



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 58 OF 2018

WILLIAM KIMUTAI KIPKOECH (Suing as a personal

Representative of the estate of Kipkore Koilege).....PLAINTIFF

VERSUS

DANIEL K. KIBOR.....1ST DEFENDANT

JOHN KIBOR KIBIWOT.....2ND DEFENDANT

KIPROP JOHN MAIYO.....3RD DEFENDANT

RUTTO JOHN KIPKOSGEL.....4TH DEFENDANT

EDWARD KIPLAGAT CHEBOI.....5TH DEFENDANT

PAUL KIYENG.....6TH DEFENDANT

JOHN KIPCHUMBA KANDIE.....7TH DEFENDANT

JOSEPH CHELANGA KANDIE.....8TH DEFENDANT

JOHANA CHEROP KANDIE.....9TH DEFENDANT

SALINA KWAMBAL.....10TH DEFENDANT

ABRAHAM CHEBII.....11TH DEFENDANT

FREDRICK K. TOROITICH.....12TH DEFENDANT

CHRISTOPHER S. YANO.....13TH DEFENDANT

PAULO C. CHELIMO.....14TH DEFENDANT

JOHN S. CHEBOI.....15TH DEFENDANT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,

MARAKWET DISTRICT.....16TH DEFENDANT

LAND REGISTRAR, ELGEYO MARAKWET.....17TH DEFENDANT

THE CHIEF LAND REGISTRAR.....18TH DEFENDANT

RULING

[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 15TH MARCH, 2021]

1. The 1st to 15th defendants moved the court vide an application dated 15th March, 2021, seeking for the following orders;

1. Spent.

2. Spent.

3. That the instant suit be struck out or dismissed with costs to the 1st to 15th Defendants.

4. Costs of this Application to be awarded to the 1st to 15th Defendants/Applicants.

The application is based on the thirteen (13) grounds on the face of the motion and supported by the affidavit of **Daniel K. Kibor**, the 1st defendant, sworn on the 15th March, 2021. That it is the defendants' case that;

- The suit was commenced through the plaint dated the 16th March, 2018. That the subject matter are the titles of land parcel E/Marakwet/Sangurur/ 2511–2519, which were subdivisions from Elgeyo/Marakwet/ Sangurur/1422.
- The plaintiff's claim is that the titles for the said subdivisions had been issued to the 1st to the 15th defendants irregularly, and in breach of the court order in **Eldoret HC Misc. Application No. 295 of 2005**.
- The issue with respect to the ownership of land title number **E/Marakwet/Sangurur/1422**, and the resultant sub-divisions being land parcels title numbers **Elgeyo/Marakwet/Sangurur/2511-2519**, was substantially in issue in **Eldoret HC Misc. Appl. NO. 295 of 2005**, and therefore the suit offends the rule on *res judicata*, as codified under **Section 7 of the Civil Procedure Act**.
- The court is prohibited under **Section 8** of the said Act from entertaining this suit and it should be struck out forthwith. The defendants urged that the Plaintiff fraudulently obtained the court order issued on 11th April, 2018 by concealing from this Court the fact that the judgment in **Eldoret HC Misc. Appl. No. 295 of 2005 had been delivered** on the 31st October, 2012 despite having been aware of that fact.
- The Plaintiff caused a misrepresentation regarding the issuance of title deeds with respect to land parcel numbers **Elgeyo/Marakwet/Sangurur/2511-2519**, claiming that they were issued during the subsistence of the court order in **Eldoret HC Misc. Appl. No. 295 of 2005**, when well aware that the order had by then lapsed upon delivery of the Judgment.
- The said concealment should not be tolerated, and as the said order of 11th April, 2018 was obtained through fraud, it ought to be stayed and/or discharged. That the said order has caused a lot of harm to them since they have been denied the use of their parcels.
- The suit has no merit, is frivolous, vexatious, an abuse of the court process and should be struck out *in limine*.

2. That in response to the application, the plaintiff, filled a replying affidavit sworn by **William Kimutai Kipkoech** on the 28th April, 2021. That it is the plaintiff's case;

