



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 174 OF 2015**

**STEPHEN KIBOWEN.....PLAINTIFF**

**VERSUS**

**RAYMOND RUTO.....1<sup>ST</sup> DEFENDANT**

**KIPKORIR RUTO.....2<sup>ND</sup> DEFENDANT**

**KIPROP RUTO.....3<sup>RD</sup> DEFENDANT**

**KIPCHUMBA RUTO.....4<sup>TH</sup> DEFENDANT**

**CHEPCHIRCHIR RUTO.....5<sup>TH</sup> DEFENDANT**

**CHEPKOECH RUTO.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 5<sup>th</sup> May 2020, the defendants seek stay of proceedings herein pending hearing and final determination of **Eldoret High Court Civil Case No. 77 of 2018, Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkeitany v Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen** formerly **Eldoret Environment and Land Court Case No. 119 of 2017**. The application is supported by an affidavit sworn by Raymond Ruto, the 1<sup>st</sup> defendant. He deposed that the 2<sup>nd</sup> plaintiff in **Eldoret HCCC No. 77 of 2018** is his father and that who is challenging statutory power of sale while the plaintiff herein is seeking their eviction on the basis of the title that is disputed in **Eldoret HCCC No. 77 of 2018**. He added that the matters in issue in this case are directly in issue in **Eldoret HCCC No. 77 of 2018** and that **Eldoret HCCC No. 77 of 2018** should therefore be heard first. The applicants also relied on a supplementary affidavit sworn by Raymond Ruto, whose contents I have noted.

2. The plaintiff opposed the application through a replying affidavit in which he deposed that the defendants have no interest in having this case concluded on the merits and have towards that end filed various applications. He added that the defendants are not parties in **Eldoret HCCC No. 77 of 2018** and that the defendants have threatened him that they will ensure that this matter is delayed. Further, that in view of this court's rulings dated 15<sup>th</sup> February 2018 and 29<sup>th</sup> July 2019, the present application is *res judicata*.

3. The application was canvassed through written submissions. For the applicants, it is argued that the application is not *res judicata* since the issues that were dealt with in the rulings dated 15<sup>th</sup> February 2018 and 29<sup>th</sup> July 2019 were consolidation of the two matters and stay of execution pending appeal. It is further argued that the question of staying proceedings in this suit pending hearing and determination of **Eldoret HCCC No. 77 of 2018** formerly **Eldoret ELC No. 119 of 2017** has arisen or been determined. It is further argued that the proceedings herein and those in **Eldoret HCCC No. 77 of 2018** are in respect of the same subject matter and that both suits revolve around proprietary rights over the suit property.

4. For the respondent, it is argued that through the rulings dated 15<sup>th</sup> February 2018 and 29<sup>th</sup> July 2019, this court pronounced itself on the issues which are now being raised again in the present application and that in the circumstances the application is *res judicata*. It is further argued that this suit was filed earlier than **Eldoret HCCC No. 77 of 2018** and that no legal basis has been laid to justify the plea to stay it contrary to the provisions of **Section 6** of the **Civil Procedure Act**.

5. I have considered the application, the affidavits, submissions and authorities cited by the parties. Only two issues arise for determination: whether the application is *res judicata* and whether the orders sought should issue. Needless to state, if I find that the application is *res judicata* then there will be no need to consider the second issue.

6. The doctrine of *res judicata* has statutory expression at **Section 7** of the **Civil Procedure Act** which provides:

***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.***

7. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. "Suit" in this context means all civil proceedings including applications. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

8. The applicants seek stay of proceedings herein pending hearing and final determination of **Eldoret HCCC No. 77 of 2018**. According to the applicants the orders sought are justified since the matters in issue in this case are directly in issue in **Eldoret HCCC No. 77 of 2018**. The record herein shows that the applicants have previously filed Notice of Motion dated 21<sup>st</sup> March 2017 seeking transfer of this suit to Eldoret Environment and Land Court for consolidation with Eldoret Environment and Land Case No. 119 of 2017 which is now **Eldoret HCCC No. 77 of 2018** and for subsequent hearing and final determination of both cases together. Among the reasons advanced in support of the application was that the issues raised in this suit were directly and substantially raised in **Eldoret ELC No. 119 of 2017**. I considered the application on the merits and dismissed it through a ruling delivered on 15<sup>th</sup> February 2018. I stated in the ruling as follows:

