plaintiff were using.
28. He stated per the search Nandi/Lelmokwo/790 was in the name of Esther Jelel and measured 1.214 hectares while Nandi/Lelmokwo/789 measuring 6.071 Ha is in the name of Kibet Ngisirei. The witness stated he had not seen the mutation and was not aware whether the mutation reflect the portion on the ground.
29. He stated that the Defendant moved the fence back after his grandmother had moved it. He stated that he was not aware of the application for consent for Land Control Board by Esther Jelel. He stated that he would accompany his grandmother to Court and his grandmother did not have an Advocate.
30. On re-examination he stated that his grandmother did not have any Advocate. He confirmed that the application for Land Control Board consent was signed on 11/9/1995 and letter of consent was dated 29/9/1995, while the application for subdivision was for 2 portions for 6.0 acres and 12 acres. The consent issued was for 6.0 acres and 12 acres.
31. The witness stated he was not aware where the titles for Nandi/Lelmokwo/789 and 790 were and who was in possession of them.
32. He stated that the fence, had been erected by Ngisirei after the death of his grandmother in 2021. No Surveyor had come to the ground.
33. With the testimony of the two Plaintiff's witnesses, the Plaintiff case closed.

Defence Evidence: -

34. Kibet Arap Ngisirei, the original Defendant testified as DW1 before he passed on. He adopted his witness statement dated 16/3/2023 as part of his evidence in chief.
35. It was his testimony that he was a nephew of Esther Jelel, his grandmother and Esther Jelel having been sisters, while the 1st Plaintiff was a woman to woman wife of Esther Jelel under the Nandi customary law.
36. The witness produced the documents listed on the list of documents dated 16/3/2023 as D Exhibits 1 to 14 and he produced the verification of the thumb print report dated 23/11/2023 as D Exhibit 15.



37. He stated that D Exhibit 10 were photographs which showed Esther Jemel's house on the property but he did not recognize the fence.
38. He stated that there was a fence that separated his house from Esther Jemel and that the fence had been erected during the lifetime of Esther Jemel with her consent and the 2nd Plaintiff had helped dig holes for the posts. The fence had been erected pursuant to what the surveyors had shown them.
39. The witness further stated that he had obtained titles from Kapsabet together with Esther Jemel, and he kept both titles at the request of Esther. He stated that Esther had been buried I her own portion and that he had attended the same.
40. On cross – examination, the witness stated that he had a dispute with Esther Jemel a while ago on the ownership of Nandi/Lelmokwo/123 which had initially belonged to him. The witness stated that he did not remember the tribunal case but remembered a panel case. He remembered filing Eldoret High Court case No. 36/2005, but the said suit was not dismissed as alleged by the Plaintiff.
41. He had agreed with Esther Jemel to record a consent, he was not aware of any matter he filed before the Court of Appeal at Eldoret. He remembered thumbprinting a consent letter at the offices of Mr. Terer Advocate together with Mr. Omwenga Advocate as well as Esther Jemel whom he did not remember her age but was elderly.
42. He stated that the consent had been signed before dismissal of the suit, and from the said consent he was to get 15 acres while Esther Jemel was to get 3 acres.
43. That after the consent, the late Esther Jemel and the witness went to the Land Control Board and they paid for the consent.
44. The witness stated that the consent was filed in Court in Eldoret but he could not remember before which Judge presided over the matter.
45. The witness did not remember when the fence was erected but Esther Jemel was alive and her family members were present during the fencing. The witness did not remember when the Surveyor went to the property, as his son is the one who brought the surveyor.
46. On re-examination, the witnesses stated that she agreed with Esther Jemel and the they hire Advocates for Eldoret High Court case No. 36/2005. They executed the consent in the offices of Mr. Terer Advocate in the presence of Mr. Omwenga, thereafter the Advocates made a presentation to Court and a decree was extracted and that he implemented the decree of the Court by effecting subdivision.
47. DW2, Mr. Issack Terer Advocate testified. It was his testimony that he is an Advocate of the High Court of Kenya practicing as Terer & Company Advocates at Barngetuny Plaza Eldoret and China Hui wi Plaza Kilimani Nairobi.
48. He confirmed having received summons to testify in respect of a consent filed in Eldoret High Court Civil Suit No. 36/2005 between Kibet Arap Ngisirei and Esther Jemel.
49. The witness stated that he had seen the consent dated 22/10/2012 and confirmed having acted for the Defendant Esther Jemel in that matter whereas Mr. Omwenga Advocate acted for the Plaintiff in the said matter.
50. The witness stated that he executed the consent with instructions from Esther Jemel and appended his signature on the space provided for the Advocate, and that Esther Jemel Too, executed the consent by thumbprinting on he said consent, and that the witness was present when the Plaintiff and his Advocate appended their signatures.



