REPBULIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

PETITION NO. 2 OF 2020

IN THE MATTER OF ARTICLES 1, 2, 10, 21, 40, 60, 64, AND 259 OF THE CONSTITUTION OF KENYA AS READ WITH THE LAND ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER BETWEEN

MUKESH KUMAR KANTILAL PATEL.....APPLICANT/PETITIONER

VERSUS

CHARLES LANGAT.....1ST RESPONDENT

SIMON MUTESHI SHIGALI.....2ND RESPONDENT

KCB BANK LIMITED.....3RD RESPONDENT

COUNTY LAND REGISTRAR BOMET COUNTY.....4TH RESPONDENT

CHIEF LAND REGISTRAR.....5TH RESPONDENT

RULING

1. In the their Petition dated and filed the 20th January 2020, the Petitioner herein sought for the following reliefs;

    i. **spent**

    ii. **spent**

    iii. **spent**

    iv. That interim conservatory orders do issue restraining the Respondents from alienating, selling, cancelling or in any other manner howsoever interfering with the Applicant/Petitioner's rights and title to suit property herein designated as Sotik Town/667 measuring 0.2627 hectares pending the hearing and determination of the Petition.

    v. That interim conservatory orders do issue restraining the Respondents from evicting the Petitioner/Applicant from the suit premises herein designated as Sotik Town/667 measuring 0.2627 hectares, or in any other manner howsoever interfering with his quiet, peaceful and lawful use and occupation of the suit land herein pending the hearing and determination of the Petition.

    vi. The cost of this application be borne by the Respondents.

    vii. Any other remedy that the Court deems fit and just to grant under the circumstance.

2. The said Application was supported by the grounds therein as well as a supporting affidavit by the Petitioner herein sworn on the 20th January 2020.

3. In response and objection to the application, the 1st Respondents herein filed a Notice of Preliminary Objection dated the 24th January

2020 in which they sought to have the Petition struck out for reasons that first, the Court had become functus officio the matter the same having been heard and determined on its merit and secondly, that the Petition was crafted as a Review or Appeal on the Court's appreciation of the law to which the court lacked jurisdiction.

4. The Court gave directions that the Preliminary Objection dated 24th January 2020 be canvassed in the first instance through written submission to which directions only the 1st, and 3rd Respondents complied. There was neither a response nor written submissions from either the Applicant/Petitioner, the 2nd, 4th and 5th Respondents to the preliminary objection dated the 24th January 2020 raised by the 1st Respondent.

1st Respondents' Submission.

5. The 1st Respondent submitted that via a Plaint dated the 5th August 2014 filed in Kericho ELC No 37 of 2014 in a matter between himself and the Petitioner herein and in respect to land parcel formerly known as L.R No. 7288/94 which was subsequently registered as lease number Sotik Township/667, he had sought for the following orders;

a) An order of vacant possession

b) mesne profits

c) unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month.

6. That the Court had delivered its judgment on the 6th July 2018 as follows;

'a) That the Certificate of Lease in respect of land parcel No. Sotik Township/667 issued Charles Kipkurui Langat on 20th June 2014 be cancelled forthwith.

b) That the title issued to Mukesh Kumar Kanthilal Patel is hereby declared as valid.

c) That the register in respect of the said title be rectified and restored to the name of Mukesh Kumar Kanthilal Patel.

d) That this judgment be served upon the Land Registrar, Bomet for purposes of ensuring the rectification of the register by cancelling the title to the suit property issued to Charles Langat and restore the name of Mukesh Kumar Kanthilal Patel.

e) As the defendant categorically stated that he was not interested in costs, I make no order as to costs.'

7. The Plaintiff being dissatisfied with the decision, filed his Appeal before the Court of Appeal in Civil Appeal No 105 of 2018. The Court of Appeal had subsequently rendered its judgment on the **3rd October, 2019 as follows:**

'On our own evaluation of the evidence in totality, we have no difficulty holding that the learned judge erred in her evaluation of the evidence presented before her, misdirected herself and made erroneous findings and conclusions. In the result the appeal succeeds. The judgment of the High Court is set aside in its entirety and substituted with an order allowing the suit as prayed in the plaint. The appellant shall have the costs of the appeal.'

