



Kipkore v Kipkosgei & another (Environment and Land Appeal E004 of 2022) [2023] KEELC 17410 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

L WAITHAKA, J

MAY 4, 2023

BETWEEN

WILLIAM KIPKEU KIPKORE APPELLANT

AND

RUTO JOHN KIPKOSGEI 1ST RESPONDENT

JOHN KIBOR KIBIWOT 2ND RESPONDENT

(Being an appeal against the ruling of Hon. Caroline R. Ateya SRM in Iten SPMCC ELC No. 055 of 2022 delivered on 16th May, 2022)

JUDGMENT

Introduction

1. By a ruling delivered on May 16, 2022 in Iten SPMC's ELC Case No. E055 of 2021, Caroline T. Ateya SRM dismissed a notice of preliminary objection filed by the appellant herein, dated December 24, 2022.
2. Through the aforementioned notice of preliminary objection, the defendant (now appellant) inter alia contended that the suit by the plaintiffs/respondents was statute barred. In particular, the defendant/appellant contended that the suit offended section 7 of the *Civil Procedure Act*. The notice of preliminary objection was also premised on the grounds that there was a suit pending before court to wit, Eldoret High Court Miscellaneous Civil Appeal No.295 of 2005 (judicial review) over the original parcel of land, parcel number 1422 Sangurur Adjudication Section Marakwet District; that the suit properties namely Elgeyo Marakwet/Sangurur/2512 and Elgeyo Marakwet/Sangurur/2513 among other parcels of land are subdivisions of the original parcel.
3. It is their contention that there is an application pending in court for leave to appeal against the decision of Ibrahim J. which resulted in the suit properties being registered in the name of the plaintiffs/



respondents and that the intended appeal may result in the judgment pursuant to which the plaintiffs/respondents were registered as the proprietors of the suit property being set aside and the titles held by the plaintiff/respondents being cancelled. Further, that the plaintiffs/respondents are parties to the judicial review proceedings before the court.

4. Terming the suit and application for interlocutory reliefs filed before the lower court premature, devoid of merit and premised on misapprehension of law, the defendant/appellant contended that the lower court lacked jurisdiction to hear and determine the suit. He urged the Learned Trial Magistrate (TM) to strike it out with costs as it was fatally defective, incompetent and bad in law.
5. In dismissing the notice of preliminary objection, the TM stated:-

“The defendant contends that the suit filed by the plaintiff is statute barred by virtue of section 7 of the *Civil Procedure Act* in that there is a pending suit being Eldoret High Court Miscellaneous Civil Appeal Number 295 of 2005-Judicial Review over the same subject matter being the mother title land parcel number 1422 Sangurur Adjudication Section Marakwet District which resulted into parcels number Elgeyo Marakwet/Sangurur/2511 to 2519 pending for leave to file an appeal out of time.....

The subject matter in the present suit is Land Registration No. Elgeyo Marakwet/Sangurur/2512 and 2513. The claim by the plaintiff is for an order of eviction and a permanent injunction to restrain the defendant from interfering with the plaintiff's ownership, possession, occupation and use of the suit property.....

The application in Miscellaneous Civil Application No.295 of 2005 is an application for judicial review. The interested party is Daniel K. Kibore and the ex parte applicant is one William Kimutai Kipkoech (suing as a personal representative of the estate of Kipkore Koilege). The subject matter is LR. No.1422 Sangurur Adjudication Section Marakwet District.

Whether or not the said land parcel No. 1422 Sangurur Adjudication Section Marakwet District is the parent parcel for the 2 parcels Elgeyo Marakwet/2512 and 2513 which are the subject matter of this suit would require evidence of facts not law. Further, an examination on whether the parties in the matter before the High Court and those in the matter before this court is also a matter of fact and not law. This would take the issue out of the purview of a preliminary objection as envisaged in the case of Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors.

I find the preliminary objection as raised at this point lacks merits and must fail. The same is dismissed with costs.”

6. Aggrieved by that decision, the defendant/appellant appealed to this court on 21 grounds which can be reduced to one broad ground to wit the TM erred by dismissing his preliminary objection.
7. Pursuant to directions given on November 21, 2022, the application was disposed of by way of written submissions.

The Defendant/Appellant's Submissions

8. In his submissions filed on January 26, 2023, the defendant/appellant has identified two issues for the court's determination. These are:-



- i. Whether the threshold for filing a preliminary objection was met in the notice of preliminary objection he filed?
 - ii. Whether the suit filed in the lower court, Iten ELC No. E055 of 2021 is *res judicata* Eldoret High Court Miscellaneous Civil Appeal No.295 of 2005, Judicial Review.
9. On whether the threshold for filing a preliminary objection was met, it is submitted that the issues raised by the defendant/appellant in the preliminary objection were pure points of law which did not require facts to ascertain. Maintaining that his preliminary objection is premised on a pure point of law, the defendant/appellant explains that his preliminary objection is premised on the doctrine of *res judicata* and contends that the facts pleaded demonstrate that it should dispose the suit.
 10. The issue raised in Iten ELC case No. E055 of 2021 is said to be the same issue substantially and directly in issue in Eldoret High Court Miscellaneous Civil Appeal No.295 of 2005; the orders sought in Iten E055 of 2021 are said to be the same as the orders sought in the suit pending before the High Court, Eldoret High Court Misc. Civil Appeal No.295 of 2005.
 11. It is further contended that from the preliminary objection, this court should come to the conclusion that the plaintiffs/respondents' suit is either *res judicata* or *res sub judice*.
 12. On whether the suit filed in the lower court, Iten ELC No. E055 of 2021, is *res judicata* Eldoret High Court Miscellaneous Civil Appeal No. 295 of 2005, judicial review, it is pointed out that the subject matter of the suit filed in E055 of 2021 was heard and determined in Eldoret High Court Miscellaneous Civil Appeal No. 295 of 2005, judicial review.