- That he filed the instant suit vide the plaint dated 16th March, 2018 seeking for inter alia, permanent injunction against the 1st to 15th defendants in respect of **Elgeyo/Marakwet/Sangurur/1422**, and or subdivisions thereof, being parcels 2511 to 2519; cancellation of the defendants' titles in respect of land parcels **Elgeyo/Marakwet/Sangurur/2511–2519**, and costs.
- That the pleadings in **Eldoret HC Misc. Civil Appl. No. 295 of 2005**, discloses grounds of judicial review orders which was based on jurisdiction and procedural law, and that this suit is therefore not *res judicata*.
- That after the judgment in the judicial review matter was delivered, the court file went missing, and his advocates on record filed **Eldoret HC Misc. Application No. 67 of 2018** to reconstitute a skeleton file.
- That the skeleton file was reconstructed, and it was only on the 11th January, 2021 that the court officially communicated to the parties that the original file had been traced.
- That upon being notified of the existence of the original court file in respect of **Eldoret HC Misc. Civil Appl. No. 295 of 2005**, he proceeded to file an application on the 25th February, 2021, seeking for the leave to file Notice of Appeal out of time against the order of **"13th October, 2012" (sic)**; and stay of execution of the said order pending the determination of the application, and intended appeal. That the said application is coming up for hearing on the 28th June, 2021 before this Court. That the counsel for the 1st to 15th defendants was granted leave to come on record in that matter on the 27th April, 2021 pursuant to their application dated 15th April, 2021.
- That he was not aware of the delivery of the Judgment in **Eldoret HC Misc. Civil Appl. No. 295 of 2005**. That the firm of M/s Chemitei & Company Advocates was the one on record for him in that matter, and not the current one, M/s Kiboi Tuwai Advocates.
- That as he was not aware of the previous proceedings, then it cannot be said that this suit amounts to fraud as he has been on the suit land since birth. That the land in question is their ancestral land and has never been used by the 1st to 15th defendants at all.

3. The court gave directions of filing and exchanging submissions on the application on the 28th April, 2021. The learned counsel for the 1st to the 15th defendants filed their submissions dated the 5th May, 2021 submitting to the following among others;

- That the dispute commenced in the year 1978 when the late **Kipkore Koilege** lodged a claim before the Land Committee which decided the dispute in favour of the late **Kandie Chesang**, from whom the defendants are claiming. The dispute later went to the

Arbitration Board where a decision was rendered in favour of the late Kandie Chesang again.

- That Kipkore Koilege lodged an objection No. 5 of 1989 to challenge the decision of Arbitration Board, and a decision was given in his favour. Thereafter, Kandie Chesang lodged **Appeal No. 639 of 1996** to the Minister to challenge the decision on the objection. The Minister rendered a determination on the appeal granting the subject parcel of land to the late Kandie Chesang.
- The late Kipkore Koilege was dissatisfied with the decision of the Minister and he lodged the judicial review proceedings before the High Court vide **Eldoret HC Misc. Appl. No. 295 of 2005**.
- The Judicial Review application was heard and Judgment delivered on 31st October, 2012 wherein the court upheld the decision of the Minister, hence confirming that the land belonged to the late Kandie Chesang.
- That the Judicial review judgment was read in open court in the presence of Mr. Kiboi Advocate for the Applicant, (Kipkore Koilege) and Mr. Ngumbi from the Attorney General's office. That after the succession proceedings with respect to the estate of the late Kandie Chesang, the land title number **Elgeyo/Marakwet/Sangurur/1422** was subdivided into parcel numbers Elgeyo/Marakwet/Sangurur/ 2511-2519 and the 1st to the 15th Defendants were issued with their respective titles as beneficiaries.
- That therefore this suit offends the rule on *Res Judicata* and does not disclose a reasonable cause of action.

4. The following are the issues for the court's determinations;

(a) Whether this suit is res judicata.

(b) Whether the 1st to 15th defendants' application has merit.

(c) Who pays the costs.

5. That I have considered the grounds on the motion, the affidavit evidence, the learned counsel submissions, the superior courts decisions cited thereon, the record and come to the following determinations;

(a) That the rule on res judicata has been codified under **Section 7 of the Civil Procedure Act, chapter 21 of the Laws of Kenya** 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."

That **Section 8 of the Civil Procedure Act** buttresses the rule on *res judicata as a bar to further suits*. That in the case of ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 (2017 eKLR)***, the Court of Appeal held that:

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

(a) The suit 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 were litigating under the same title.

(c) The issue was heard and finally determined in the former suit.

(d) 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."

That the court went on to explain the role of the doctrine thus;

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

(b) The res judicata principle is therefore meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the issue for determination in the **Eldoret HC Misc. Appl. No. 295 of 2005**, and the present suit is similar. That from the facts before the court, there is no doubt that the issue in both suits was about the ownership of land parcel number Elgeyo/Marakwet/Sangurur/1422 that has been subdivided into parcels 2511 to 2519. The fact that this suit was commenced through a plaint, and the previous one through a notice of motion does not stop the rule on res judicata from kicking in, as *Majanja J*, in ***E.T. v Attorney General & Another***

[2012] eKLR warned when he held that:

“The courts must 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.”

