



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 09 OF 2021**

**SEVENTH DAY ADVENTIST (E. A) LIMITED.....PLAINTIFF**

**VERSUS**

**CHILD WELFARE SOCIETY OF KENYA.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION..... 4<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed suit against the Defendants vide a Plaint dated 21<sup>st</sup> March, 2021 seeking the following reliefs;

a) A declaration that the allocation of land parcel, L.R. No. Kisii Municipality/Block 3/649 to the 1<sup>st</sup> Defendant vide a grant issued on 14/11/2018 was irregular, illegal and a nullity *ab initio*.

b) The grant issued to the 1<sup>st</sup> Defendant with respect to land parcel **L.R. No. Kisii Municipality/Block 3/649** be revoked.

c) A permanent injunction be and is hereby issued to restrain the 1<sup>st</sup> Defendant, her agents, assigns, authority derivatives and/or any other person acting under the authority and/or direction of the 1<sup>st</sup> Defendant from evicting the Plaintiff (Millennium Church) from their occupied portion of land parcel LR NO. Municipality/Block 3/649 measuring 0.132 hectares or from howsoever dealing with land parcel L.R. No. Kisii Municipality/Bloc 3/649.

d) A declaration that the Plaintiff (Millennium) has lawful rights over a portion of land measuring 0.132 hectares as allotted vide letter of allotment dated 25/06/2001 which subsumed in land parcel L.R. No. Kisii Municipality/Block 3/649 which merit recognition.

e) Costs of and incidental to the suit.

2. Contemporaneously with the Plaint, the Plaintiff filed a Notice of Motion seeking a temporary injunction against the first Defendant restraining her from evicting the Plaintiff (Millennium Church) from their occupied portion of land parcel LR No. Kisii Municipality/Block 3/649 measuring 0.132 hectares or from howsoever dealing with land parcel L.R. No. Kisii Municipality/Block 3/649 pending the hearing and determination of the suit.

3. In response to the application, the 1<sup>st</sup> Defendant filed a Replying Affidavit sworn by its Executive Director, one Irene Mureithi on 26<sup>th</sup> April, 2021 wherein she deponed that the suit was an abuse of the court process in so far as the claim by Millennium SDA Church, an associate of the Plaintiff had already been heard and determined all the way to the Court of Appeal vide **KISII ELC Case No. 220 OF 2017** and **Civil Appeal No 152 of 2019** and thus the suit was *Res Judicata*.

4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents opposed the application through Grounds of Opposition dated 17<sup>th</sup> May, 2021 raising the following grounds:-

- a) The suit is frivolous, mischievous and an abuse of the court process. The application offends the provisions of order 45 of the Civil Procedure Rules;
- b) The Applicant lacks *locus standi* to institute the suit and the application;
- c) The suit and application are *res-judicata*;
- d) The suit and application were against Article 40 of the constitution of Kenya; and
- e) This Honourable Court lacks jurisdiction to determine this application and the main suit.

5. The 4<sup>th</sup> Respondent opposed the suit and application by filing a Notice of Preliminary Objection based on the grounds that the matter is *res judicata* contrary to section 7 of the Civil Procedure Act since the issues therein had substantially been heard and decided in **Kisii ELC Case No. 220 of 2017** and **Civil Appeal No 152 of 2019**.

6. The 1<sup>st</sup> Defendant filed a Notice of Motion dated 18<sup>th</sup> May, 2021 seeking to have the Plaintiff's suit struck out together with all pleadings inclusive of the Notice of Motion seeking injunctive orders on the grounds that the same was *res judicata* since the issues therein had been heard and determined by both the ELC and the Court of Appeal. The 1<sup>st</sup> Defendant also claimed that the Plaintiff lacked the *locus standi* to file this suit.

7. The application was opposed by the Plaintiff vide a Replying Affidavit sworn on 27<sup>th</sup> July, 2021 by its Executive Secretary one Tom Miyienda.

8. The court directed that for expediency both the Preliminary Objection filed by the 4<sup>th</sup> Defendant and the application filed by the 1<sup>st</sup> Defendant seeking to strike out the suit be heard concurrently. The Court further directed that both be disposed of by way of written submissions and all the parties filed their respective submissions.

#### **ISSUES FOR DETERMINATION**

9. From my analysis of the application by the 1<sup>st</sup> Defendant, the Preliminary Objection by the 4<sup>th</sup> Respondent, the response by the Plaintiff and the written submissions filed by all parties, I deduce that the issues for determination are;

- a) Whether the Plaintiff has locus standi to file this suit
- b) Whether the Suit by the Plaintiff is *res judicata*.