The Plaintiffs'/Respondents' Submissions

13. In their submissions filed on March 1, 2023, the plaintiffs/respondents have given an overview of their case and the defendant/applicant's notice of preliminary objection and identified the following as the issues arising from the appeal herein:-
 - i. Whether the notice of preliminary objection met the required threshold;
 - ii. Whether the suit offends the rule on *res sub judice*; and
 - iii. Who should bear the costs of the appeal.
14. On whether the preliminary objection meets the requisite threshold, it is acknowledged that a challenge to a suit on the ground that it is *res judicata* constitutes a matter of law but submitted that in the circumstances upon which the preliminary objection hereto was taken required evidence to prove existence of a nexus between the parties in the suit hereto and the previous suit.
15. It is stated that parties to this suit were not parties in the previous suit and that the facts are contested. For those reasons, it is submitted that the preliminary objection did not meet the necessary threshold. Reliance is placed on the cases of *[Cheraik Management Ltd v National Social Security Services Fund Board another](#)* cited with approval in the case of *[Pius Wanjala v Cleopa Mailu & 4 others](#)* (2016)e KLR and the case of *[Oraro Mbaja](#)* (2005)e KLR where the principles that undergird a preliminary objection are discussed.
16. On whether the instant suit offends the rule on *res judicata*, reference is made to the definition of *res judicata* in *[Barron's Dictionary of legal terms](#)*; the law on *res judicata* as codified in section 7 of the *[Civil Procedure Act](#)* and as espoused in the case of *[Independent Electoral and boundaries Commission v Maina Kiai & 5 others](#)*, Civil Appeal No.105 of 2017 (2017)e KLR and submitted that the issues raised in the suit before the lower court had never been adjudicated upon in any previous suit.



17. It is pointed out that the decision in the High Court touched on the decision of the Minister for Lands, Housing and Land Adjudication and submitted that there is no nexus between the decision of the minister and the issues raised in the suit before the lower court.
18. It is further submitted that no material was placed before the lower court and this court from which the court can determine that the issues raised in the suit before the lower court were heard and determined in previous proceedings.
19. On costs, it is submitted that the defendant/appellant unjustifiably dragged the plaintiffs/respondents to this court thereby causing them to hire advocates to defend them. In keeping with the general rule as to costs, that costs follow the event, this court is urged to dismiss the appeal with costs to the plaintiffs/respondents.

Analysis and determination

20. Upon review of the evidence adduced in this case, I find as a fact that the legal issues raised in the suit filed before the lower court are different from those in 295 of 2005. The suits are also different in character; the one filed in the lower court is civil while the one filed in the high court is strictly speaking not a civil suit per se. The principles of law involved are different. In that regard, see the case of *Cortec Mining Co Ltd v Cabinet Secretary, Attorney General & 8 others* (2015) e KLR where it was held:-

“There is considerable merit in the argument that judicial review proceedings are sui generis; that they are not criminal or civil in nature and that they are not intended to deal with private rights...”

Also see the case of *Republic v MRK & 3 others* (2020)e KLR where it was observed:-

“Judicial review is not concerned with reviewing the merits of a decision which is the subject of an application but rather the review of the process by which the decision was arrived at. In exercising its jurisdiction, the court does not function as an appellate court and cannot substitute the impugned decision of the statutory body with its own....”

21. The orders and remedies sought in 295 of 2005 and Iten SPMC ELC E055 of 2021 are different. The proceedings before the High Court would only help the defendant/appellant by way of evidence, of the outcome of those proceedings. For instance, if desirous of showing that the title on which the plaintiffs/respondents have hinged their claim were quashed or none existent and not in support of their contention that the suit filed before the lower court is res judicata. This is so because, no orders of eviction or permanent injunction were issued in the suit before the High Court.
22. Concerning the plea/submission that the suit was either res judicata or res subjudice, it is noted that the defendant/applicant had only pleaded that the suit is res judicata. That being the case, he cannot be heard to claim that the TM erred by failing to find that the suit was res sub judice.
23. The court was bound to determine the defendant/appellant’s preliminary objection on the basis of the grounds which the defendant/appellant had raised in his preliminary objection. In that regard see the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* (2018)e KLR where it was held:-

“It is by now well settled by precedent that parties are bound by pleadings and evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be



at variance with the pleadings must be disregarded. That settled position was re-affirmed in the case of *Independent Electoral Commission & another v Stephen Mutinda Mule others* which cited with Approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

“It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....in fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the party to meet the new situation”

24. The issues of parties being bound by their pleadings applies to several other grounds raised by the defendant/appellant in his Memorandum of Appeal and submissions yet they did not form part of the grounds taken up in the preliminary objection. These include, the contention that the TM erred by failing to evaluate, consider, appreciate and determine the decision of Kibunja J. in Eldoret ELC Case No.58 of 2018.
25. In view of the foregoing, I find the instant appeal to be misadvised and lacking in merits. Consequently, I dismiss it with costs to the plaintiffs/respondents.
26. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 4TH DAY OF MAY, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Isiji for the appellant

Ms. Chelgoi holding brief for Mr. Kenei for the respondent

Court Asst.: Christine

