



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 41 OF 2019

CHORLIM MULTIPURPOSE

CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1STRESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

1. By way of a Preliminary Objection dated 29/4/2019 and filed in court on 30/4/2019, the 1st defendant challenged the entire suit herein on the following grounds:-

(1) That this court lacks jurisdiction to hear and determine this suit as there is a prevailing judgment issued by a competent court in Kitale ELC Petition No. 4 of 2017.

(2) That the plaintiff's suit is incompetent as it offends the mandatory provisions of Section 7 of the Civil Procedure Act Cap 21 as it is *res judicata*.

(3) That the suit is an abuse of the court process and as such should be dismissed with costs to the defendants.

2. On 14/11/2019 this court ordered the parties to file submissions on the preliminary objection.

The Defendants' Submissions on the Preliminary Objection

3. The 1st defendant filed submissions on 12/11/2019 in support of the preliminary objection. He submitted that the case is *res judicata* in that this court delivered a ruling in **Kitale ELC Petition No. 4 of 2017** which finalised the issue for determination in this suit. It is argued that the suit are the same and that only some parties have been omitted to give this suit a new look. He cites the case of **Grace Njeri Kabiru -vs- Stephen Wagiita Kiboi & 2 Other [2018] eKLR** and **Kungu Ngethe -vs- George Kibatia [2018] eKLR** as well as **ET -vs Attorney General & another [2012] eKLR** and urges the court to strike out the suit with costs.

Determination

Issues for determination

The issues that arise from this objection are as follows:

a. Whether the instant suit is *res judicata* Kitale ELC Petition 4 of 2017.

b. Who should bear the costs of this objection?

5. The issues are discussed as herein under:-

(a) Whether the instant suit is *res judicata* Kitale ELC Petition 4 of 2017

6. The *res judicata* rule is embodied in our law in **Section 7** of the **Civil Procedure Act** which provides as follows:

“7. 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.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. - (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. - (4) 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.

Explanation. - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

7. The *res judicata* principle applies to suits as well as applications. The decisions revolving around *res judicata* are legion.

8. In **Kenya Hotel Properties Ltd -vs- Willesden and Others** eKLR the court held as follows:

“48. In **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others** [1996] eKLR this Court summarized the ingredients of the principle of *res judicata* as follows:

“In order to rely on the defence of *res judicata* there must be:

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title.
- iii. a competent court heard the matter in issue;
- iv. the issue has been raised once again in a fresh suit.”

9. These ingredients were reiterated in the case of **Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 others** (2017) eKLR.

10. In the case of **Muira & Another -vs- Ikinuya & 2 Others** [2005] eKLR the court cited the decision in **Mburu Kinyua v. Gachini Tuti** [1978] KLR 69 (per Law, JA) as follows:

“...an Applicant whose application to set aside an *ex parte* judgement has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision...*He can only success fully file a second application* if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as *res judicata*, as happened here. The position otherwise would be intolerable. A decree-holder could be deprived of the benefits of his judgement by a succession of applications to set aside the judgement, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madan JA’s expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view...”

11. In the **Independent Electoral and Boundaries Commission** case (*supra*) the Court of Appeal observed as follows:

“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 foundation of *res judicata* thus rests in the public

interest for swift, sure and certain justice.”

12. In the **Joseph Kimatu -vs- Jones Alaka Kimatu & another [2019] eKLR**, the court observed as follows:

“15. In Gurbachau -vs- Yowani Ekori (1958) EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the judgment of the Vice Chancellor in Henderson -vs- Henderson (1), 67 ER 313 at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time.”

13. The essence of the *res judicata* rule is therefore that no party should be vexed twice over the same issue in litigation in a court of law. That rule applies to applications, suits petitions as well as judicial review applications.

14. In the instant case the respondents aver that the suit is *res judicata* a petition. The issue arising therefore is whether the instant suit is *res judicata* that petition. The daunting task before this court is to examine the records and determine if the issues arising in the claim before it were decided, or should have been decided in the previous litigation regarding the subject matter which is the suit land.