8. That following the Court of Appeal pronouncement, the Petitioner had filed an application to the Supreme Court of Kenya seeking leave to appeal the said decision, which application was pending. That the matter before court was therefore Res Judicata and was filed in bad faith, was an abuse of the court process and should not be entertained.

9. The 1st Respondent framed their issues for determination as follows:

i. Whether the Petition is Res judicata

ii. Whether this court is functus officio

iii. Whether this honorable court has jurisdiction to determine this dispute

iv. Who should bear the cost of the suit

10. On the first issue of determination, the Respondent relied on the Black's Law dictionary and the provisions of Section 7 of the Civil Procedure Act to define res judicata and proceeded to submit that the present Petition was Res judicata.

11. That the principles under the said provision of the law were applicable to the subsequent proceedings which had been adjudicated by a court of competent and concurrent jurisdiction and had conclusively determined the rights over a matter between the same parties or parties under whom they claimed in regard to the same subject matter in controversy. Reliance was placed on the decided case in the **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**

12. That parties and the subject suit in the present Petition were the same as the parties and subject suit in Kericho ELC No 37 of 2014 and in the Court of Appeal No. 105 of 2018 save that the Petitioner had now added to the Petition, parties who had testified in Kericho ELC No 37 of 2014.

13. Respondent relied on the case of **E.T vs Attorney General & Another [2012] eKLR** to submit that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action, referred to as cosmetic changes, in a subsequent suit.

14. That through the doctrine of Res judicata, litigation had to come to an end and the Respondent had to be protected from a multiplicity of proceedings involving determination of the same issue. That litigation could not be done in installments and parties had to bring the entire case for determination. Reference was made to the decided case of **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR**.

15. On the second issue as to whether the court was functus officio, the 1st Respondent relied on the Court of Appeal decision in the case of **Chacha Mwita Mosenda vs Baya Tsuma Baya & 2 Others [2017] eKLR** to submit that by virtue of the orders of the Court of Appeal in No. 105 of 2018, this court was now functus officio. That further, pursuant to the holding in the case of **Re Estate of Kinuthia Mahuti (deceased) [2018] eKLR** this court was therefore prevented from reopening of this matter to which it had rendered the final decision.

16. The 1st Respondent further submitted that this court had no jurisdiction to determine the Petition herein as the proper forum for the Petitioner was to ventilate his case as an appeal to the Supreme Court by virtue of the provisions of Article 163(4) of the Constitution and therefore by virtue of the numerous decided cases on jurisdiction for example **Owners of the Motor Vessel Lillian 'S' vs. Caltex Oil (Kenya) Limited [1989] KLR 1,** the court ought to down its tools in respect of this matter.

17. The 1st Respondent concluded that the present Petition was an abuse of the court process and ought to be struck out as was held in the case of **Mbeyu wa Ngombe & Another vs Patani Virpal & 2 Others [2015] eKLR.**

3rd Respondent's submission

18. The 3rd Respondent's submission to the Preliminary objection raised by the 1st Respondent after giving a background history of the matter in question which was akin to the 1st Respondent's background, and while relying on issues for determination similar to those by the 1st Respondents and in agreement with the 1st Respondent was that;

19. The present matter was res judicata as it was between the same parties over the same subject matter being Sotik Town /667 where the issue for determination was the ownership of the said parcel of land and for which matter had previously been decided by a court of competent jurisdiction in Kericho ELC No. 37 of 2014. That the court had now become functus officio by virtue of the doctrine of Res judicata. Reference was made to the decided case in **Nicholas Njeru vs Attorney General & 8 Others [2013] eKLR.**

20. That although the Petitioner had added parties to the present Petition, the doctrine of Res judicata was clear to the effect that parties could not evade it by merely adding other parties or course of action and that litigation had to come to an end.

21. That the Petitioner had presented this suit after the Court of Appeal had set aside the decision of the trial court which had been in his favour. The proceedings had therefore been concluded and this court cannot be called to visit its decision which would be tantamount to asking the court to sit on appeal or review its decision. That the proper channels open to the Petitioner would have been to ventilate his concerns to the Supreme Court as this court having been declared functus officio lacked jurisdiction to entertain the matter any further. Reliance was placed on the Supreme Court case in **Samwel Kamau Macharia vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR**.

