



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAMIRA**

**ELC CASE NO. 78 OF 2021 (O.S)**

**{Formerly at Environment and Land Court at Kisii Case No. 19 OF 2020 (O.S)}**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION PURSUANT TO  
SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT, CAP 22 OF LAWS OF KENYA**

**AND**

**IN THE MATTER OF: L.R. NO. EKERUBO SETTLEMENT SCHEME/159**

**BETWEEN**

**ALFRED SAGERO OMWERI.....PLAINTIFF**

**=VERSUS=**

**KENNEDY OMWERI SAGERO.....DEFENDANT**

**RULING:**

Before me is a Preliminary objection dated 21/10/21 to the effect that this suit is Res Judicata and should therefore be struck out with costs.

The suit was initiated by way of an Originating Summons dated 29/06/20 for the determination of the following orders: -

- 1) A declaration that the Defendant’s rights to recover the whole parcel of the land known as LR. NO. EKERUBO SETTLEMENT SCHEME/159 is barred under the limitations of Actions Act, Chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.
- 2) There be an order that the Plaintiff be registered as the proprietor of the whole parcel of land of LR. NO. EKERUBO SETTLEMENT SCHEME/159 in place of the Defendant who currently holds the title to the suit land.
- 3) There be an order restraining the Defendant either by himself, agents, servants and/or employees from interfering with the Plaintiff’s peaceful possession and occupation of all the parcel of land known as LR. NO. EKERUBO SETTLEMENT SCHEME/159 any manner whatsoever and/or howsoever.
- 4) The Deputy Registrar and/or the Executive Officer of the Honourable Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the whole parcel of land known as LR. NO. EKERUBO SETTLEMENT SCHEME/159 in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary transfer instruments.
- 5) Costs of this Originating Summons be borne by the Defendant.

**6) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.**

In the Grounds in support of the said Summons the Plaintiff avers that the suit parcel known as **L.R. No. EKERUBO SETTLEMENT SCHEME/12** belonged to his late father Alfred Sagero Omweri and that the same was originally L.R. NO. EKERUBO SETTLEMENT SCHEME/12 before the Defendant caused sub-division of the said parcel of land without the Plaintiff's knowledge with 2 resulting parcels of land **L.R. No. EKERUBO SETTLEMENT SCHEME/155 AND 159** respectively. The Defendant has never informed him of his interest in the land and that the latter land **L.R. No. EKERUBO SETTLEMENT SCHEME/159** was registered in his name without the knowledge of the Plaintiff. He further states that he has been on the piece of land together with his family openly, continuously and without interruption and/or interference by the previous registered owner and Defendant. He has developed the suit land and continues to cultivate the whole parcel with the Defendant's knowledge and has therefore acquired prescriptive rights over the portion of the suit land. The Plaintiff also swore an Affidavit and deponed that he was never made aware that there was a suit between his late father and the Defendant that led to the Defendant being declared the legal owner of the land parcel number **L.R. No. EKERUBO SETTLEMENT SCHEME/159** as evidenced in an attached copy of the Judgment from the court of Appeal at Kisumu being Civil Appeal Number 4 of 2016.

The issue in the Court of Appeal Kisumu in Civil Appeal No. 4 of 2016 was the ownership of **L.R. No. EKERUBO SETTLEMENT SCHEME/159**. This was an Appeal from the Judgment of Justice Okong'o in Kisii Environment and Land Court Civil Suit Number 266 of 2012.

The court of Appeal held that it could not interfere with the Judgment of adoption of Borabu Land Disputes Tribunal in Case No. 001 of 2009 which awarded the Respondent (Kennedy Omweri Ondieki) a portion of Plot No. **L.R. NO. EKERUBO SETTLEMENT SCHEME/12** measuring 18.5 Acres. The court held that it could not interfere with it because the moment the award was adopted by the Resident Magistrate's Court at Keroka in *Misc. Civil Suit No. 16 of 2009* as a Judgment of that court on 18/06/2009 it ceased to be an award of the Tribunal and was now a Judgment of the Resident Magistrate's Court. The court of Appeal further held that should the Appellant have wanted to have it set aside, he should either have appealed against the Land Disputes Tribunal award to the Provincial Appeals Committee or had it quashed by the court. Having failed to do so, then the Appellant would not have been heard to urge the court to have the same disturbed by the Court of Appeal. Justice Kiage went on to say that the closure of the register for Plot No. 12 upon sub-division thereof that gave rise to **L.R. No. EKERUBO SETTLEMENT SCHEME/158 and 159** respectively was carried out pursuant to the Decree of Keroka Resident Magistrate's Court which had not been set aside, varied or declared void. The title issued to the Respondent pursuant to that Decree cannot therefore be said to be fraudulent. The Appellant therefore lost the Appeal.

