



REPUBLIC OF KENYA



**Komen & 18 others v Lorho Properties Limited & 8 others (Environment & Land
Case 190 of 2015) [2022] KEELC 14628 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 190 OF 2015
EO OBAGA, J
NOVEMBER 3, 2022**

BETWEEN

CHRISTOPHER KIPLAGAT KOMEN 1ST PLAINTIFF
PHILIP KIPCHIRCHIR KIMAIYO 2ND PLAINTIFF
WILFRED KIPKOSGEI CHEPSIROR 3RD PLAINTIFF
DANIEL KAKUSHA KIMUTAI 4TH PLAINTIFF
MARY NANJALA KAYANDA 5TH PLAINTIFF
LENA JEMESUNDE 6TH PLAINTIFF
RAEL JEMELI ROP 7TH PLAINTIFF
BETTY JELAGAT 8TH PLAINTIFF
NICHOLAS KIPCHIRCHIR ROTICH 9TH PLAINTIFF
HILDA CHERUTO 10TH PLAINTIFF
JOHN KIPLAGAT KOSKEI 11TH PLAINTIFF
GLADYCE JEPNGETICH CHERUIYOT 12TH PLAINTIFF
JOHN KIPKOECH EGO 13TH PLAINTIFF
JANE CHERUTICH TANUI 14TH PLAINTIFF
LUCY JEPKOECH MWEI 15TH PLAINTIFF
ANN JESANG KOECH 16TH PLAINTIFF
RUTH JEPKEMEI AMWAYI 17TH PLAINTIFF
ROSEMARY CHELIMO MAIYO 18TH PLAINTIFF
STEPHEN KURGAT KOSGEI 19TH PLAINTIFF



AND

LORHO PROPERTIES LIMITED	1 ST DEFENDANT
LONRHO AGRIBUSINESS EAST AFRICA LIMITED	2 ND DEFENDANT
ELISHA CHUMO	3 RD DEFENDANT
DAVID RONO	4 TH DEFENDANT
JOSEPH METTO T/A CHEPKATET SELF HELP GROUP	5 TH DEFENDANT
JOSIA K MAGUT	6 TH DEFENDANT
CHRISTOPHER K SUMBAEI	7 TH DEFENDANT
DAVID CHEPSIROR	8 TH DEFENDANT
LAND REGISRTAR, UASIN GISHU COUNTY	9 TH DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a notice of motion dated August, 25 in which the 3rd, 4th and 5th defendants/ applicants seek the following orders:-
 - a. The honourable court be pleased to discharge/set aside the *ex parte* orders issued on July 2, 2015 and September 21, 2015.
 - b. The honourable court be pleased to dismiss/strike out the plaintiffs suit for lack of service of the summons to enter appearance, plaint and other court documents upon the defendants as prescribed by order 5 of the [Civil Procedure Rules, 2010](#).
 - c. In the alternative, the honourable court be pleased to strike out the plaintiffs suit herein for being scandalous, vexatious and an abuse of the process of the court and is res judicata the judgment and decree in previously instituted and determined suit Eldoret CMCC No 516 of 2005.
 - d. The plaintiffs to bear the costs of the application and the suit.

Background:

2. The applicants are officials of Chepkatet Self Help Group (Chepkatet Group) which are the registered owners of LR No Pioneer/Ngeria Block 1 (EATEC) 7081 measuring 1.6 hectares (suit property). The suit property was a subdivision of LR No Pioneer Ngeria Block 1 (EATEC) 151 which was around 162 acres. The suit property was registered in the name of the applicants on June 4, 2004.
3. In May, 2005, the applicants sued four defendants in the Chief Magistrates Court at Eldoret over the suit property. This suit was heard and judgment was delivered on October 23, 2014 in favour of the applicants. The defendants were found to be trespassers on the suit property and an eviction order was subsequently issued against them on March 25, 2015.
4. On July 1, 2015, nineteen plaintiffs who claim to be members of Kapsaret Self Help Group (Kapsaret Group) filed a suit against the Applicants and six others in which they sought to stay execution in



Eldoret Chief Magistrates Civil Case No 516 of 2005. They contemporaneously filed a notice of motion in which they sought stay of execution arising out of Eldoret CMCC 516 of 2005.

