



**Kipleting v Sang (Environment & Land Case E039 of 2022)
[2023] KEELC 17241 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E039 OF 2022**

MN MWANYALE, J

MAY 4, 2023

BETWEEN

STANLEY KIPLETING PLAINTIFF

AND

REMY KIPKOECH ARAP SANG DEFENDANT

RULING

1. This ruling relates to two applications. The first application is Notice of Motion dated January 16, 2023 brought by the Plaintiff herein, Stanley Kipleting. He seeks the following orders;-
 - a. Spent
 - b. Pending the hearing and determination of this suit, the Honourable Court be pleased to grant an order of maintenance of status quo to entail the following:
 - i. That there shall be no further constructions or development at the disputed parcel.
 - ii. Constructions which are ongoing to forthwith cease.
 - iii. There shall be no charging or transferring of the land.
 - c. Costs of this application be borne by the Respondent.
 - d. Such further and/or other orders be made as the Court may deem fit and expedient.
2. The second application is dated February 3, 2023 brought by the Defendant herein Remy Kipkoech Arap Sang who seeks the following orders;
 - i. That this Honorable Court be pleased to strike out the Plaintiffs/Respondent Originating Summons dated December 6, 2022 and Application dated January 16, 2023 as they offend Section 7 of the [Civil Procedure Act, 2010](#).



- ii. That the Plaintiff/Respondent to bear costs of this Application.
3. On the February 6, 2023, I gave directions that parties to file written submissions in respect of both applications.
4. Based on the prayers sought in both applications I shall proceed to determine the Defendants application dated February 3, 2003 first since its outcome has a direct effect to the Plaintiff's application and the suit in general.
5. The application dated February 3, 2023 by the Defendant is premised on the grounds that this suit is *re judicata* as it is similar to Kapsabet ELC No 85 of 2021 *Hillary Kiplagat Kemei –vs- Remmy Kipkoech Sang*. Further that the matter in issue in this suit is similar to the previous suit aforementioned which was instituted by the Plaintiff's brother. That the parties herein are litigating under the same title as well. The Defendant avers that litigation must come to an end therefore, his application be allowed. The said application is supported by affidavit sworn on February 3, 2023 by Remmy Kipkoech Sang, the Defendant herein. He reiterates the contents in the grounds found on the face of the application.
6. The application is opposed vide Replying Affidavit sworn by Stanley Kipleting. He contends that he acquired title to the suit property by way of adverse possession. That the Applicant has never taken possession of the suit property for over 12 years. The Respondent confirms that indeed the Plaintiff in the previous suit is his brother but had filed suit on his own behalf. The Respondent was not a party in the previous suit and has brought the present suit on his own capacity. He urges this Court to dismiss the instant application so as to allow for expedient disposal of the suit.
7. As stated earlier in this ruling, parties were invited to file and serve written submissions.
8. Upon perusal of the Court's record, I have only come across the Defendant/Applicants submissions in respect to the application dated February 3, 2023. The Respondent on their part only submitted on their application dated January 16, 2023 and not on the Defendant's application dated February 3, 2023.
9. Nevertheless, I shall proceed to determine the Defendant's application since the timelines within which to comply have since lapsed.
10. In a nutshell, the Defendant/Applicant submits that the present suit is *res judicata* as a similar suit previously lodged by the Plaintiff/Respondent's brother was already heard and determined by this Court. As a result this suit offends Section 7 of the *Civil Procedure Act* and the Court must down its tools. Counsel for the Applicant relied on the case of *Independent Electoral and Boundaries Commission –vs- Maina Kiai and 5 others* (2017) eKLR and the case in *Omondi –vs- National Bank of Kenya Limited and others* (2001). 1 EA 177 page 183 to buttress their position.
11. The only issue for determination in respect of this application is whether this suit is *res judicata*.
12. Section 7 of the *Civil Procedure Act*, which is primarily relied upon by the Applicant, provides as follows;

“No Court shall try suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between 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 has been subsequently raised and has been heard and finally decided by such Court.”