What are the prayers that the Plaintiff's father had sought in *Kisii ELC No. 266 of 2012*: -

- a) A permanent injunction to issue against the Defendant himself, his servant or agent or any other person claiming and/or otherwise howsoever manner interfere with suit land parcel No. EKERUBO SETTLEMENT SCHEME/12.**
- b) A declaration that the suit land parcel known as EKERUBO SETTLEMENT SCHEME/12 belongs exclusively to the Plaintiff and not any other person/party.**
- c) A declaration that the decision of the Borabu Land Disputes in Case No. 001 of 2009 is null and void.**
- d) An order directing the District Land Registry Borabu District to reject and/or cancel any document executed to effect transfer of the suit land to the Defendant arising from the decision of Borabu Land Dispute Tribunal Case No. 001 of 2009.**
- e) An award of compensation and General Damages.**
- f) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.**
- g) Any such other or further relief as this Honourable Court may deem appropriate.**

And what was the Decision of the ELC Court?

***"in conclusion it is my finding that the Plaintiff's case against the Defendant has not been proved. Consequently, the same is dismissed with costs to the Defendant."***

In his Replying Affidavit the Defendant has deponed that it is dishonest of the Plaintiff to claim that he was not aware of any proceedings relating to the suit land since the Plaintiff's close relatives have in the past been charged and convicted with various offences relating to trespass to the suit property. The Defendant therefore argues that this case is *Res Judicata*.

The Defendant filed his Submissions on the Preliminary Objection dated 21/10/21 on 19/11/21 and the Plaintiff filed his on 07/12/21.

I have considered the rival Submissions. I have also considered the prayers made in this suit and juxtaposed the same on the prayers made in *Kisii ELC NO. 266 of 2010* where the Defendant is the same while the Plaintiff in *Kisii ELC Case No. 266 of 2010* is the father to the Plaintiff in the instant case.

It is dishonest for the Plaintiff to purport that he only knows of Kisumu C.A.C.A No. 4 of 2016 because on previous occasions his father and other kin have severally been arrested for trespass and other offences and arraigned in Court, charged, convicted and sentenced for trespass and removal of boundary features on the suit premises. All these offences have been in relation to land parcel **L.R. No. EKERUBO SETTLEMENT SCHEME/159**. Before the above *Kisii ELC* suit was determined on 6/12/13 Joseph Omweri Sagero was arraigned in

Court and charged and was later convicted after a full trial with the offence of causing grievous harm to Kennedy Omweri Ondieki, the Defendant herein. He was fined Kshs. 60,000/= on 6/4/2017 in Keroka Principal Magistrate's Court Criminal Case No. 1163 of 2013. The Plaintiff's kins Alfred Sagero, Daniel Machoka and Doctor Oyagi had also been charged in Keroka Principal Magistrate's Court in Criminal No. 1242 of 2009 with interfering with boundary features of land parcel **L.R. No. EKERUBO SETTLEMENT SCHEME/159** one Kennedy Omweri (the Defendant herein) by removing the poles he had used to elect his boundary in Plot No. **EKERUBO SETTLEMENT SCHEME/158**. In his sworn Defence the accused testified that the Defendant herein is their cousin and that they had allowed him to stay on their land after the 2007/2008 Tribal clashes. And that the Defendant later fraudulently obtained land from their father and that the Defendant alleged ownership was being challenged at the ELC Court. The Defendant's brother (a co-accused) also made a similar allegation. The first 2 accused persons were found guilty and convicted and each was fined Kshs. 25,000/= or in default 3 months' imprisonment and the 3<sup>rd</sup> accused person was placed on probation for 1 year.