***17. I also note that the Eldoret suit was filed in the year 2017 while this suit has been pending in Nakuru since the year 2015. It therefore takes precedence. As regards the fears about conflicting decisions, the parties are at liberty to keep the courts abreast of orders and decisions that may be made in the two different stations.***

9. Being dissatisfied with the ruling dated 15<sup>th</sup> February 2018, the applicants filed a Notice of Appeal followed by Notice of Motion dated 5<sup>th</sup> March 2018 seeking stay of proceedings pending hearing and determination of the appeal. Once again, I considered the application on the merits and having found no merit in it, I dismissed it through a ruling dated 29<sup>th</sup> July 2019. I stated as follows in the ruling:

***It must be remembered that any judgment in this case will be the end product of a hearing in which the defendants will have a chance to challenge the plaintiff's case and to put forth their own case including calling witnesses of their choice. Any party who will not be satisfied with the outcome will have a right of appeal. In those circumstances, I do not see how the defendants will suffer any substantial loss by the mere fact that this suit proceeds.***

***... I am not persuaded that the defendants will suffer substantial loss if stay is not granted. If anything, staying proceedings herein indefinitely will likely cause injustice to the plaintiff who has been waiting to be heard since the year 2015. ...***

10. It is thus manifest that the issue of whether or not this suit should be stayed has been previously raised and determined in this matter specifically through the ruling dated 29<sup>th</sup> July 2019. Similarly, the questions of the matters in issue in this case being directly in issue in **Eldoret HCCC No. 77 of 2018** and the implication of the two matters proceeding independently have been raised and determined through this court's ruling dated 15<sup>th</sup> February 2018. The effect of the ruling was that the court was not persuaded that the alleged similarity of issues in both matters warranted transfer of this suit to Eldoret Environment and Land Court for consolidation with **Eldoret ELC No. 119 of 2017** which is now **Eldoret HCCC No. 77 of 2018**. Having filed a Notice of Appeal against the ruling dated 15<sup>th</sup> February 2018 over two years ago, the applicants should file the appeal and vigorously prosecute it.

11. The doctrine of *res judicata* requires that parties raise their whole case for determination at one go. It frowns upon the practice of fragmenting issues and litigating them piece meal. Thus, *res judicata* applies not only to points which were actually raised by parties but to all points that a diligent party ought to have raised. That is the essence of explanation 4 of **Section 7** of the **Civil Procedure Act**. The question of stay of proceedings ought to have been expressly raised in Notice of Motion dated 21<sup>st</sup> March 2017 or Notice of Motion dated 5<sup>th</sup> March 2018. Further, in the context of this case where no final judgment has been delivered so as to pose any threat of execution, stay of proceedings pending hearing and determination of appeal as was sought in Notice of Motion dated 5<sup>th</sup> March 2018 amounts to the same thing as stay of proceedings pending hearing and final determination of **Eldoret HCCC No. 77 of 2018**, which is sought in the instant application. In the circumstances, I find that the instant application is *res judicata*.

12. The respondent has validly complained that the applicants are bringing a multiplicity of applications whose effect is to delay the hearing of this matter. There is quite some justification in that concern. In fact, as is stated in the Certificate of Urgency accompanying it, the present application was filed because this suit was scheduled for hearing on 27<sup>th</sup> May 2020. Upon delivery of this ruling, I will give directions to facilitate early hearing and determination of the suit.

13. In the result, I strike out Notice of Motion dated 5<sup>th</sup> May 2020 with costs to the plaintiff.

14. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of July 2020.**

**D. O. OHUNGO**

**JUDGE**