That the defendants’ submissions that the previous suit was between the late Kipkore Koilege, Minister for Lands and Housing, District Land Adjudication and Settlement Officer and Daniel K. Kibor, being the personal representative of the estate of the late Kandie Chesang, has not been disputed and indeed it has been confirmed by the court record. That in the instant suit the Plaintiff, William Kimutai Kipkoech, is suing on behalf of the late Kipkore Koilege, and on the other side are the 1st to 15th Defendants, who includes Daniel K. Kibor and the other beneficiaries of the estate of the late Kandie Chesang. That the 16th Defendant is the Land Adjudication and Settlement Officer and the 17th and 18th Defendants are being sued under the same title as the then Minister for Lands and Housing. That in view of this I find that the parties in the instant suit are litigating under the same capacities, and for the same title (subject matter) as in the previous suit. That there is no party suing or being sued in this suit in a different capacity and on a separate title from the previous proceedings.

(c) That the previous suit was heard and determined by a court of competent Jurisdiction being the High Court, since the Environment and Land Court was by then not yet set up. That a regular judgment was delivered, and accordingly the issue of ownership of land tile number Elgeyo/Marakwet/Sangurur /1422, and the resultant subdivisions finally determined as between the parties and or those claiming under them. That there is no evidence of any appeal having been preferred over the judicial review determination. That indeed the plaintiff has divulged that they have a pending application for leave to file the Notice of Appeal that is pending in the judicial review proceedings. That therefore, the issue of ownership of the said land and the subdivisions thereof, as between the parties herein claiming title under the parties in the previous judicial review proceeding, raised through this suit amounts to litigating on an already decided matter, and hence the suit is res judicata. That the Court of Appeal in the case of ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others 120151 eKLR***, expressed itself on the purpose of res judicata as follows;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgements by reducing the possibility of inconsistency in the judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

(d) That the plaintiff did not rebut or challenge the defendants’ contention that this suit is res judicata. That rather he blamed the firm of his advocate, M/s Chemitei & Company Advocates, for the failure to inform him that the previous judicial review proceedings had been heard and judgement delivered. That however, the record of the proceedings in ***Eldoret HC Misc. Appl. No. 295 of 2005*** captures Mr. Kiboi Advocate, as having been present at the time of delivery of the Judgment, which then confirms the defendants’ position and submissions that the said Mr. Kiboi advocate was personally in conduct of the matter for the plaintiff, first while practicing under M/s Chemitei & Company Advocates, and after transiting to M/s Kiboi Tuwai & Company Advocates, which has not been disputed by the plaintiff. That this notwithstanding, the crux of the matter is that the issue in this suit has been previously determined as between the parties before the court, or those that they claim under, by a court of competent jurisdiction. That this court cannot therefore entertain this suit any further, as that would amount to sitting on an appeal on a decision by a court of equal status. The plaintiff can only appeal against the decision of the High Court in the previous suit.

(e) That on whether the suit discloses a reasonable cause of action, the plaintiff’s assertion that the 1st to the 15th defendants acquired the titles to the suit land in disobedience of the interlocutory order issued in ***Eldoret HC Misc. Appl. No. 295 of 2005***, and therefore they should be cancelled, and that the defendants be permanently enjoined with respect to possession, occupation and use of the suit parcels of land do not have reasonable basis. That is because the order the plaintiff relies on had lapsed upon the final determination in the judicial review proceedings through the judgment dated the 24th August, 2012 that was delivered on the 31st October, 2012. That it is clear that the titles were issued to the defendants after the judgment delivered on the 31st October, 2012. That accordingly, the said titles were issued regularly and without breach of any court order. That the plaintiff’s suit does not therefore disclose any reasonable cause of action.

(f) That on the issue of costs, I agree with the learned counsel for the defendants that costs should follow the cause or event. That in the case of ***Joseph Oduor Anode vs. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009: [2012] eKLR***, it was held as follows;

“... In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so....”

That I therefore find that the defendants are entitled to costs under ***section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya***.

(g) That in view of the foregoing, it is evident that the defendants have demonstrated that the plaintiff’s suit offends the principle of res judicata and should not to be allowed to continue pending before the court any longer as there must be an end to litigation. That the defendants’ application is thus meritorious and succeeds in its entirety with costs.

Orders accordingly.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MAY, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF:

PLAINTIFF: ABSENT

DEFENDANTS: ABSENT

COUNSEL: MR. KIBOI FOR PLAINTIFFS.

MR. KENEI FOR 1ST TO 15TH DEFENDANTS.

MR. WABWIRE FOR 16TH TO 18TH DEFENDANTS.

COURT ASSISTANT: CHRISTINE