51. It was the witness further testimony that the consent had been signed at his chambers in Barngetuny Plaza and that Mr. Omwenga and his client had visited his said chambers, and the consent was filed in Court and a decree was extracted on 23/10/2012 and signed on 26/11/2012. The witness identified the consent and decree as D Exhibit 8 and 9.
52. On cross – examination, the witness stated that he represented Esther Jelel in the High Court case. He had filed a Notice of appointments of Advocates.
53. The witness stated that the consent was recorded on 22/10/2012 but the Defendant was reasonably old though he could not remember the exact age. He did not remember whether Esther Jelel had been in the company of anyone else, he indicated that he asked his client whether she was comfortable executing the consent and the client was comfortable.
54. The witness stated that he was not aware of the dismissal of the matter vide a ruling by Justice Gacheche in July 2005. The witness was also not aware of an Appeal having been filed in the matter against the dismissal.
55. DW3, Mr. Duke Omwenga Okeyo Advocate testified as DW3. It was his testimony that he had practiced as an Advocate of High Court of Kenya for over 20 years.
56. He testified that he had received summons to appear in Court to give evidence in relation to a consent letter dated 22/10/2012 and a decree. He stated that he had executed the consent and signed the same on behalf of Kibet Arap Ngisirei, that the Plaintiff signed the same together with Mr. Terer Advocate and his client Esther Jelel.
57. That the consent was thereafter filed in Court and adopted as a decree of the Court and the matter closed at that level. The witness reiterated that he had witnessed the execution of the consent, which had been produced as D Exhibit 8 and D Exhibit 9.
58. On cross – examination, the witness did not recall when the firm of Terer & Company Advocates came on record for the Defendant, and that there was no way Mr. Terer would have acted in the matter without filing a Notice of appointment and/or A Notice of Change of Advocates.
59. The witness stated that the consent has been executed at Mr. Terer’s chambers he did not recall who had accompanied the Defendant in the suit.
60. The witness could not recall the Defendants age, and neither could he recall whether the suit had been dismissed. He was not aware either whether there was an order reinstating Eldoret High Court case No. 36/2005.
61. After the testimony of the 3 witnesses, the Defence case closed.
62. Upon conclusion of both Plaintiff and Defence cases, the Court having found that none of the parties had filed a Surveyor’s report on their occupation directed a surveyor’s report to be filed under the provisions under 18 Rule 10 of the Civil Procedure Rules and Section 146 (4) of the Evidence Act as additional evidence and invited the parties to file submissions on the said report in their main submission.

Plaintiff’s Submissions: -

63. The Plaintiff has framed and submitted on two issues for determination; -
 - i. Whether the suit is resjudicata



- ii. If not whether the Plaintiffs have made a case against the Defendant and whether they are entitled to the reliefs sought.
64. On resjudicata the Plaintiff submits that the issue of resjudicata as pleaded by the Defendant is premised on the existence of a previous suit, to wit, Eldoret Civil Suit No. 36/2005 (herein after referred to as previous suit), between Kibet Arap Ngisirei vs Esther Jelel and therefore this suit is resjudicata.
65. The Plaintiff submit that it is the Defendants case that the consent recorded in the matter, and the extracted decree settled the dispute between the Plaintiff and the Defendant. The Plaintiff submit that the previous suit was dismissed and that the Appeal that purportedly reinstated the same was not produced before Court.
66. The Plaintiff submit that by the time the consent was recorded in Court and the resultant decree extracted, the suit in which the consent was recorded in had already been dismissed.
67. The Plaintiff submits that the consent recorded was fraudulently and hence the plea of resjudicata cannot stand. In this regard the Plaintiff cites Section 26 (i) of the Land Registration Act, the decision in the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR, as well as the decision in the case of Chemey Investment Limited vs Attorney General & 2 others, Court of Appeal No. 349/2012 and finally the decision in the case of Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015) eKLR.
68. On issue number 2 on whether the Plaintiff has proved his case and is entitled to the reliefs sought. The Plaintiffs submits that she has proven her case by proving that the consent with the resultant decree were fraudulently and the Defendant did not procure the 15 acres legitimately hence she had proven her case and is entitled to the reliefs sought.
69. The Court notes that the Plaintiff submission were silent on the Surveyor's report.