13. Under this Section of the law are explanations with respect to the application of the doctrine of res judicata. I shall delve into the applicable explanation later on in this ruling.
14. This doctrine essentially ousts the jurisdiction of a Court to try any suit or issue which had been finally determined by a Court of competent jurisdiction in a former suit involving same parties or parties litigating under the same title.
15. A party, such as the Defendant herein, who invokes the doctrine of res-judicata must satisfy conjunctively the following elements as spelt out by the Supreme Court in the case of *Independent Electoral and Boundaries Commission –vs- Maina Kiai and 5 Others* (2017) eKLR;
- “ a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That the former suit was between the same parties or parties under whom they or any of them claim.
 - c) These parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
16. Applying the foregoing to the present case, in the Court’s view the elements of *res-judicata* that are not disputed are firstly, that the issue in the former suit was directly and substantially similar to the issue in the present suit. Both Plaintiffs claim for adverse possession against the Defendant’s property. Secondly the Court that formerly heard the dispute and determined the issue was this Honourable Court hence competent to try this suit.
17. This brings me to quote explanation 6 under Section 7 of the *Civil Procedure Act* which provides that;
- “(6) where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such right shall, for the purposes of this Section, be deemed to claim under the persons so litigating.”
18. This explanation principally provides that the parties in the former suit litigated over their rights on the suit parcel as well as the rights of all persons interested including their heirs and representatives.
19. In order to discern whether this element of similar parties has been met, a perusal of the pleadings herein and judgment in the former suit is vital. This way the Court shall establish whether this suit is indeed res judicata or a party just drafted pleadings in a manner to evade this doctrine. I am persuaded by the holding in the case of *ET vs Attorney General and Another* (2012) eKLR where the Honourable Judge stated under paragraph 57 that;
- “The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before Court..... in the case of *Omondi –vs – National Bank of Kenya Limited and Others* (2001) EA 177 the Court quoted Kuloba J in the case of *Njangu –vs- Wambugu and another* Nairobi HCCC 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 on every occasion he comes to Court, then I do not see the use of the doctrine of *res – judicata*.”

20. Similarly Munyao J in the case of *Kungu Ngethe –vs- George Kibatia* (2018) eKLR held;
- “I have looked at the plaint and the judgment in the case Nairobi HCC No 5716 of 1989. The Plaintiff herein was the Plaintiff in the previous suit and it is common found that the Defendant was the father of the Defendant in this case.”
21. It was argued by Counsel for the Defendant that the parties are different. That may be the case, but it cannot be disputed that the Defendant’s position is similar to that of a person litigating under the same title. In this instance, the position of the Defendant is precisely similar to the position that his father was in.”
22. In the present suit, the Plaintiff herein is the brother to the Plaintiff in Kapsabet ELC No 85 of 2021 Hillary Kiplgat Kemei –vs- Remmy Sang. Going by explanation 6 of Section 7 of *Civil Procedure Act*, the Plaintiff in the former suit was litigating a private right for himself and for all persons interested in that right for adverse possession against Defendant’s property, which was the suit property in the former suit as well as the present suit. Therefore this Court deems that the Plaintiff in Kapsabet ELC No 85 of 2021 Hillary Kiplgat Kemei was litigating on his own behalf and that of all person interest in the right including the Plaintiff herein one Stanley Kipleting. This Court made a determination on the issue of adverse possession against the suit property and found the same to be rightly owned by the Defendant in the former suit who is also the Defendant in the present suit. Hence the issue of adverse possession by the Plaintiff in the former suit was settled.
23. Having found that all the elements for this doctrine have been conjunctively satisfied by the Defendant Applicant, it is this Court’s holding, which the application dated February 3, 2023 has merit and the same is allowed. Consequently, the application by the Plaintiff dated January 16, 2023 and this suit in general is struck out with costs to the Defendant.
24. It is so ordered.

DELIVERED, DATED AT KAPSABET THIS 4TH DAY OF MAY, 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

Ms. Kesei for the Defendant

Mr. Korir for the Plaintiff