5. The application for stay of execution was placed before Justice Ombwayo who certified it urgent and granted stay of execution of Eldoret CMCC 516 of 2005 on July 2, 2015 pending hearing and determination of the application. On September 21, 2015, the orders which had been granted on July 2, 2015 were confirmed on September 21, 2015 pending hearing and determination of this suit.
6. It is as a result of the orders given on July 2, 2015 and September 21, 2015 that the applicants have brought this application in which they contend that the orders be discharged and that the court do proceed to strike out this suit for non-service of summons to enter appearance, plaint and other documents upon the defendants in this suit. In the alternative, the court be pleased to strike out the suit for being scandalous, vexatious and an abuse of the process of the court and for being *res judicata*.

Applicants' contention

7. The applicants contend that the plaintiffs/respondents failed to serve summons to enter appearance, plaint, notice of motion and other court documents. The applicants argue that the original summons expired and that there was no extension of their validity. The applicants further argue that the orders which were granted on July 2, 2015 and September 21, 2015 were given based on defective affidavits of service contrary to the provisions of the *Civil Procedure Rules*.
8. The applicants further contend that this suit is *res judicata* as the issues which are being raised in this matter were determined in Eldoret Chief Magistrate Civil Case No 516 of 2005 and that this suit is vexatious, scandalous and an abuse of the process of the court.

Respondents' contention

9. The respondents contend that the applicants' application is frivolous, mischievous and an abuse of the process of court. The respondents further contend that the applicants were served with summons to enter appearance, notice of motion including all other processes as per the affidavit of service dated September 21, 2015.
10. The respondents argue that there was no need for extension of validity of summons as the same were served upon the applicants immediately after the suit was filed. The respondents further argue that the plaintiffs/respondents in this suit are very different from the parties in Eldoret Chief Magistrate Civil Suit No 516 of 2005 and that the claims in the two suits are different.
11. The respondents state that the court was satisfied with the mode of service and that is why the orders of July 2, 2015 and September 21, 2015 were issued and confirmed respectively. The respondents blame the applicants for not taking any steps upon being served and are now casting aspersions on the court and that in any case, this application has been brought after inordinate delay and should be dismissed.

Analysis and determination

12. The parties herein were directed to file written submissions. The applicants filed their submissions on September 27, 2022. The respondents filed their submissions on October 6, 2022. I have carefully considered the applicants' application as well as the opposition to the same by the respondents. I have also considered the submissions by the parties herein. The issues which emerge for determination are firstly, whether summons to enter appearance and plaint were served upon the applicants. Secondly, whether the applicants were served with notice of motion dated July 1, 2015. Thirdly, whether this suit is an abuse of the process of the court and lastly, whether this suit is *res judicata*.



Whether summons to enter appearance and summons were served upon the Applicants;

13. Order 5 rule 1 (5) obligates the plaintiff or his advocate to prepare summons which should be filed together with the plaint so that the summons can be signed in accordance with Order 5 rule 1 (2) of the *Civil Procedure Rules*. I have perused the court file and cannot see any summons which were filed together with the plaint. I cannot also see any signed copy of summons which was retained in the file or any notification by the court to the advocate to collect the signed summons. This being the case and the respondents' advocate failing to annex a copy of the signed summons, I find that no summons to enter appearance or plaint were served upon the applicants.