Defendant's Submission: -

70. On his part the Defendant through his Advocates frames and submitted on two issues for determination, to wit,
 - i. Whether the Plaintiffs have against the Defendants and if they are entitled to the relief sought.
 - ii. Whether the suit is resjudicata
71. The issues frames by the Defendant are similar to the one's frames by the Plaintiff, save that the Defendant has submitted on the issues of resjudicata as the last issue.
72. On issue number 1, it is the Defendants submission that there was a binding consent order P Exhibit No. 8 with a resultant decree D Exhibit No. 9.
73. That the consent and decree having been made during the lifetime of the parties led to the subdivision of Nandi/Lelmokwo/123 into Nandi/Lelmokwo/789 and Nandi/Lelmokwo/790, hence the decree was executed and implemented and the parties have lived peaceful.
74. On resjudicata, the Defendant submits that under the provisions of Section 7 of the Civil Procedure Act, this Court cannot try this case as it is resjudicata given the consent order and decree issued in previous suit, to wit Eldoret High Court Civil Case No. 36/2005 between Kibet Ngisirei and Esther Jelel.



75. The Defendant further places reliance on the decision in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR.
76. On the issue of the consent filed in the former suit, the Defendant submits based on the decision in the case of Susan Jane Shah & Another vs Cooperative Merchant Bank Limited & Another that this suit is resjudicata.
77. The Defendant submits that the suit be dismissed and the parties to co-exist peacefully.
78. On the Surveyor's report the Defendant submits that the Defendant was buried in Nandi/Lelmokwo/789 which has further been subdivided into Nandi/Lelmokwo/962 and Nandi/Lelmokwo/963.
79. Before framing the issues for determination, a number of issues were settled in the course of trial, which the Court notes as follows;
 - i. It is common ground that the Plaintiffs are administrators of the Estate of Esther Jelel, while the Defendant Julius Kipkemboi is the Administrator Ad Litem of Kibet Arap Ngisirei who passed on after testifying but before judgment was delivered.
 - ii. It is also common ground that Esther Jelel was buried in Nandi/Lelmokwo/790 while Kibet Ngisirei was buried in Nandi/Lelmokwo/789 which has now been subdivided into Nandi/Lelmokwo/762 and Nandi/Lelmokwo/963 as per the Surveyors report filed in Court on 11/7/2024.

Issues For Determination: -

80. Having considered the pleadings, the evidence, submissions and the law and taking into account the Ruling delivered on 25th September 2023 with regard to the Notice of Preliminary Objection raised by the Defendant as set out at paragraph 2, 3 and 4 of this judgment, and noting that the issue of resjudicata required ascertainment of facts and production of evidence, and the same being a matter of law with the potential of determining this case in limine the Court frames the same as the first issue for determination. The issues will thus be; -
 - i. If yes, who bears the costs of the suit?
 - ii. If no, has the Plaintiff proven his claim against the Defendant?
 - iii. What reliefs are available to the Plaintiff?
 - iv. Who bears the costs of the suit?

Analysis And Determination: -

81. Both the Plaintiffs and Defendants Advocates agree in their submission that the basis of the Defendant raising the issue of resjudicata is the issue of the previous suit to wit Eldoret High Court Civil Case No. 36/2005 between Kibet Ngisirei and Esther Jelel.
82. The plea of Resjudicata was pleaded at paragraphs 7 and 8 of the Defence, and indeed the same related to the existence of a previous suit Eldoret High Court Civil Case No. 36/2005 between Kibet Ngisirei and Esther Jelel.
83. The point of departure between the Plaintiff and the Defendant on the issue of Resjudicata is that the Plaintiff submits that this suit is not Resjudicata as the previous suit was dismissed and not heard on merits and hence it did not conclusively determine the rights of the parties herein, while the Defendant



