



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 235 OF 2012**

**TERESA CHEMOIYWO.....PLAINTIFF**

**VERSUS**

**LAWI KIPLAGAT.....1<sup>ST</sup> DEFENDANT**

**JOSEPH RONO.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 27<sup>TH</sup> MAY, 2019 FILED ON 4<sup>TH</sup> FEBRUARY, 2020 BY 1<sup>ST</sup> DEFENDANT]**

1. The 1<sup>st</sup> Defendant vide the above application seeks for the striking out of the Plaintiff's suit with costs on account of being res judicata. The application is based on the three grounds on its face and supported by the affidavit sworn by **Lawi Kigen Kiplagat**, the 1<sup>st</sup> Defendant on the 27<sup>th</sup> May, 2019. It is the 1<sup>st</sup> Defendant's case that the issues herein, were the same ones in **Eldoret Hccc No. 34 of 1984**, which was decided on the 9<sup>th</sup> November, 1984 and decree issued on 4<sup>th</sup> October, 1985 in his favour. That the earlier suit was between the Plaintiff's late husband and the 1<sup>st</sup> Defendant and the Plaintiff's suit is therefore res judicata.

2. That no replying affidavits and or grounds of opposition were filed by the Plaintiff and 2<sup>nd</sup> to 4<sup>th</sup> Defendants. The learned Counsel for the 1<sup>st</sup> Defendant, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the Plaintiff filed their written submissions dated 11<sup>th</sup> June 2020, 19<sup>th</sup> February 2021 and 26<sup>th</sup> February, 2021 respectively.

3. The following are the issues for the Court's determinations;

*(a) Whether the subject matter and parties in this suit and Eldoret Hccc No. 34 of 1984 are the same.*

*(b) Whether this suit is res-judicata by reason of the decision in Eldoret Hccc No. 34 of 1984.*

*(c) Whether the Plaintiff is in contempt of a court order.*

*(d) Who pays the costs?*

4. The Court has carefully considered the grounds on the application, the supporting affidavit, the learned Counsel's written submissions, the superior court's decisions cited and come to the following findings;

(a) That the Plaintiff commenced this suit through the plaint dated the 24<sup>th</sup> February, 2006 and filed on the 27<sup>th</sup> February, 2006. That paragraph 1 of the said Plaint describes the Plaintiff as **"a female adult individual of sound mind and the administrator of the Estate of the late Paul Tinnie Chemoiywo"**. That further, paragraphs 4, 9, 14 to 18 among others, confirms the subject matter of the suit is land parcel **Plateau/Chepkong'ony Block 1 (Songich)/36 and 37**.

(b) That the facts deponed to by the 1<sup>st</sup> Defendant in his supporting affidavit sworn on the 27<sup>th</sup> May, 2019 in support of the Motion

of even date, have not been challenged or rebutted especially on the existence of **Eldoret Hccc No. 34 of 1984** between himself and the Plaintiff's late husband. That it has not been disputed that the subject matter of **Eldoret Hccc No. 34 of 1984** was L. R. No. 10355/2 that is now registered as Plateau/Chepkong'ony Block 1 (Songich)/36 and 37.

(c) That the 1<sup>st</sup> Defendant had in his defence dated 28<sup>th</sup> April, 2006 and filed on 2<sup>nd</sup> May, 2006 at paragraph 6 confirmed the Plaintiff's averments at paragraphs 9 and 10 of her plaint, adding however that his registration with Plateau/Chepkong'ony Block 1 (Songich)/37, measuring 6.40 hectares, was lawfully and properly done. The 1<sup>st</sup> Defendant has annexed a copy of the decree issued in Eldoret Hccc No. 34 of 1984 to the current application. That the decree has not been challenged or rebutted. That the decree arose from the decision of the High Court which was then with jurisdiction to hear and determine land ownership disputes, and hence a court of competent jurisdiction. That the decree among others confirms that the Plaintiff was to transfer 16 acres of land from his Songich Farm L. R. No. 10355/2 to the Defendant. That in case the Plaintiff failed to sign the relevant transfer documents, the Executive Officer of the Court was authorized to execute them on behalf of the Plaintiff. That the said decree has not been challenged through review or appeal and being one issued by a court of concurrent jurisdiction, the issues decided therein cannot be raised before this Court in view of the provisions of **Section 7 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

(d) That the Plaintiff in the current suit being an administratrix of the estate of the Plaintiff in **Eldoret Hccc No. 34 of 1984** cannot sue the 1<sup>st</sup> Defendant over the same suit land as the decision of 9<sup>th</sup> November, 1984 is still subsisting. That the fact that the Plaintiff has added the 2<sup>nd</sup> to 4<sup>th</sup> Defendants in this suit does not make the suit any different from the previous one. That the following decisions cited by learned Counsel are relevant on this issue; **Grace Njeri Kabiru Vs Stephen Wagiita Kiboi & 2 Others [2018] eKLR**, **Kungu Ngethe Vs George Kibatia [2018] eKLR**, **E. T. Vs Attorney General & Another [2012] eKLR**, **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR**, **John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, **Gurbachau Vs Yowani Ekori [1958] E.A. 450**, **Omondi Vs National Bank of Kenya & Others [2001] E. A. 177**, **Joshua Ngatu Vs Jane Mpinda & 3 Others [2019] eKLR**, **Joseph Kimatu Vs Jones Alaska Kimatu & Another [2019] eKLR** and goes to affirm the provisions of **Section 7 of the Civil Procedure Act** and **Section 28 of the Environment and Land Court Act No. 19 of 2011** that bars Courts from entertaining disputes between the same parties and over the same issues previously and finally determined by a Court of competent jurisdiction.

(e) That though the 1<sup>st</sup> Defendant at paragraph 7 and 8 of the supporting affidavit sworn on the 27<sup>th</sup> May, 2019 and his learned Counsel's written submissions sought for the Plaintiff to be punished for contempt, there is no specific prayer in the Notice of Motion seeking for that order. That further, the order the Plaintiff is alleged to have disobeyed has not been annexed to the application, and as it was not an issue for determination in the application, no order will be issued.

(f) That as the 1<sup>st</sup> Defendant has succeeded in his prayer, he is under **Section 27 of Civil Procedure Act** entitled to costs of the application.

5. That flowing from the foregoing, the Court finds merit in the 1<sup>st</sup> Defendant's Notice of Motion dated the 27<sup>th</sup> May, 2019 and filed on 4<sup>th</sup> February, 2020. That the Plaintiff's suit is accordingly struck out with costs to the Defendants for being res-judicata.

Orders accordingly.

**DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 14TH DAY OF APRIL, 2021.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendants: Absent.

Counsel: M/s Chesoo for the Plaintiff.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.