There was also another Criminal Case No. 566 of 2012 Keroka where Doctor Oyagi Sagero and Daniel Machoka Sagero were charged with forcible detainer contrary to Section 90 of the Penal Code. In the above case the particulars were that on 19/12/2012 jointly in order to take possession thereof the accused persons entered the land of Kennedy Omweri (the Defendant herein) in a violent manner armed with pangas and chased him (the Defendant) away. On 01/08/2016 upon conviction they were fined the sum of Kshs. 15,000/= each or in default imprisonment for 4 months.

It would be quite improper that someone who claims that he was living on the suit premises never heard of these criminal proceedings.

It cannot be true that the Plaintiff has been in occupation of land parcel No. 159 by way of adverse possession not being aware of any suit between his father and the Defendant whilst the suit in Kisii ELC No. 266 of 2012 was filed by the Plaintiff's father against the Defendant herein over the same suit premises.

On the Question raised on behalf of the Plaintiff as to whether the issue raised by the Defendant is really a Preliminary Objection I am obliged to revisit the all-important Decision by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696**. A preliminary objection per Law J.A. was stated to be: -

***“So far as I am aware, 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 point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

It is not in dispute from the pleadings in this suit that the Parties herein are warring on the ownership of the suit land known as **L.R. No. EKERUBO SETTLEMENT SCHEME/159**. Neither is it in dispute that the Plaintiff's late father had filed another suit against the same Defendant over the ownership of the suit land known as **L.R. No. EKERUBO SETTLEMENT SCHEME/159**. As to whether this is a preliminary objection or not, the issue of Res judicata has been pleaded in paragraph 2 of the Defendant's Response, the same arises by clear implication out of pleadings and the affirmative determination of this issue would invariably dispose of this suit. The same also touches on the jurisdiction of this Court to try this suit. Needless to say, jurisdiction is everything. Do we need to go through the entire motion of the Hearing of the suit before determining whether this Court had jurisdiction in the first place? The Court does not have the luxury of that time.

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”***

The **Black's law Dictionary 10<sup>th</sup> Edition** defines “*res judicata*” as

***“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”***

In the case of **Christopher Kenyariri vs Salama Beach (2017) eKLR**, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus;

***“...the following elements must be satisfied...in conjunctive terms;***

- a) The suit or issue was directly and substantially in issue in the former suit**
- b) Former suit between same parties or parties under whom they or any of them claim**
- c) Those parties are litigating under the same title**
- d) The issue was heard and finally determined.**
- e) The court was competent to try the subsequent suit in which the suit is raised.”**

In order therefore to decide 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.

In *E.T vs Attorney General & Another (2012) eKLR* where it was 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*....”**

Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists a Judgment in **Kisii ELC Court Civil Case No.266 of 2012** wherein **the matter was not only heard and finally decided by the court, which matters therein were directly and substantially in issue as those in the present case and an Appeal was preferred and the same dismissed in the Court of Appeal Kisumu in Civil Appeal Number 4 of 2016.**

**What is the common issue in both suits?** The ownership of Plot No. **EKERUBO SETTLEMENT SCHEME/159.**

**Who are/were the litigants?** The Defendant is the same in both suits. As to the Plaintiffs, the Plaintiff in Kisii ELC No. 266 of 2012 Alfred Sagero Omweri, is the father to Joseph Omweri Sagero, the Plaintiff herein.

Can the Plaintiff herein then hide behind the fact that he was not a party in the previous suit?

Section 7 of the Civil Procedure Act Cap 21 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.”**

As observed above, the Plaintiff herein is the son of the Plaintiff in the previous suit and the subject matter is the same. The son seems to be proceeding with the case from where his father left now that the latter is deceased. As to his lamentations that he was not aware of the earlier suit, nothing can be far from the truth and even if the same were true, Section 7 does not recognize any such proviso.

**I therefore uphold the preliminary objection on the basis that pursuant to section 7 of the Civil Procedure Act Cap 21 Laws of Kenya this court lacks jurisdiction to deal with a matter which has already been decided by a court of competent jurisdiction.**

The upshot of the foregoing is that matters in this case having been decided in **Kisii ELC Court Civil Case No.266 of 2012** and conclusively settled by the Court of Appeal in Kisumu C.A.C.A No. 4 of 2016 the present case is *Res Judicata* and an abuse of the court process.

The Originating Summons dated 29/06/20 is therefore struck out and dismissed with costs to the Defendant.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF DECEMBER 2021.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Plaintiff: Mr. Momanyi holding brief for Mr. Ochoki**

**Defendant: M/s Kebungo**