- takes the position that having filed a consent (D Exhibit 8) and a decree extracted (D Exhibit 9) the parties rights were conclusively determined which led to the implementation of decree in 2018 by the subdivisions of Nandi/Lelmokwo 123 into NANDI LELMOKWO/789 and Nandi/Lelmokwo/790.
84. In her testimony before Court PW1, the first Plaintiff produced a copy of a Ruling delivered in previous suit on 28th July 2005 as P Exhibit 14. The said Ruling under the hand of Lady Justice Jean Gacheche but was delivered by Dulu J, upheld a Preliminary Objection and dismissed the said suit, it was delivered in the presence of Mrs. Abuga who was acting for the Plaintiff.
 85. On his part the Defendant produced a consent dated 22/10/2012 filed in the previous suit as D Exhibit 8 and a decree dated 26/10/2012 extracted pursuant to the consent file as D Exhibit 9.
 86. DW2 and DW3, both confirmed the execution of the consent by themselves as Advocates for the parties in the previous suit as well as the parties themselves. Indeed, the thumb verification report dated 23/11/2023 and produced as D exhibit 10 confirmed that Esther Jelel had executed the consent (D Exhibit 8).
 87. At paragraph 4 (e) of the Defence, the Defendant pleaded that an Appeal was preferred against the Ruling of Lady Justice Gacheche delivered on 28/7/2005 dismissing the previous suit; that the said Appeal was Court of Appeal No. 261/2005; which appeal reinstated the previous suit.
 88. The Defendant however did not produce a copy of the order from the Court of Appeal reinstating the dismissed the previous suit. On cross – examination on the same, the Defendant feigned ignorance of the Court of Appeal matter. DW2 and DW3 who stated that they were the Advocates who appeared in the previous suit, were not aware of the dismissal of the said suit vide the ruling delivered on 28/7/2005, they were not also aware of the Court of Appeal matter reinstating the dismissed previous suit.
 89. The burden to proof on the reinstatement of Eldoret Civil Suit No. 36/2005 was with the Defendant having pleaded the same. Section 107 of the Evidence Act places that responsibility on the person who alleges the existence of a fact to proof the same.
 90. On the evidence placed before Court previous suit stood dismissed as at 28/7/2005 and was dead as a dodo from the said date.
 91. No evidence has been adduced to show that the said Eldoret Civil Suit 36/2005 was reinstated by the Court of Appeal pursuant to an Appeal lodged by the Defendant.
 92. Returning to the issue of Resjudicata at hand, the same is provided for by Section 7 of the civil Procedure Act. The Plaintiff did not cite any authorities on the issue of Resjudicata while the Defendant cited the decision of IEBC vs Maina Kiai.
 93. The elements to be proven in the case of plea of Resjudicata were restated by the Supreme Court in its decision in the case of John Maritime Florence Services Limited & Another vs Cabinet Florence Service Limited and Another Cabinet Secretary Transport & Infrastructure 2021 (KESC 39) where the Court interalia

“for the doctrine to apply the following must be demonstrated

- a. There is a former judgment or order which is final
- b. The judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties



- c. There must be between the first and second suits, identical parties, subject matter and cause of action.”

94. The Court shall apply each element to the case herein, on the issue of their being identical parties, subject matter and cause of action as well as the Court being competent, this Court finds that the said elements have been proven, in that Kibet Ngisirei the Defendant herein was the Plaintiff in 36/2005, is represented by her personal Administrators in this suit, the subject matter and cause of action is identical in both suits and the High Court in Eldoret has jurisdiction.
95. The Court shall consider the other elements together. It is Plaintiff position that the previous suit was dismissed, while the Defendant position is that the consent filed in the suit and the resultant decree, conclusively settled the rights of each party.
96. As the Court has found out that the previous suit was dismissed based on upholding of a preliminary objection and the fact that there was no evidence of its reinstatement by the Court of Appeal. It follows that the dismissal order was final, but the case was not determined on its merit, as it was dismissed based on the preliminary objection.
97. The Court thus finds that the dismissed order was not on the merits of the case, and since there was no reinstatement of the suit, this element has not been proved hence, this suit not Resjudicata.
98. As observed earlier on, once the suit was dismissed and not reinstated on Appeal, it was dead as a dodo and not action could possibly be taken in said suit save for taxation of costs if the same were granted.
On issue number 1, the Court thus finds this suit is not Resjudicata on account that Eldoret High Court civil Suit No. 36/2005 was dismissed on a Preliminary Objection and not on merit.
99. Having answered issue number 1 in the negative, the Court shall now consider whether the Plaintiff has proven her case.
100. The gravamen of the Plaintiff's case is that the subdivisions and transfers of Nandi/Lelmokwo/123 was illegal and fraudulent and the illegality and fraud has been pleaded and particularized at paragraph 16 of the plaint, the Defendant case is that the same were legally and procedurally done pursuant to the consents dated 22/10/2012 (D Exhibit 8) and the resultant decree dated 26/10/2012 (D Exhibit 9) issued in in the previous suit.
101. Whereas it is undoubted that Esther Jelel, signed the consent dated 22/10/2012 (D Exhibit 8), the issue is whether the consent could have been filed in the previous suit 7 years in 2012 after the suit had been dismissed in 2005.
102. The Court has already found out that the previous suit having been dismissed vide the Ruling dated 28/7/2005, it stood dead as dodo, and in absence of proof of reinstatement, was the consent filed regular and proper? What of the resultant decree?
The Court finds it perplexing that DW2 and DW3 the Advocates who appeared in Civil Suit No. Eldoret High Court 36/2005; -
 - a. Were not aware of its dismissal in 2005 yet Mrs. Abuga for the Plaintiff was recorded as present during the delivery
 - b. Were not aware of any order reinstating the suit by the Court of Appeal, yet
 - c. They executed and attested the consent that gave rise to the decree which gave the Defendant 15 acres out of Nandi/Lelmokwo/123.



