



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L PETITION NO. 2 OF 2020**

ANNE CHEPSIROR.....1<sup>ST</sup> PETITIONER  
CUSTOM CREDIT MANAGEMENT LTD.....2<sup>ND</sup> PETITIONER  
HOSEA KIBET RUTO.....3<sup>RD</sup> PETITIONER  
SAMACK GENERAL SUPPLIES LTD.....INTENDED 4<sup>TH</sup> PETITIONER  
ULTRA EUREKA FARM LTD.....INTENDED 5<sup>TH</sup> PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT  
THE LAND REGISTRAR, UASIN GISHU.....2<sup>ND</sup> RESPONDENT  
THE REGISTRAR OF TITLES.....3<sup>RD</sup> RESPONDENT  
KENYA INDUSTRIAL ESTATES LIMITED.....4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

**RULING**

**[4<sup>TH</sup> RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION DATED 12<sup>TH</sup> FEBRUARY, 2020 AND NOTICE OF MOTION BY 4<sup>TH</sup> AND 5<sup>TH</sup> INTENDED PETITIONERS DATED 29<sup>TH</sup> FEBRUARY, 2020]**

1. **Kenya Industrial Estates Limited**, the 4<sup>th</sup> Respondent, raises three grounds in their Notice of Preliminary objection dated the 12<sup>th</sup> February, 2020 as set out herein below;

***“1. The Honourable Court lacks jurisdiction to entertain the Notice of Motion application and Petition herein or grant any of the orders sought.***

***2. The Notice of Motion application and Petition herein are inimical to the provisions of Section 7 of the Civil Procedure Act, Chapter 21 of Laws of Kenya, hence resjudicata.***

***3. The matters raised in the Notice of Motion application and Petition herein have already been determined by a court of competent jurisdiction in Eldoret ELC Case No. 71 of 2013; Kenya Industrial Estates Ltd Vs Anne Chepsiror & Others; and hence the application and Petition are bad in law, are vexatious and an abuse of the court process and as such, they ought to be dismissed/struck out with costs.”***

2. **Samack General Supplies Ltd** and **Ultra Eureka Farm Ltd**, the Intended 4<sup>th</sup> and 5<sup>th</sup> Petitioners, moved the court under the Notice of Motion under Certificate of Urgency dated the 29<sup>th</sup> February, 2020 and filed on the 2<sup>nd</sup> March, 2020 seeking for the following orders;

***“(a) That this application be certified urgent and service of the same dispensed with in the first instance.***

(b) *That this application be heard and determined on a priority basis.*

(c) *That this Honourable Court be pleased to stay further proceedings in the Petition herein pending the hearing and determination of this application.*

(d) *That this Honourable Court be pleased to enjoin M/s Samack General Supplies Ltd and Ultra Eureka Farm Ltd in the Petition herein as the 4<sup>th</sup> and 5<sup>th</sup> Petitioners respectively.*

(e) *That upon grant of prayer (d) above, the Petitioners be granted leave to amend the Petition accordingly.*

(f) *That costs of this application be in the cause.”*

The Motion is based on the eleven (11) grounds on its face marked **(1)** to **(11)** and supported by the affidavit sworn by **Jackson Kiplimo Chebett**, a director of the intended petitioners on the 29<sup>th</sup> February, 2020. That it is the intended Petitioners' case that they are registered proprietors of **Eldoret Municipality Block 8/596 and 597** respectively. That the two parcels are subdivisions from Eldoret Municipality Block 8/53 which is the subject matter in this petition. That Eldoret Municipality Block 8/53 was subdivided into eight (8) parcels and allotted to the various allottees including the Petitioners, Intended Petitioners and others. That the Respondents have in breach of the fundamental rights and freedoms of the Intended Petitioners sought to repossess the parcels held by the Petitioners and Intended Petitioners leaving out the allottees of the three other parcels, that is Eldoret Municipality Block 8/591, 593 and 598. That it is imperative, fair, cost effective and prudent use of the Court's limited time and resources that the Intended Petitioners be enjoined in this Petition as the issues subject matter for determinations affects the Petitioners and Intended Petitioners alike. That the Respondents will not suffer any prejudice if the application is allowed.

3. That when the matter came up in court on the 13<sup>th</sup> February, 2020 and upon the Court noting that the 4<sup>th</sup> Respondent had contemporaneously with filing the Notice of Preliminary Objection filed their submission dated the 13<sup>th</sup> February, 2020, the Court directed among others that the other parties do file and exchange their written submissions in fourteen (14) days. The 2<sup>nd</sup> Respondent [The Land Registrar, Uasin Gishu] filed their written submission on the 4<sup>th</sup> Respondent's preliminary objection dated the 19<sup>th</sup> February, 2020 on the 21<sup>st</sup> February, 2020 through the Attorney General [5<sup>th</sup> Respondent].