#### **ANALYSIS AND DETERMINATION OF THE ISSUES**

##### **Whether the Plaintiff has *locus standi* to institute this suit.**

10. Learned counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff has no locus to litigate over the suit property as the purported sole allottee of suit property (Millennium SDA Church) had litigated over the same subject matter up to the Court of Appeal on its own account and has now retreated to the background and handed over the baton to the current Plaintiff.

11. Learned counsel argued that Millennium SDA Church having been unable to convince this court and the Court of Appeal that it had been allotted part of the suit property cannot re-package itself and appear in court through its proxy in bid to litigate over the same subject matter.

12. Counsel contended that in the purported allotment letter in respect of the suit property, the Plaintiff does not feature as the head lessee, nor does the letter bear the names of the two as joint allottees. Thus he argues that the Plaintiff has no capacity to institute any claim on behalf of the Millennium SDA Church regarding any rights that could accrue from the purported allotment letter.

13. Learned Counsel for the Plaintiff on his part argued that the Plaintiff filed the suit since Millennium Church was its branch and could not originate the suit by itself.

14. With all due respect to learned counsel for the Plaintiff, the argument that the Plaintiff filed the suit on behalf of Millennium SDA Church for reasons that Millennium SDA Church does not have capacity to file a suit does not hold water at all. This is because the main issue in the suit as demonstrated in the Plaintiff and in all the supporting documents is a claim for ownership of an unsurveyed parcel of land solely registered in the name of Millennium SDA Church.

15. The Plaintiff is well aware of the previous suit filed against its branch through its trustees concerning or relating to the suit property herein. In fact, the Plaintiff has displayed great knowledge of its purported branch's case in all its documents. If the Plaintiff is to be believed that its branch has no capacity to sue, why did it not advise its purported branch to apply for the previous suits to be dismissed for lack of capacity.

16. Even if we were to assume that the Plaintiff could sue on behalf of Millennium SDA Church, the Plaintiff being a Limited Liability Company did not comply with Order 4 Rule 4 of the Civil Procedure Rules as Tom. K. Miyienda who swore the Verifying Affidavit

accompanying the Pliant and the Replying Affidavit in opposition to the 1<sup>st</sup> Defendant's application, did not disclose that he was authorized to swear the said affidavits on behalf of the Plaintiff. Furthermore no company resolution was exhibited by the Plaintiff sanctioning the commencement of the suit.

17. I am guided by the case of **Kenya Commercial Bank Limited V Stage Coach Management Limited (2014) eKLR** where the court relied on the case of East African Portland Cement Limited where Justice Mumbi Ngugi (as she then was) stated thus:

*“33. In Affordable Homes Africa Limited V Ian Henderson & 2 others HCC No. 524 of 2004 Njagi J observed that as an artificial body a Company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are by the articles vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers. (See the decision of the court in Automotive Self Cleansing Syndicate V Cunningham (1906) Ch. 34 C.A). That it was therefore necessary to examine a particular company's Articles of Association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the Company. The court (Njagi J) held that it was common ground that there was no authority from the Board of Directors to institute the suit and consequently he held as follows;*

*The upshot of these considerations is that in the absence of a Board resolution sanctioning the commencement of this action by the Company, the Company is not before the court at all. For that reason the Preliminary Objection succeeds and the action must be struck out with costs such costs to be borne by the advocates for the Plaintiff’.*”

18. It is therefore my finding that the Plaintiff having failed to comply with the mandatory provisions of Order 4 Rule 4 of the Civil Procedure Rules lacks the locus standi to institute this suit on behalf of SDA Millennium Church.

19. From the foregoing therefore, I find that the Plaintiff lacks locus standi to claim any interest over the suit property on behalf of Millennium SDA Church.

#### **Whether the suit is *res judicata*.**

20. The doctrine of *res judicata* is set out in the **Civil Procedure Act at Section 7** as follows:

*“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 can 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.”*

21. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** set out the elements that that court needs to consider when determining the issue of *res judicata*. The court stated that;

*“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;*

*(a) The subject matter or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those 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.”*

22. In order to establish whether this suit before me is *res judicata*, it is important to analyze whether the aforementioned elements have been established by both the 1<sup>st</sup> and 4<sup>th</sup> Defendants to warrant rendering this suit *res judicata*. I shall summarize the elements into two.

#### **a) Whether the subject matter or the issues in the current issue were directly and substantially in issue in the former suit and whether the same were determined by a court of competent jurisdiction.**

23. In support of the application to strike the suit on grounds of *res judicata*, learned counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff in this suit just like in the former suit (**Kisii ELC Case No. 220 of 2017**) claimed that Millennium SDA church was an allottee of unsurveyed plot and has been in occupation of the said plot. Counsel contended that the said issue had been determined by this court and upheld by the Court of Appeal. The Court of Appeal agreed with this court that there was no Unsurveyed plot that abutted the suit property which belongs to the 1<sup>st</sup> Defendant nor was there a Part Development Plan (PDP) to show its location. Learned counsel for the 4<sup>th</sup> Defendant in his submissions concurred with submissions of the 1<sup>st</sup> Defendant.