103. As the suit stood dismissed the consent order executed by the parties was recorded in a vacuum and this a nullity and all the actions that were premised on the same, including the decree dated 26/10/2012, the subdivisions of Nandi/Lelmokwo and the registration of the Defendant as owner of Nandi/Lelmokwo/789 measuring 15 acres and the registration of Esther Jelel as owner of Nandi/Lelmokwo/790 and any subsequent subdivisions.
104. In arriving at the said finding I am guided by the decision in the case of *Nashon Fitzwanga vs Environment Disaster Research Foundation* 2002 eKLR, where it was observed inter alia,
- “As earlier indicated, it true on 2/5/2000, this main suit was dismissed for want of prosecution by Hon. Commissioner Khaminwa. It cannot therefore be doubted that in that situation any subsequent proceedings in the file under the said suit were being held in a vacuum. They were not only irregular and void, but amount to a nullity....”
105. Similarly, in the Court of Appeal decision in *Association of Member Episcopal Conference of Eastern Africa (AMECEA) Vs Alfred Romani t/a Romani Artitectas & 3 others* (2002) eKLR quoted with approval the privy council decision in the case of *Macfoy vs United Africa* (1961) E.A. 1169 at page 1172, where the Court held inter alia
-”if an act is void, then it is in law a nullity. It is only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad ad incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”
106. The Plaintiff have thus proven that the subdivisions and subsequent registration of Esther Jelel and Kibet Ngisirei was founded on a nullity hence transaction were illegal null and void and the protection under Section 26 of the Land Registration Act does not cover illegality.
107. At paragraph 4 of the plaint, the Plaintiff have pleaded that Esther Jelel had been awarded 12 acres within Nandi/Lelmokwo/124. The Plaintiff produced the proceedings of the LDT No./ 29/1995 and the subsequent decree issued on 18/9/1995 as P Exhibit 16. They have thus proved entitlement to 12 acres within Nandi/Lelmokwo/123 as was originally.
108. On issue number 2, the Court finds that the Plaintiff has on a balance of probabilities proven her case and is deserving of the reliefs sought in the plaint.

Disposition: -

109. Accordingly, the Court thus enter judgment for the Plaintiffs in terms as follows; -
- a. Declaration that subdivision and transfer of land parcel No. Nandi/Lelmokwo/124 in two Nandi/Lelmokwo/789 in the name of Kibet Ngisirei and Nandi/Lelmokwo/790 to Esther Jelel and any subsequent subdivisions is illegal null and void.
 - b. The Land Registrar Nandi County shall cancel all the entries relating to the subdivision of Nandi/Lelmokwo/123 and revert the same to the original parcel as Nandi/Lelmokwo/123.
 - c. The Plaintiffs are hereby awarded 12 acres on behalf of the Estate of Esther Jelel, and the Defendant is awarded 6 acres in Nandi/Lelmokwo/123.
 - d. The county Surveyor Nandi County shall upon the reversion to Nandi/Lelmokwo/123 as was originally cause a subdivision into thereof two parcels, 12 acres in favour of the Plaintiff on



behalf of the Estate of Esther Jelel and the remaining 6 acres to the Defendant on behalf of Kibet Ngisirei (now deceased). In the subdivision to be done by the County Surveyor regard should be given to the resting places of Esther Jelel so as to remain in the parcel to be registered to the Plaintiff and the resting place of Kibet Ngisirei, to remain registered in his Defendant and/ his Estate.

- e. The Deputy Registrar of the Court shall execute all necessary documents required to give effect to this judgment.
- f. Costs of the suit are awarded to the Plaintiff in any event.

JUDGEMENT DATED, AND DELIVERED AT KAPSABET THIS 3RD DAY OF OCTOBER, 2024.

HON. M. N. MWANYALE,

JUDGE.

In the presence of; -

1. Mr. Kirui for the Plaintiff
2. Mr. Kogo holding brief for Mr. Rotich for the Defendant