Whether the Applicants were served with notice of motion dated July 1, 2015;

14. I have looked at the affidavit of service sworn by George Ochieng on September 21, 2015. The process server depones that he went to a building opposite Central Bank Eldoret in Pursuit of 1st and 2nd defendants in this suit. The process server states that he met a lady called Irene who refused to receive the notice of motion and order on behalf of the 1st and 2nd defendants claiming that the two companies had been wound up and in their place was a company called Fanikiwa Limited.
15. The process server further depones that he proceeded to Langas stage and on to Riverside Hotel where he met the 7th defendant's daughter who told him that the 7th defendant had left shortly and that he served the 7th defendant's daughter.
16. Order 5 rule 3 of the *Civil Procedure Rules* provides the mode of service on a corporation. In the instant case, the process server did not serve the notice of motion in the manner provided. The process server alleged that he was informed that the 1st and 2nd defendants had been wound up and that the company operating in their place was Fanikiwa Limited. Fanikiwa Limited was not sued in this case. It cannot therefore be said that the notice of motion was left at the offices of either the 1st and 2nd defendants as required by law. There was therefore no service upon the 1st and 2nd defendants.
17. The 7th defendant was not properly served. The law required that the process server should have made at least two or more attempts to serve the 7th defendant before he could serve an adult member of his family. Besides this, the process server did not state on how he knew the whereabouts of the 7th defendant. The other defendants were not served as there is no evidence of any service upon them.

Whether this suit is an abuse of the process of court;

18. There is no evidence that Kapsaret Group ever purchased the suit property. The suit property was purchased by Chepkatet Group who obtained title on June 4, 2004. A close look at the documents held by the respondents shows that the respondents purchased their respective portions of the suit property between 2005 and 2014. As at the time the respondents were purchasing portions of the suit property, the suit property was already registered in the name of the applicants. Those who sold the suit property to the respondents were not members of Chepkatet Group.
19. The registered owners of the suit property sued trespassers and they obtained judgment in their favour. An eviction notice was issued against the trespassers. One of the trespassers is Nyokosei Tarus who is the one who sold most portions of the suit property to the respondents. The respondents in this suit are therefore abusing the court process by filing a suit which is seeking to stop execution of a lawful judgment when there is no evidence that Kapsaret Group had purchased the suit property.



Whether this suit is res judicata

20. The principles of res judicata is predicated on section 7 of the [Civil Procedure Act](#) which provides 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 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 litigation in this matter touches on the suit property. This is the same property which was being litigated under Eldoret CMCC No 516 of 2005. The person who sold most of the portions of the suit property to the plaintiffs was named as one of the defendants in Eldoret CMCC No 516 of 2005.

22. Explanation (4) of section 7 of the [Civil Procedure Act](#) provides as follows:-

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

23. It is clear that the respondents’ case is that Kapsaret Group purchased the suit property from the 1st and 2nd defendants. The respondents further contend that those who sold them land were members of Kapsaret group. It is therefore clear that the issues being raised in this suit should have been raised as a defence or attack in Eldoret CMCC No 516 of 2005. This therefore renders this suit res judicata in view of explanation (4) of section 7 of the [Civil Procedure Act](#).

24. The mere fact that the respondents brought in new parties does not change the fact that this suit is *res judicata*. The previous suit was determined with finality. The title litigated is the same in both suits. In [E T v Attorney General & another](#) (2012) eKLR, justice Majanja stated as follows:-

“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 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 a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v 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 cause of action in a subsequent suit.’ In that case the court quoted Kuloba J in the case of *Njangu v 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 doctrine of *res judicata*...’

Disposition

25. It is clear from the above analysis that this suit is not only an abuse of the process of the court but is also *res judicata*. Furthermore, no summons to enter appearance were served upon any of the defendants. I proceed to allow the application dated August 25, 2021. The suit herein is struck out with costs to the 3rd, 4th and 5th defendants/applicants.



It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF NOVEMBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Miyianda for Plaintiffs

Mr. Rotich for Mr. Njuguna for 3rd, 4th and 5th Defendants.

Court Assistant -Albert

E. O. OBAGA

JUDGE

3RD NOVEMBER, 2022