22. Indeed the 3rd Respondent's submission was in support of the 1st Respondent's submission to the effect that this matter had been finalized and therefore this court had no jurisdiction over it and therefore the Petitioner's Petition ought to be dismissed.

23. Finally, that since costs followed the event and that this was at the discretion of the court to award the same to the successful party for the amounts they expended on the case as compensation for the trouble taken in defending the suit, the 3rd Respondent sought that this discretion be in their favour.

Determination.

24. Upon consideration of the Petitioners Petition and the Preliminary Objection raised I am obliged to revisit 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** A Preliminary Objection per Law J.A. 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."*

In the same case Sir Charles Newbold, P. stated:

> *'….a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the*

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.'

25. From the submissions and pleadings filed by the 1st and 3rd Respondents in response to the Petitioner's Application, it is clear that the Respondents herein are challenging the court's jurisdiction over the Petitioner's Petition dated the 20th January 2020 to the extent that the same is Res judicata by virtue of the proceedings in the Kericho ELC No. 37 of 2014 and the Court of Appeal in **Civil Appeal No. 105 of 2018.**

26. 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"

27. 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.

28. 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:

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

i. The parties in the suit are the same;

ii. Sameness of the title/claim;

iii. Concurrence of jurisdiction; and

iv. Finality of the previous decision.

30. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other

31. The court of Appeal in the case of **James Njuguna Chui vs John Njogu Kimani [2017] eKLR** held that

The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.

32. I have carefully considered the content of the Petitioner's Application as well as the supporting affidavit. I have also considered the 1st and 3rd Respondents' replying affidavits and the submissions of Counsel as well as the relevant provisions of the law and Authorities herein cited.

33. It is not in dispute that the 1st Respondent Charles Langat, while claiming ownership to parcel of land formerly known as L.R No. 7288/94 and subsequently registered as No. Sotik Township/667 measuring approximately 0.2627 hectares within Bomet County for reason that he had bought the same for the sum of Kshs. 1,750,000 in the year 2011 from Kenya Commercial Bank (KCB) the 3rd Respondent herein, filed suit against the Applicant/Petitioner Mukesh Kumar Kantilal Patel via a Plaint dated 5th August 2014 in Kericho ELC No 37 of 2014 seeking for the following orders;

a) An order of vacant possession

b) mesne profits

c) unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month.

34. It is also not in dispute that the matter was heard and determined wherein the court delivered its verdict on the **6th July 2018 and ordered the** Land Registrar, Bomet to rectify the register by cancelling the title to the suit property issued to 1st Respondent herein and restore the name of the Petitioner. **See Charles Langat v Mukesh Kumar Kanthilal Patel [2018] eKLR**

35. It is further not in dispute that the 1st Respondent being dissatisfied with the court's decision, filed his Appeal to the Court of Appeal sitting at **Kisumu via Civil Appeal No. 105 of 2018 wherein vide its verdict of 3rd October, 2019, the Court of Appeal set aside the ju**dgment of the Environment and Land Court in its entirety and substituted it with an order allowing the suit as prayed in the plaint. See **Charles Langat v Mukesh Kumar Kantilal Patel [2019] eKLR.** The Petitioner was dissatisfied with the holding by the Court of Appeal and preferred an Application to the Supreme Court seeking leave to appeal the said decision, which application was pending.

36. The Applicant/Petitioner then, vide his Petition dated the 20th January 2020 sought the following orders:

> i. A declaration do issue that the suit property herein designated as Sotik Town /667 measuring 0.2627 hectares is the property of the Petitioner and the Certificate of lease issued to him on the 1st August 2009 is a valid title to the suit property.
>
> ii. A declaration do issue that the Certificate of lease held by the 1st Respondent or such other person in respect of the suit property herein designated as Sotik Town /667 measuring 0.2627 hectares is invalid and is therefore revoked accordingly.
>
> iii. A conservatory order do issue restraining the Respondents from alienating, selling, cancelling or in any other manner howsoever interfering with the Applicant/Petitioner's rights and title to suit property herein designated as Sotik Town/667 measuring 0.2627 hectares.
>
> iv. A conservatory order do issue restraining the Respondents from evicting the Petitioner/Applicant from the suit premises herein designated as Sotik Town/667 measuring 0.2627 hectares, or in any other manner howsoever interfering with his quiet, peaceful and lawful use and occupation of the suit land herein.