24. Learned counsel for the Plaintiff on his part submitted that the subject matter in **Kisii ELC Case No. 220 of 2017** is not the same as the

subject matter in this suit as the Applicant in the said suit had pleaded trespass and sought eviction of Millennium SDA Church whereas in this suit, the cause of action is that the 1<sup>st</sup> Defendant fraudulently acquired what is now parcel 649 to defeat Millennium SDA Church's interest as an allottee thereof.

25. Counsel further submitted that the judgement in **Kisii ELC Case No. 220 of 2017** cannot be said to be a judgment which resolves issues disclosed before this court. He argued that the facts upon which this suit is founded disclose the creation of land parcel **Kisii/Municipality/Block III/649** with an acreage greater than that of **Kisii/Municipality/Block III/153**. He contended that the main question in this suit was therefore whether the Millennium SDA Church was in occupation of **Kisii/Municipality/Block III/649** which is a question that was not resolved by **Kisii ELC Case No. 220 of 2017**.

26. From my analysis of the submissions of the two learned counsel on the element whether the subject matter and issues of determination are similar, two arguments arise. The first argument is whether the issue concerning the alleged unsurveyed plots bordering the land owned by the 1<sup>st</sup> Defendant and the allotment letter purportedly issued to Millennium SDA Church with respect to said unsurveyed are the subject of both matters as submitted by the learned counsel for the 1<sup>st</sup> Defendant. It is my finding that this Court and the Court of Appeal determined this issue between the Trustees of Millennium SDA Church (now represented by the Plaintiff) and the 1<sup>st</sup> Defendant and the same cannot be a subject of litigation. In its Judgement this court held that;

*“The report has identified all and features bordering land Parcel KISII MUNICIPALITY III/53 and there is no identification of any unsurveyed plot that abuts the suit land. The alleged letter annexed to the Defendant’s Replying Affidavit as “SDC5” is incomplete. The unsurveyed plot is not identified and no Part Development Plan (PDP) is attached to show its location. The rates demand notice marked “SDC6” does not assist. No plot is identified, it only indicates that the plot is unsurveyed.”*

27. The second argument by the Plaintiff is that of the discovery of new evidence by the officials of Millennium SDA Church which was not subject of litigation in the previous suit. The Plaintiff in the Plaint alleges that the said officials were **alerted** in June 2019 that the 1<sup>st</sup> defendant had vide a lease dated 14<sup>th</sup> November, 2018 granted a new lease with respect **Kisii/Municipality/Block III/649** which according to the Plaintiff, subsumed the suit property in the previous suit and its alleged unsurveyed plot hence having an increased acreage.

28. Learned counsel for the Plaintiff argued that the discovery of an alteration of the suit property in the previous suit having been made after the delivery of the judgment in **Kisii ELC Case No. 220 of 2017** gave rise to a new cause of action which cannot be said to have been resolved by the said judgment. The court having held that the unsurveyed plot does not exist, this argument does not fly.

29. From the foregoing therefore, it is clear that the subject matter in this suit is directly and substantially the same as the one that was determined by this court and Court of Appeal respectively.

**b) Whether that former suit was between the same parties or parties under whom they or any of them claim.**

30. It is common ground that the Plaintiff together with the 2<sup>nd</sup> to 5<sup>th</sup> Respondents in this suit were not parties in **ELC 220 of 2017** and the Appeal case. Does this make this suit different from the previous suit? Both Counsels for the 1<sup>st</sup> and 4<sup>th</sup> Respondents have submitted that it does not. Specifically, learned Counsel for the 1<sup>st</sup> Defendant contended that the suit was filed through a new Plaintiff together with different Defendants as a decoy by the former Plaintiff to cunningly seek its day in court once again over similar issues which were conclusively determined by this court and the Court of Appeal.

31. Having established hereinabove that the issues raised by the Plaintiff were conclusively determined by both this court and the Court of Appeal the introduction of different parties does not at all imply the suit is not *res judicata*. In arriving at this conclusion, I am guided by the case of **Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR** where the court faced with similar circumstances held that;

*“Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.” (Emphasis supplied)*

32. I am equally persuaded by the holding in the case of **E.T vs. Attorney General & Another (2012) eKLR** where the court held that:

*“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177* the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....’”*

**CONCLUSION**

33. From the foregoing, I find that the suit is devoid of merit for lack of *locus standi* on the part of the Plaintiff and on an account of the same being *res judicata*. Accordingly, I uphold the Preliminary Objection, allow the application and strike out the suit with costs to the 1<sup>st</sup> and 4<sup>th</sup> Defendants.

**DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF FEBRUARY, 2022.**

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**J.M ONYANGO**

**JUDGE**