



**Seroney t/a Kimsite Park Hotel & Restaurant v Kipkemboi & 2 others (Civil Case 1 of 2021) [2024] KEHC 12569 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL CASE 1 OF 2021  
JR KARANJA, J  
OCTOBER 16, 2024**

**BETWEEN**

**SAMUEL SERONEY T/A KIMSITE PARK HOTEL &  
RESTAURANT ..... PLAINTIFF**

**AND**

**DOUGLAS KIPKEMBOI ..... 1<sup>ST</sup> DEFENDANT**

**PRISCAH JEPTOO ..... 2<sup>ND</sup> DEFENDANT**

**CHERUIYOT KIMETTO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaint dated 15<sup>th</sup> June 2020 was filed by the Plaintiff, Samuel Seroney, trading as Kimsite Park Hotel Restaurant against the three Defendants, Douglas Kipkemboi, Priscah Jeptoo and Cheruiyot Kimeto for a declaratory order that the Defendant breached and/or adversely interfered with the Plaintiffs tenancy rights and subsequently occasioned him loss and damages by jointly and severally without any justifiable cause nor basis unlawfully and forcefully evicting and locking him out of the aforementioned business premises.

The Plaintiff therefore sought compensation for loss of business, business structures, earning and business stock.

The three defendants denied the claim and respectively filed statements of defence in which they all challenged the jurisdiction of this court in this matter.

2. The challenge to the jurisdiction of this court was clearly manifested by the Notices of Preliminary Objection dated the 8<sup>th</sup> August 2020 by the Third Defendant and the 30<sup>th</sup> September 2020 by the First and Second Defendants. The court directed that the First Preliminary Objection dated 8<sup>th</sup> August 2020 be heard and determined in priority to the Second Preliminary Objection dated 30<sup>th</sup> September 2020.



The hearing was by written submissions which were duly filed by the first and Second Defendants through Rugut & Company Advocates and by the Third Defendant through Kibichy & Company Advocates. The Plaintiff filed his submissions through B. Murgor & Company Advocates.

3. The objection at hand was given due consideration by this court in light of the rival submissions and what the court could pick out as the issues for determination were Firstly, whether the objection is competent and proper before the court and Secondly, whether this matter is res-judicata and/or outside the jurisdiction of this court to hear it.
4. With regard to the first issue, it was stated in the leading case of *Mukhisa Biscuit Manufacturing Company Limited v West End Distributors* [1969] EA 696, that: -

“A preliminary objection consists of a point of Law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary part may dispose of the suit.....

It raises a pure, point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. The Supreme Court of Kenya discussed the issue of preliminary objection in its decision in the case of *Independent Electoral & Boundaries Commission v Jane Chepkiner & Two Others* [2015] e KLR, and stated that: -

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants in Preliminary Objection. The true Preliminary Objection serves two purposes of merit; Firstly, it serves as a shield for the originator of the Objection against profligate deployment of time and other resources. And Secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, on the merits.”

6. In this case, the third Defendants objection is anchored on the legal concept of “res-judicata” as provided for under Section 7 of the *Civil Procedure Act*. This is more or less similar to the objection raised by the first and second Defendants. Thus, what the Defendant are saying is that this court lacks jurisdiction to hear and determine this matter on account of the doctrine of “res-judicata”. It is a truism that jurisdiction is everything and without it a court has to down its tools and take no more action in a matter.

The elements of “res-judicata” and jurisdiction are pure matters of law. Therefore, the objection by the third Defendant and by extension, the First and Second Defendant’s objection are competent and proper before this court.

7. With regard to the Second issue for determination, Res-judicata is a latin term for a matter which has been heard and a judgment pronounced by a competent court or tribunal in finality. The doctrine allows a litigant only “one bite at the cherry” meaning that he cannot come back to court to re-litigate on matters which had already been heard and determined in finality in the same forum or another forum. Thus, Section 7 of the *Civil Procedure Act* 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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

8. The Third Defendant with agreement from the First and Second Defendant contends that this suit offends Section 7 of the *Civil Procedure Act* as there are similar claims in other suits which have since been decided. These other suits include Kapsabet Civil Suit No. 132 of 2018, Eldoret High Court Environment and Land Case No. 147 of 2017, Eldoret Business Rent Tribunal Case No. 51 of 2017, Judicial Review 1 of 2019.

It is further contended that Eldoret E & L No. 147 of 2017 was dismissed for want of jurisdiction and Eldoret BPRJ No. 51 of 2017 was concluded and so was Kapsabet Civil Suit No. 132 of 2018. Judicial Review No. 1 of 2019 was said to be ongoing.

9. In his submissions, the Third Defendant states that the Eldoret BPRT Case No. 51 of 2017 involving the Plaintiff as a tenant and the Defendants as the Landlords was determined in favour of the Defendants and the Eldoret Judicial Review 1 of 2019 was struck out for want of jurisdiction while Kapsabet Civil Suit No. 132 of 2018 was wholly heard, determined and concluded.