4. That during one of the subsequent mentions of 18<sup>th</sup> May 2020, the Court inter-alia directed that the Notice of Motion by the Intended Petitioners be canvassed through written submissions that are to be digitally filed and exchanged. The Court further gave timelines for filing and exchanging of submissions to both the 4<sup>th</sup> Respondent's preliminary objection and the Intended Petitioners' Motion but none had been filed by the 25<sup>th</sup> July, 2020 when the matter was mentioned last. The Court therefore fixed a ruling date for both the preliminary objection and the Motion pursuant to Order (d) of the 18<sup>th</sup> May, 2020.

5. That it is the 4<sup>th</sup> Respondent's submissions in support of their preliminary objection that the issues raised in the Petition and Notice of Motion filed by the Petitioners herein have already been determined by a court of competent jurisdiction in **Eldoret ELC No. 71 of 2013, Kenya Industrial Estates Ltd Vs Anne Chepsiror & Others**, which was decided on 30<sup>th</sup> January, 2015. That the interest of the 4<sup>th</sup> Respondent in Eldoret Municipality Block 8/592, 594, 595, 596 and 597 was decided in the said case where the Defendants included the Petitioners herein. That the 1<sup>st</sup> Respondent consequently revoked the titles of the five parcels through Kenya Gazette Notice Volume CXIX-NO. 97 of 17<sup>th</sup> July, 2018. That the intended appeal preferred by the Defendants in the case to the Court of Appeal was never prosecuted and was struck out on the 20<sup>th</sup> September, 2018. That the 3<sup>rd</sup> Petitioner has also filed **Eldoret Chief Magistrate ELC No. 169 of 2019; Hosea Kibet Ruto Vs Johana Kipchumba t/a Tajakos Enterprises & 4 Others**, seeking similar orders as in the petition and has failed to disclose it. That the Petitioners' petition and application are therefore a concerted effort to litigate the issues concerning the subject parcels of land endlessly, and in contravention of the principle of finality. That the entire Petition and application should be struck out with costs.

6. That on behalf of the 2<sup>nd</sup> Respondent, the 5<sup>th</sup> Respondent submitted that the subject matter in this petition involves parcels Eldoret Municipality Block 8/592, 594 and 595 which according to the Petitioners are subdivisions from Eldoret Municipality Block 8/53. That Eldoret ELC No. 71 of 2013 had dealt with Eldoret Municipality Block 8/591, 593, 596, 597 and 598 and ruled in favour of 4<sup>th</sup> Respondent. That the issue of jurisdiction, plea of functus officio and res-judicata being pure points of law can be determined in limine. That what the Court needs to determine is whether the factual details underpinning the preliminary points have been contested, hence requiring to be proved by evidence. That if the points of preliminary objection do not require to be authenticated, then the petitioners are in serious abuse of court process in view of the decision in Eldoret ELC No. 71 of 2013, and the subsequent filing of Eldoret CMCC No. 169 of 2019, which is still pending. The learned counsel for the 2<sup>nd</sup> and 5<sup>th</sup> Respondents urged the Court to find that the Petitioners are in serious abuse of court process.

7. The following are the issues for the Court's determinations;

(a) *Whether the issues raised in the Petitioners' Petition and Notice of Motion are res judicata.*

(b) *Whether the Intended Petitioners are necessary parties to be enjoined in the Petition for the issues herein to be effectually determined with finality.*

(c) *Who pays the costs in the preliminary objection and Notice of Motion?*

8. The Court has carefully considered the grounds on the Notice of Preliminary Objection and the Notice of Motion, the affidavit evidence by the Intended Petitioners, the learned Counsel for the 4<sup>th</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents' written submissions, the superior courts' decisions and

the law cited therein, and come to the following conclusions;

(a) That as submitted by the learned Counsel for the 4<sup>th</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents, res-judicata is a principle of law that has been embodied or anchored on **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya** in the following words;

***“7. Res judicata 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 superior courts have time and again pronounced themselves on the import of the foregoing provision. That the aim of the provision is to maintain the dignity of the Court’s process by guarding 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 of a new cause of action which has been resolved by a Court of competent jurisdiction.”*** **IE. T. Vs Attorney General and Another (2012) eKLR.**

(b) That in the Court of Appeal case of **John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, the Court discerned the ingredients of res judicata in **Section 7 of the Civil Procedure Act** to include the following;

(a) *That the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar;*

(b) *That the former suit should be between the same parties or parties under whom they or any of them claim, litigating under the same title; and*