15. First, it must be noted that a plaint (or statement of claim) and a petition are two different ways of commencing proceedings. The first is a common method of seeking redress in private law claims though it may also be employed against public authorities. The second is commonly found where claimants seek redress in the public law realm such as for damages for violation of constitutional rights.

16. In the plaint dated **11/9/2018** the plaintiff seeks the following prayers:

- (a) Refund of stand premium.**
- (b) General and punitive damages for unlawful eviction.**
- (c) Alternatively an order that the defendant do provide an alternative parcel of land to the plaintiff;**
- (d) Costs of the suit.**
- (e) Interest at court rate.**

17. In the body of the plaint the plaintiff states that it is a co-operative society comprised of **200** members formed for the sole purpose of acquiring land and settling its members; that on **22/6/1999** it applied to the then Commissioner of Lands for allotment to it of a parcel of land known as **LR No. 6992/2** situate in Saboti Division Trans Nzoia County; that by a letter of allotment referenced **23558/85** dated **9/2/1999** the Commissioner of Lands allocated the plaintiffs **252.5 Hectares** of the said land for a term of **99** years with effect from **1/2/1999** and the plaintiffs accepted the offer, took vacant possession and subdivided the land amongst its members who settled therein and substantially developed their individual parcels in the belief that the land was legally allocated to them. However on **4/8/2018** its members were forcibly evicted from the suit property and without notice on the basis that the land was forest land. They claim that they have suffered loss and damage by reason of being deprived of their means of livelihood and also the destruction of their property hence the prayers.

18. I have examined the petition and the ruling in **Kitale ELC Petition No. 4 of 2017 Chorlim Multipurpose Co-operative Society -vs- Attorney General & 9 Others** which was struck out. In that petition the petitioners, who included the plaintiff herein, sought for the following orders:

- (a) A declaration that the gazette/ alienation/ acquisition of LR No. 6992/2 by the respondents in the petition was illegal and unconstitutional and in violation of the proprietary rights and null and void;**
- (b) A declaratory order declaring that gazette/ alienation/ acquisition of LR No. 6992/2 amounts to a violation of the petitioner’s rights to protection and ownership of property under Article 40 of Constitution;**
- (c) A declaratory order declaring that the impending gazette/ alienation/ acquisition of LR No. 6992/2 violates the petitioner’s right to human dignity and protection of law enshrined in Article 27, 28, 47, 50, 1(3) and 10 of the Constitution and the Land Act 2012, The National Land Commission Act and other statutes;**
- (d) An order of prohibition to prohibit gazette/ alienation/ acquisition of LR No. 6992/2 situated at Kiboroa sub-location within Trans Nzoia County;**
- (e) A mandatory order of mandamus compelling the respondents to recognize, confirm, affirm and/or pronounce the petitioners as the duly bona fide and legally registered owners of all that land parcel No. LR No. 6992/2 and popularly known**

as Ex-Sorensen situated at Kiboroa within Trans Nzoia as already allocated and henceforth initiate the process of surveying adjudicating registration and issuance of titles to the 1st petitioner;

(f) A permanent conservatory order restraining the respondents jointly and severally from gazetting/alienating/acquiring/claiming/allocating/evicting members of 1st petitioner or dealing in any manner with LR. No. 6992/2 contrary to the interests of the petitioners;

(g) That the respondents be ordered to bear the costs of the petition.

19. The two sets of proceedings therefore had the same land parcel as their subject matter.

20. From a perusal of the ruling dated 31/5/2018 in **Kitale ELC Petition No 4 of 2017**, it is clear the issue of refund of stand premium and propriety of the allocation were dealt with in previous litigation. A refund of the stand premium was ordered by the court. Without needing to investigate further, this court's view is that the issue of refund of stand premium is therefore *res judicata*.

21. However it is noteworthy that the plaint herein claims for two additional substantive orders for general and punitive damages for unlawful eviction and the provision by the defendants of alternative land. These are the two more issues that this court must investigate to determine if this suit is *res judicata*.

22. I start with the last prayer for alternative land. Could it have been made in previous litigation, even by way of amendment, as soon as the respondents claimed in that litigation claimed that the land was not available for allocation to the plaintiffs?

23. The 3rd and 4th respondents' grounds of opposition filed on 22/8/2017 in **Petition No 4 of 2017** inferred that the land was not available for alienation to the plaintiffs. Those grounds stated in part as follows:

"1. ...the land which the petitioners are in this application demanding to occupy is forest land namely Makunga forest which falls within the mandate of Kenya Forest Service (KFS) having been gazetted as a forest area vide legal notice No 23 of 16th December 2012 hence being a gazetted forest land, the suit land is therefore protected by the constitution as well as registration and even international instruments to which Kenya is a party."

24. That is not all; the 3rd and 4th respondents in that petition also revealed the existence of previous litigation in respect of the suit land and alleged thus:

"4. The issues raised by the petitioners in their application as well as in the petition and the orders prayed for therein contradict a previous decision of this honourable court in its ruling dated 26/2/2014 (Hon Obaga J) in Kitale High Court Misc Civil Application No 67 of 2006 (Republic vs minister of Environment & National Resources and Kenya Forest Services Ex Parte Chorlim Multi Purpose Coop Society Ltd), orders which were never appealed against; hence by granting the orders sought by the petitioners the court will be reversing its own decision through the backdoor."

25. In **Republic -vs- Minister of Environment & Natural Resources Ex-Parte Chorlim Multi-Purpose Co-operative Society Ltd [2014] eKLR** the plaintiff herein was the *ex parte* applicant. In that case the court observed as follows:

"It is not disputed that the said land was surveyed and the plan duly registered by the Director of Survey. What was only remaining is Gazettement of the said land as forest land. It is apparent that the purported allotment by the Commissioner did not confer any lawful interest in the applicant. A look at the records in this file shows that there were other entities which had invaded gazetted forest land. The notice complained of may have targeted them as well. There is no evidence in form of affidavits put forth in this application to show that the notice affected the applicant. In any case even if it were directed to the applicant, the applicant has not demonstrated that it had recognizable interest in the land. The applicant did not seek to quash the decision of the District Environment Committee. It instead sought to quash a letter by the District Forest Officer communicating the decision. There was no decision in that letter capable of being quashed. The decision which should have been sought to be quashed was the decision of the District Environment committee made on 3/6/2006. For the reasons given hereinabove, I find that the applicant's motion dated 5/6/2006 cannot stand. The same is hereby dismissed with costs to the interested party."

26. The above passage is contained in a ruling read on 30/9/2014, yet **Kitale ELC Petition No. 4 of 2017 Chorlim Multipurpose Co-operative society -vs- Attorney General & 9 Others** was filed almost 3 years later on 11/7/2017.

27. In this court's view the plaintiff, having been made aware that the land was not available for allocation to it in the Judicial Review decision, ought to have included the prayer for alternative land in the first subsequent litigation that it would file.

28. However, notwithstanding the observations and decision of the court in **Republic -vs- Minister of Environment & Natural Resources Ex-Parte Chorlim Multi-Purpose Co-operative Society Ltd [2014] eKLR**, the proceedings in **Kitale ELC Petition No. 4 of 2017** did not contain any prayer for allocation of alternative land as claimed in **prayer (c)** in the present suit. That petition having been dismissed the plaintiff is again before this court and wishes to litigate concerning the allocation of alternative land.

29. In this court's view, the proper position pronounced in the **Henderson -vs- Henderson case (supra)** that a litigant should not except in very exceptional circumstances be allowed to reopen a matter "*which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident*" omitted it as it is a "*point which*

properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time” should and does indubitably apply to this issue of alternative land. It is therefore *res judicata*.

30. Having dealt with the claim for alternative land as above this court now has to determine if the claim for general and punitive damages for unlawful eviction in the instant suit is also *res judicata*.

31. The plaintiff’s claim in the instant suit is that on **4/8/2018** its members were forcibly evicted without notice from the suit property on the basis that the land was forest land. They also claim that they suffered loss and damage by being deprived of their means of livelihood and by the alleged destruction of their property.

32. In this court’s view, there was adequate notice to vacate the forest land issued to the plaintiff and its members hence the litigation mentioned earlier. In **Kitale High Court Misc. Civil Application No 67 of 2006 (Republic -vs- Minister of Environment & National Resources and Kenya Forest Services Ex Parte Chorlim Multipurpose Co-op. Society Ltd)**, the court stated as follows in its ruling:

“On 3/5/2006 the District Environment Committee met and resolved that all squatters in Government Forest be evicted so that the forests could be conserved. It is on this basis that notices were issued on 4/5/2006 giving the squatters time to move out of the Government Forest. The interested party contends that there were no objections to the said quit notice but the applicant decided to move to court for protection.”

33. In the final part of the ruling in **Kitale High Court Misc. Civil Application No 67 of 2006** this court stated as follows:

“A look at the records in this file shows that there were other entities which had invaded gazetted forest land. The notice complained of may have targeted them as well. There is no evidence in form of affidavits put forth in this application to show that the notice affected the applicant. In any case even if it were directed to the applicant, the applicant has not demonstrated that it had recognizable interest in the land. The applicant did not seek to quash the decision of the District Environment Committee. It instead sought to quash a letter by the District Forest Officer communicating the decision. There was no decision in that letter capable of being quashed. The decision which should have been sought to be quashed was the decision of the District Environment committee made on 3/6/2006.”

34. The above decision is not emphatic on whether the plaintiffs received a notice or not, but it makes it clear that there was a letter from **District Forest Officer** communicating the decision of the District Environment Committee made on **3/6/2006**. Whether the plaintiffs then received the notice or not, the letter from the District Forest Officer was sufficient notice in itself, and the eviction having been suspended by the ensuing **Kitale High Court Misc Civil Application No. 67 of 2006** it lasted the entire period of the litigation. The letter was a focus of interest in that litigation. The main ingredient of the purported wrongful eviction claim in the instant suit being alleged notice, the scrutiny of the passages set out above from the decision in **Kitale High Court Misc. Civil Application No. 67 of 2006** has debunked the myth that there was no notice. In any event if no notice was issued, this allegation should have, formed the basis of a claim in **Kitale ELC Petition No. 4 of 2017** which did not happen and that petition is already concluded. Therefore the *res judicata* principle that matters that should have been made the subject of an offensive or defence in previous litigation but were somehow not made part of that litigation should not be made the basis of a claim in subsequent litigation applies to the issue of *forcible eviction without notice* from the suit property land. It is *res judicata*.

35. Having demonstrated that all the reliefs sought by the plaintiff are *res judicata*, this court finds that it has no jurisdiction to hear and determine the instant suit. As was said in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, jurisdiction is everything and without it the court must down its tools. For completeness, I will set out the following passage from that case:

“...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

See Words and Phrases Legally defined - Volume 3: I - N Page 113

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

36. When the history of this matter wholistically is considered, it is clear that **Section 7** of the **Civil Procedure Act** has deprived this court of jurisdiction to hear and determine this suit and this court must therefore down its tools.

For the foregoing reasons, I find that the preliminary objection dated **29/4/2019** has merit and I hereby issue the following orders:

a. This suit is dismissed for being *res judicata*.

b. The plaintiff shall bear the costs of the suit.

It is so ordered.

Dated, signed and delivered at Nairobi on this 30th day of April, 2020.

MWANGI NJOROGI

JUDGE.

Ruling read in the presence of:

Hon Mercyline Lubia, Deputy Registrar.

No appearance for all the parties.