The Third Defendant stated further that the Plaintiff filed an appeal against the decision in Kapsabet Civil Suit No. 132 of 2018 vide Eldoret HCCA No. 21 of 2021 which was later transferred to this court and that he (Plaintiff) also filed another appeal vide Eldoret High Court No. 47 of 2021 which was still pending in court.

It is the contention of the Third Defendant that Kapsabet Civil Suit No. 132 of 2018 was dismissed and that in this present cause in which the Plaintiff is seeking damages for loss of business, the cause of action is similar to that in Kapsabet Civil Suit No. 132 of 2018. Therefore, this suit is “res-judicata” and ought to be struck out.

10. To counter the foregoing arguments and counterclaims by the Third Defendant, the Plaintiff submitted that if the cause of action in Kapsabet Civil Suit 132 of 2018 arose after the lapse of the tenancy agreement between the Plaintiff and the First and Second Defendants on 27<sup>th</sup> June, 2018, three months after the lapse of the agreement and after the forceful eviction of the Plaintiff from the suit premises. That, the Defendant raised a preliminary objection to the suit and the Objection was allowed by the court in as much as it was grounded on the fact that the suit ought to have been filed in the Business Premises Rent Tribunal. That, the upholding of the objection by the court was erroneous as there was no subsisting tenancy between the parties. That, after the objection was allowed on 20<sup>th</sup> August 2019, this present suit was instituted in the year 2021.

11. The Plaintiff contended that Kapsabet Civil Suit No. 132 of 2018, was never heard and adjudicated on its merit. Therefore, this suit would not be caught up by the doctrine of “res-judicata”.

In his supplementary submissions, the Plaintiff stated that he was dissatisfied with the decision in Kapsabet Civil Suit No. 132 of 2018 and filed Eldoret High Court Civil Appeal No. 47 of 2021 which was compromised by consent of the parties due to lack of a complete record of appeal. The Plaintiff further stated that Eldoret High Court Civil Appeal No. 47 of 2021 was compromised in favour of Eldoret High Court Civil Appeal No. 21 of 2021 which was later transferred to become the present suit, i.e. High Court Civil Suit NO. 1 of 2020.

The Plaintiff contended that Eldoret Judicial Review No. 1 of 2019 was dismissed for want of jurisdiction such that the issue raised therein were never considered and decided.



12. Clearly, several cases related to the dispute between the Plaintiff and the Defendants have been mentioned by the parties in their respective submissions. Other than the cases specified herein above, the First and Second Defendants in their supplementary submissions also mentioned a Civil Appeal No. 25 of 2020 at Eldoret which was withdrawn by the Plaintiff and a Civil Appeal No. 81 of 2022 at Eldoret which is still pending.

It would appear that there has been a multiplicity of suits relating to the current dispute between the Plaintiff and the Defendant arising from an erstwhile tenancy agreement between the first and second Defendants which ended in a rather acrimonious manner with the third Defendant being roped in along the way and becoming a party to not only this present suit but several others which clearly arose from the dismissal of Kapsabet Civil Suit No. 132 of 2018 after the Defendants Preliminary Objections thereto was upheld by the Court.

13. Despite the present existence or past existence of all the suits mentioned herein above the Defendants did not provide evidence to establish and prove that the present suit is “res-judicata” thereby encumbering the court’s jurisdiction to hear and determine it on the merits. No pleadings and/or decrees and/or statements of claim from all the other suits mentioned herein were exhibited in the notices of preliminary objection and/or affidavits in support thereof and/or the submissions filed herein. In the circumstances, it cannot be said with certainty that this suit is “res-Judicata” or that it is a generic of the previous suits on the same subject matter which have since been concluded to finality.
14. Seemingly, what the plaintiff has done is to abandon all the other suits including the appeal in favour of this suit. If that be not the case, then it must be pointed out that the Plaintiff is abusing the court process by instituting a multiplicity of suits arising from the same subject matter and without good cause.

In sum, the preliminary objection by the Third Defendant and by extension that of the First and Second Defendants are hereby overruled and dismissed with each party meeting their own costs. It is hereby ordered that the Plaintiff withdraws any other case in relation to the subject cause of action and take necessary steps to ensure that this suit is expeditiously heard and finally decided on the merits.

Considering that the Plaintiff’s claim against the Defendant is for monetary compensation for loss of business and related matter whose value may not be in excess of Kshs. 20million, it is further ordered that this matter be and is hereby transferred to the Chief Magistrate’s Court at Kapsabet for hearing and final disposal.

Ordered accordingly.

**DELIVERED AND DATED THIS 16TH DAY OF OCTOBER, 2024**

**J. R. KARANJAH,**

**JUDGE**

