



REPUBLIC OF KENYA



**Kirui v Korir & another (Environment & Land Case E008 of 2020)
[2023] KEELC 15876 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E008 OF 2020**

MC OUNDO, J

MARCH 2, 2023

BETWEEN

JOHNSTONE KIPNGENO KIRUI PLAINTIFF

AND

SAMWEL KORIR 1ST DEFENDANT

STANLEY KORIR 2ND DEFENDANT

RULING

1. Before me for determination is a notice of preliminary objection dated the January 5, 2021 and filed by the applicant/2nd defendant in which the 2nd defendant seeks that the suit herein be dismissed for being *res judicata* the Kericho Resident Magistrates Court Misc Application No 24 of 1984, *Samwel Cheruiyot A Korir and Reuben Kopkorir A Koech vs Elijah Ngulolu A Tonui*, which had determined the issue herein raised.
2. That in this respect, the suit herein was defective, misconceived, scandalous frivolous and vexatious and a blatant abuse of the process of the court.
3. There was no response to the application despite there having been directions for the plaintiff and the 1st defendant to file their responses.
4. Subsequently, parties were directed to dispose of the application by way of written submissions wherein only the 2nd defendant and the plaintiff complied.

Applicant/2nd Defendant's submissions

5. The 2nd defendant's submissions in support of his preliminary objection dated January 5, 2021 was to the effect that the substratum of the suit herein as sought in the plaintiff's plaint dated October 29, 2020 were similar with that which had been canvassed in Land Dispute Case No 8 of 1984 at the



- District Officer's Office, Litein where the decision of the elders in the said dispute had been adopted by the court in Kericho Magistrate's Court Miscellaneous Application No 24 of 1984 in *Samwel Cheruiyot A. Korir and Reuben Kopkorir A Koech vs Elijah Ngulolu A Tonui*. That there had been no appeal preferred against the decision made therein.
6. That the matter had been on an issue of ownership of the parcel of land known as LR Kericho/Kibwastuiyo/286 which is the suit property in the subsequent matter.
 7. The 2nd respondent framed his issues for determination as follows;
 - i. Whether the matter in question is *res judicata*;
 - ii. Whether the present suit is vexatious and an abuse of the process of the court; and
 - iii. Which of the parties should bear the costs of this suit.
 8. On the first issue for determination, the 2nd defendant, while relying on the provisions of section 7 of the *Civil Procedure Act*, submitted that the said provision espoused the fundamental doctrine that there should be an end to litigation. The doctrine of *res judicata* was pleaded as a way of estoppel so that where a judgment had been given, future and further proceedings on the same issues and facts are estopped. That the rationale for the doctrine of *res judicata* existed to protect public interest so that a party would not endlessly be dragged into litigation over the same issue or subject matter that had otherwise been conclusively determined by a court of competent jurisdiction.
 9. That in the present matter, the suit or cause of action that gave legal rights and obligations of the parties herein had been decided by an earlier judgment, in Kericho Magistrate's Court Miscellaneous Application No 24 of 1984 and therefore the current matter amounted to *res judicata*.
 10. That the issue(s) in dispute in the previous litigation were between the same parties as those in the current suit; which issues were directly or substantially in issue with the current suit and had been conclusively determined by a court of competent jurisdiction. That what was before court now was a fresh suit which had raised the same or similar issues that had already been litigated and determined.
 11. Reliance was placed on the holding by the Court of Appeal in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR to submit that in light of the above argument, that the court be pleased to find the plaintiff's suit *res judicata*, and allow the notice of preliminary objection dated January 5, 2021 and thereafter dismiss the plaintiff's suit with costs.
 12. That the plaintiff here was fully aware of the former case which had been determined both at the District Officer's Office and upheld in the Resident Magistrate's Court and therefore the mere change of a party to insert himself as a party but pursuing the same cause could not save him from the jaws of *res judicata*. It is trite that the mere addition of parties in a subsequent suit or omission of a party or parties as had happened in this case did not necessarily render the doctrine of *res judicata* inapplicable since a party could not escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. That were the added parties peg their claim to the same title as the parties in the earlier suit, the doctrine would still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.
 13. The 2nd defendant then submitted on the second issue for determination while relying on the decided case in *Satya Bhama Gandhi vs Director of Public Prosecutions & 3 others* [2018] eKLR that it was clear that the plaintiff, despite being aware that the issues of ownership of the suit property had already been determined, he decided to ignore the set rules which in turn amounted to an abuse of court process and his action should not be countenanced.



14. That courts were not powerless when it came to dealing with such misconduct. That the power, together with rules of court and statutory provisions, enable the court to dismiss or strike claims which are frivolous and vexatious. In addition, it may be exercised to discipline litigants and lawyers found guilty of misconduct.
15. That the present case presented the best example of a litigant who was hell bent on abusing the laid down legal process by materially concealing the material facts of a case that had been determined while trying to bring the same back to court using a back door instead of pursuing an appeal if he was not satisfied with the holding in Kericho Magistrate's Court Miscellaneous Application No 24 of 1984.
16. That since the costs follow suit, the 2nd defendants sought for the suit to be dismissed with costs to him.

Plaintiff's Submission.