37. The Applicant thus adopted prayers (iii) and (iv) above to seek for interim injunctive orders against the Respondents in his application pursuant to which the 1st Respondent herein raised the issue, of the Petition being res judicata Kericho ELC No 37 of 2014 and Court of Appeal Civil Appeal No **105 of 2018**

38. In line with the principles of the doctrine of Res judicata, this court is invited to determine whether;

> i. The parties in the suit are the same;
>
> ii. Sameness of the title/claim;
>
> iii. Concurrence of jurisdiction; and
>
> iv. Finality of the previous decision.

39. I am reminded that an application on the basis of a matter being Res judicata is one on a point of law that must not be blurred with factual details liable to be contested and/or proved through the process of evidence. To this effect, on the first issue as to whether parties in the current suit were the same as parties in the previous suit, I find the answer in the affirmative save for the fact that in the present suit, the Petitioner has enjoined 2nd -5th Respondents who were actually witnesses in previous suit being Kericho ELC 37 of 2014.

40. As to whether there was sameness in the title/claim, I find the answer again in the affirmative wherein in both matters there was claim of ownership to land parcel No. Sotik Town/667 measuring 0.2627 hectares. Clearly and without going into the merits of the case, I find that there is sameness in the subject matter.

41. On the third issue as to whether there was concurrence of jurisdiction, I find that the orders issued in Kericho ELC No 37 of 2014 were issued by the Environment and Land Court which had jurisdiction to grant or refuse to grant the relief claimed and whose determination was appealed against to the court of Appeal which rendered its verdict.

42. On the last issue as to whether the orders issued by the previous court were of nature of finality, the answer is yet again affirmative in that the Court of Appeal sitting in Kisumu granted the 1st Respondent herein the orders sought in his plaint thus setting aside the judgment of the High Court in its entirety. In essence thereof there was transfer of the ownership of the suit land herein being Sotik Town/667 measuring 0.2627 hectares to the 1st Respondent wherein the Applicant/Petitioner was to give vacant possession of the same as well as to pay mesne profits and unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month, in fulfilment of the Court of Appeal judgment. This order, having become a Judgment of a court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by the Supreme Court in an appropriate proceedings.

43. In the Court of Appeal case of **Siri Ram Kaura – vs – M.J.E. Morgan**, **CA 71/1960 (1961) EA 462** the then EACA stated that:-

> *"The general principle is that a party cannot in a subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.*

The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the Respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

44. Further in the case of ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** *the Court of Appeal* pronounced itself as follows*:*

'The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.'

45. Addressing my mind to the orders sought in the present Application, I find that regardless of the terms or words employed thereunder, the same touched on the ownership and/or proprietorship of land parcel No. Sotik Town/667 measuring 0.2627 hectares which in my view, had been conclusively determined by the judgment in Kericho ELC No 37 of 2014 dated **6th July 2018** and the judgment of the Court of Appeal dated **3rd October, 2019.** The injunctive orders sought were tantamount to the Applicant/Petitioner seeking both a review and an appeal against the above captioned orders which jurisdiction this court lacks.

46. It follows therefore, that the Preliminary Objection raised by the 1st Respondent was based on pure points of law, that is, jurisdiction and the doctrine of *res-judicata*, and did not require additional evidence to substantiate the objection. The upshot of my consideration is that I find in favour of the Applicant's Preliminary Objection dated the 24th January 2020 and hold that the present Petition is Res judicata Kericho ELC No 37 of 2014 and Civil Appeal No 105 of 2018 and proceed to dismiss both the Application and Petition dated the 20th January 2020 with costs to the 1st and 3rd Respondents.

Dated and delivered via Microsoft Teams this 22nd day of April 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE