



REPUBLIC OF KENYA



**Kilel v Bett & 3 others (Environment & Land Case 32 of 2015)  
[2022] KEELC 14496 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14496 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 32 OF 2015  
MC OUNDO, J  
NOVEMBER 3, 2022**

**BETWEEN**

**FREDRICK CHERUIYOT KILEL ..... PLAINTIFF**

**AND**

**DAVID CHERUIYOT BETT ..... 1<sup>ST</sup> DEFENDANT**

**SAMWEL KIPKORIR BETT ..... 2<sup>ND</sup> DEFENDANT**

**REBECCA CHEPKURUI BETT ..... 3<sup>RD</sup> DEFENDANT**

**JOHN KIPKURUI BETT ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is an application dated the November 24, 2021 and filed by the applicants/defendants pursuant to the provisions of section 3 of the *Civil Procedure Act*, order 2 rule 15, order 50 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law where the applicants/defendants seek that the originating summons herein be dismissed for being *res judicata* the Chief Magistrates Court civil suit No 313 of 2014. In support of the application were the grounds there in and the supporting affidavit by the 1<sup>st</sup> applicant/defendant sworn on the November 24, 2021.
2. The said application was opposed through the replying affidavit of the respondent/plaintiff herein sworn on the February 1, 2022 to the effect that it had been filed in bad faith and with the intention of denying the court an opportunity to hear and determine the matter. That the suit in the subordinate court had been dismissed due to insufficient information because there was no prior information to the effect that parcel No Kericho/Sosiot/473 no longer existed by virtue of its subdivision into the resultant parcels of land No Kericho/Sosiot/3343-3346. That the present suit was premised on a claim of 0.8 acres in No Kericho/Sosiot/3343-3346 by way of adverse possession and/or trust. The respondent sought for the application to be dismissed for lacking merit.



3. Vide an order of February 9, 2022, parties took directions that the application be disposed of by way of written submissions.

### **Applicants' submissions**

4. The applicants' submission was to the effect that pursuant to the filing of a suit *vide* a plaint dated September 11, 2014 before the subordinate court in Kericho CMCC No 313 of 2014, where the parties therein had been Fredrick Cheruiyot Kilel v David Cheruiyot Bett, Samwel Kipkorir Bett, Rebecca Chepkurui Bett and John Kipkurui Bett, the plaintiff had sought for the following orders;
  - a. An order for adverse possession against the defendants and an order of permanent injunction restraining the defendants by themselves, their agents, servants, or otherwise from encroaching on to, from occupying, selling, subdividing, evicting and any act which is prejudicial to the plaintiff's interest in land parcel No Kericho/Sosiot/473.
  - b. Cost of the suit
  - c. They any other further relief that the honorable court would deem fit to grant.
5. That after the court, through a decree dated July 2, 2015 dismissed the suit for being incompetent and fatally defective, the respondent /plaintiff had now filed the present suit which was between the same parties seeking the same orders but premised on land parcel Kericho/Sosiot/3343-3346 which had been the resultant subdivision of land parcel Kericho/Sosiot/473, so as to disguise the claim.
6. That the doctrine of *res judicata* as provided for under section 7 of the [Civil Procedure Act](#) was clear that for the said principal to be applied, the issues at hand must be identical to those that were previously in dispute, between the same parties and that the matter ought to have been decided on merits by the competent court.
7. The applicants relied on the decided case in [ANM v PMN \[2016\] eKLR](#) quoted in an English case of [Henderson v Henderson](#)(1843-60) ALL ER 378 and the case in [Okiya Omutatab Okoiti v Communications Authority of Kenya & 14 Others](#), Petition No 59 of 2015 to buttress their submission. That the parties in the subordinate court were the same parties as in the present suit wherein the orders sought were the same but with a cosmetic uplift of the suit land being Kericho/Sosiot/3343-3346 which parcels of land had comprised in Kericho/Sosiot/473, the mother title herein.
8. That the doctrine of *res judicata* acts as an estoppel to a person re-litigating on matters that have already been ruled upon by the court on a basis of a new action so as to avoid the filing of disputes in installations.
9. That the subordinate court had dismissed the respondent/plaintiff's suit for being incompetent and fatally defective and not for reasons that it was without jurisdiction. That the present suit was therefore res judicata Kericho CMCC No 313 of 2014 and the same ought to be dismissed with costs

### **respondent's submissions**

10. In opposition to the application that the suit was res judicata, the respondent via his submissions, submitted that the suit before the subordinate court had been dismissed due to insufficient information furnished to his former counsel on record, which information was that parcel No Kericho/Sosiot/473 had been sub-divided and was not in existence. That the substantive matter in issue had not been litigated upon. That the present suit was premised on a claim of 0.8 acres comprised in LR No Kericho/Sosiot/3343-3346.



11. The respondent relied on the provisions of section 7 of the *Civil Procedure Act* and the explanations thereto to submit that the application herein had not met the threshold therein despite the parties being the same. That the crux of the matter was not the same land parcel No Kericho/Sosiot/473 having been sub-divided thus giving rise to Kericho/Sosiot/3343-3346.
12. That as at the September 11, 2014 when the suit in the subordinate court was filed, the Chief Magistrate Court had no jurisdiction to entertain the matter and therefore had downed her tools and dismissed the matter for being incompetent and fatally defective.
13. That pursuant to the provisions of section 38(1) of the *Limitation of Actions Act*, the respondent had moved the court *vide* the current suit where he was seeking to be heard. That the errors of the previous counsel should not be visited upon the respondent/plaintiff.
14. Reliance was placed on the english case of Henderson (supra) to submit the respondent's case was not heard as no witness testified and that this was the proper forum which had jurisdiction to hear determine the case.
15. That it would be in the best interest of justice to allow the respondent to enjoy the rights to be heard. That it was bad practice for litigants to choose to use preliminary objections as a tool to throw the matter out of court instead of letting the matter proceed for full hearing and determination on merits. That the application lacked merit and the same ought to be dismissed with costs.

#### **Determination**

16. Having heard the submissions by both sides as well as having regard to the authorities and annexures filed herein, consequently the pending issues for determination are;
  - i. Whether the dismissal of the suit constituted a determination of a suit.
  - ii. Whether the plaintiff's suit is res judicata.
  - iii. Whether the Preliminary Objection raised is sustainable.
17. Indeed it is not in dispute that the respondent herein had filed suit *vide* a plaint dated September 11, 2014 before the subordinate court in Kericho CMCC No 313 of 2014 where he had sought for orders of adverse possession over land parcel No Kericho/Sosiot/473. It is further not in dispute that the said suit had been between the same parties and that the same had been dismissed by a decree of July 2, 2015, for being incompetent and fatally defective. The respondent has now filed the present suit by way of originating summons seeking entitlements to 0.8 acres comprised in No Kericho/Sosiot/473 land which has since been subdivided resulting into parcels LR No Kericho/Sosiot/3343-3346.
18. 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”
19. 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.
20. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
  - i. What issues were really determined in the previous case;
  - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
  - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction
21. Having considered and reviewed the pleadings and submissions by counsel for the parties, what this court is tasked to determine is whether the dismissal of Kericho CMCC No 313 of 2014 constituted a final determination of the court as per the provisions of section 7 of the *Civil Procedure Act* and therefore constituted Res judicata in the present suit.
22. In his plaint in Kericho CMCC No 313 of 2014, the respondent had sought for orders of adverse possession against the applicants as well as for an order of permanent injunction restraining the applicants by themselves, their agents, servants, or otherwise from encroaching on to, from occupying, selling, subdividing, evicting and any act which is prejudicial to the respondent's interest in land parcel No Kericho/Sosiot/473. He had also sought for costs of the suit and for any other relief the court deemed fit to grant. I find that Kericho CMCC No 313 of 2014 was a suit in the sense of the provisions of section 7 of the *Civil Procedure Act*.
23. I have perused the decree in Kericho CMCC No 313 of 2014 annexed on the applicants' application. The holding in the impugned decree herein which I wish to produce verbatim for ease of reference was as follows:

‘And upon the matter coming up for hearing on June 18, 2015, it is hereby decreed and ordered as follows;

  - i. That the suit be and is hereby dismissed for being incompetent and fatally defective.
  - ii. That costs of the suit to the defendants.’
24. This ruling, I find, did not constitute a final determination of the court nor did it resolve the cause of action before it. The issue as to the ownership of parcel of No Kericho/Sosiot/473 and its resultant sub-divisions being No Kericho/Sosiot/3343-3346 was not heard and determined by the subordinate court.
25. Indeed both parties have consented that the subordinate court had dismissed the respondent's suit for being incompetent and fatally defective due to insufficient information furnished to his former counsel on record, which information was that parcel No Kericho/Sosiot/473 had been sub-divided and was not in existence. The matter did not therefore proceed for hearing. The trial magistrate erred in “dismissing the suit” instead of “striking it out”, terms which are sometimes used interchangeably.



26. I find that the suit before me is neither *res judicata* nor an abuse of the court process. The issues before the court in Kericho CMCC No 313 of 2014 although having had been between the same parties over the same cause of action, the previous case was not heard and determined by the court. For the reasons herein above, I dismiss the applicants' application dated November 24, 2021 with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 3<sup>RD</sup> DAY OF NOVEMBER 2022.**

**M C OUNDO**

**ENVIRONMENT & LAND – JUDGE**