17. The plaintiff, who appeared in person filed his submissions to the effect that he was the sole beneficiary to the land through succession and had no idea of any other beneficiary through any other system either inherited or as a family member. That the case referred to by the defendants' lawyer was not part of the inheritance and he had no idea to the said referred case.
18. That both the defendants, to his understanding forcefully settled on land and forcefully demolished his temporal house and other developments thereon. That despite there having been interim orders in place, the defendants herein had disobeyed the said court orders claiming that he could do nothing to them. That since he was not ready to confront them and cause physical confrontation which could easily cause bloodshed, he had approached the court.
19. That immediately after the court's direction, the 2nd defendant had constructed a permanent building and planted crops on the suit land on a claim that they held title deed to 3 acres of land, which claim they had never proved.
20. That the land parcel No Kericho/Kipwostuiyo/286 was inherited from his great grandfather and no portion had been sold or given to anybody as a gift. That he was its absolute proprietor who held the original Title through Succession Cause No 17 of 2018.
21. That the defendants had their own lands, were his neighbors and financially stable wherein they had taken advantage over his inability to force them out of his property.

Determination.

22. I have considered the 2nd defendant's application, submission and authorities therein cited. I have also considered with empathy the plaintiffs submissions herein which submissions seem to have veered of the main bone of contention.
23. Briefly, the plaintiff filed a suit dated the October 29, 2020 against the defendants herein where he had sought for the following orders;
 - i. A permanent injunction meant to restrain the defendants by themselves their agents and/or assignees, their workers, sons, from fencing of and/or alienating and further trespassing into land parcel No Kericho/Kipwostuiyo/286.
 - ii. He had also sought for costs of the suit,
 - iii. Any other the receipt (sic) that the honorable court would deem fit to grant.



24. Subsequent to filing of the suit, the defendants filed their respective responses alongside which the 2nd defendant filed his notice of preliminary objection to the effect that this matter was *res judicata* a decision made in the Disputes Tribunal No 8 of 1984 which decision had been adopted by the court in Kericho Magistrate's Court Miscellaneous Application No 24 of 1984.
25. That the issue(s) in dispute in the previous litigation were between the same parties as those in the current suit, which issues were directly or substantially in issue with the current suit and had been conclusively determined by a court of competent jurisdiction. That what was before court now was a fresh suit that raised the same or similar issues that have already been litigated and determined.
26. Pursuant to the service of the notice of preliminary objection upon the plaintiff, he chose not to file a response to the same but instead filed his submissions challenging the preliminary objection. The Supreme Court of Kenya in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR held as follows:

A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent on August 17, 2018 are of no effect.
27. That said and done, I find that the plaintiff's written submissions of October 14, 2022 are of no effect without a replying affidavit.
28. I find the matters for determination as being;
 - i. Whether the present suit is *res judicata*.
 - ii. Whether the preliminary objection raised is sustainable.
29. On the first issue, the court finds that the doctrine of *res judicata* is important in adjudication of cases 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.
30. 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.
31. The test in determining whether a matter is *res judicata* as stated was summarized in *Bernard Mugo Ndegwa vs James Nderitu Gitbae 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.
32. I shall endeavor to tackle the issues one at a time to determine whether the same passed the test as herein enumerated in the Bernard Mugo, case (supra.)
 33. Looking at issues raised in the present suit as well as the finding and award in Land Disputes Tribunal that was allegedly “adopted as the judgment” in the Kericho Magistrate’s Court Miscellaneous Application No 24 of 1984, this court finds as follows;
 34. The matter held on April 4, 1984 before the Kapkatet Land dispute involved *Samwel Cheruiyot Korir and Reuben Kipkorir Koech as the Plaintiffs vs Elijah Ngulolu A Tonui* as the defendant wherein the suit property in dispute was land parcel No Kericho/Kipwostuiyo/286. Both the plaintiffs had claimed for the transfer of four acres and three acres respectively, to them having bought the said parcels of land from the defendant therein in 1977 wherein they taken possession, but the defendant had refused to effect the transfer to them.
 35. The decision was made by the elders for the defendant herein to execute the transfer of the said parcels of land to the two complainants (plaintiffs) with immediate effect.
 36. After this decision was made, the court has not been provided with any documentary evidence that the Elders’ award was adopted as judgment of the court by the subordinate court in Kericho Magistrate’s Court Miscellaneous Application No 24 of 1984.
 37. Indeed I have also considered the title deed annexed to the plaintiff’s pleadings and I note that the same is in reference to land parcel No Kericho/Kipwostuiyo/286 measuring 2.83 ha which is an equivalent of 6.993 acres. I have also noted that the said title deed was issued to the plaintiff on the June 5, 2020.
 38. The question then arises as to whether the decision by the elders in the tribunal was ever adopted? Why was it that after the period from 1984, the said suit land was registered to the plaintiff in 2020 which was about thirty six (36) years later? Was the suit land ever transferred to the plaintiffs in the tribunal proceedings and why didn’t they ever acquire titles 36 years down the line.
 39. The all-important case decided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* (1969) EA 696 was clear as to what comprised a preliminary objection in that the court had held 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.”



40. It is evident that a preliminary objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd. vs Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

41. In the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC 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.”

42. I have pondered over the issue as to whether the decision in the Land Disputes Tribunal was decided in finality or not and I find with due respect, that there need to be further investigation to be carried out which then in my humble opinion, I find that the preliminary objection herein is argumentative in nature and needs to be canvassed further in a hearing.

43. The upshot thereof is that the preliminary objection raised on January 5, 2021 is unsustainable herein having failed the test as is stipulated in the above captioned authorities and the same is dismissed with costs to the plaintiff at a lower scale since the same was undefended.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 2ND DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