(c) *That the Court or Tribunal before which the former suit was litigated was competent and determined the suit finally.*

That the Court of Appeal further laid down the rationale behind the res-judicata doctrine to be ***“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 timely termination of cases. ...it promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts.... The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court, may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prove abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013...”***

That the 4<sup>th</sup> Respondent’s replying affidavit sworn by **Charity Ndeke**, Acting Manager Legal Services with the 4<sup>th</sup> Respondent, on the 12<sup>th</sup> February, 2020 and filed with the Notice of Preliminary Objection on the 13<sup>th</sup> February, 2020 at paragraphs 3, 4, 5, 6, 7 among others raises the defence of res-judicata and in view of the Court of Appeal’s decision set out above, the Court finds that the preliminary objection has been properly raised.

(c) That the three (3) grounds set out in the Notice of Preliminary Objection by 4<sup>th</sup> Respondent dated the 12<sup>th</sup> February, 2020 raises the same issue of whether this Court has jurisdiction in the Petition and Application by the Petitioners in view of the issues therein having already been determined in Eldoret ELC No. 71 of 2013, by a court of competent jurisdiction. That other than the 2<sup>nd</sup> and 5<sup>th</sup> Respondents who participated in the hearing of the Preliminary Objection through filing their written submissions dated the 19<sup>th</sup> February, 2020 that is essentially in support of the preliminary objection, the Petitioners did not, and therefore have not rebutted or challenged the 4<sup>th</sup> Respondent’s position on the interpretation of **Section 7 of the Act**, and the implication of Eldoret ELC No. 71 of 2013 to this proceedings. That the 4<sup>th</sup> Respondent invited the Court, through paragraph 17 of their written submissions, to the judgment in Eldoret ELC No. 71 of 2013 attached to their Replying affidavit sworn on 12<sup>th</sup> February, 2020 and marked “CN-1”. That the heading of the said judgment gives the parties as follows;

**“REPUBLIC OF KENYA**

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

**[FORMERLY HCCC NO. 130 OF 2008 (CONSOLIDATED WITH 129, 131, 132 AND 133 OF 2008)]**

**KENYA INDUSTRIAL ESTATES LIMITED.....PLAINTIFF**

**VERSUS**

**ANNE CHEPSIROR.....1<sup>ST</sup> DEFENDANT**

**SAMACK GENERAL SUPPLIES**

**LIMITED.....2<sup>ND</sup> DEFENDANT**

**ULTRA EUREKA FARM**

**LIMITED.....3<sup>RD</sup> DEFENDANT**

**CUSTOM CREDIT**

**MANAGEMENT LIMITED.....4<sup>TH</sup> DEFENDANT**

**TAJOKOS ENTERPRISES**

**LIMITED.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

That the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners and the two Intended Petitioners in this proceedings were clearly the 1<sup>st</sup>, 4<sup>th</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in Eldoret ELC No. 71 of 2013. That according to the 4<sup>th</sup> Respondent, the 3<sup>rd</sup> Petitioner herein [**Hosea Kibet Ruto**] had testified as a witness in Eldoret ELC No. 71 of 2013, and later filed an application thereon dated the 29<sup>th</sup> October, 2018 to set aside the Court's judgment of 30<sup>th</sup> January, 2015, which he lost vide the ruling of 31<sup>st</sup> May, 2019. That the Court has perused the said ruling attached to the replying affidavit and marked "CN-4" and the judgment marked "CN-1" and confirmed that indeed, the 3<sup>rd</sup> Petitioner herein was an Applicant in the Motion dated 29<sup>th</sup> October, 2018 and ruled upon on the 31<sup>st</sup> May, 2019 and had testified as DW5 in the main suit. That the foregoing shows that the three (3) Petitioners and the two (2) Intended Petitioners plus the 5<sup>th</sup> Respondent were among the Defendants in Eldoret ELC No. 71 of 2013. That Eldoret ELC No. 71 of 2013 had been initiated in 2008 going by the references of "**Formerly Hccc No. 130 of 2008 (consolidated with 129, 131, 132 and 133 of 2008)**". That the National Land Commission, the 1<sup>st</sup> Respondent was then [2008] not in existence. That the Commission is a creation of the Constitution of Kenya, 2010 and operationalized through the **National Land Commission Act No. 5 of 2012** that commenced on 2<sup>nd</sup> May, 2012. That the inclusion of the National Land Commission, The Land Registrar, Uasin Gishu and The Registrar of Titles, as the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in this proceedings alone does not make it different from Eldoret ELC No. 71 of 2013 as the Attorney General [5<sup>th</sup> Respondent herein] and who was the 6<sup>th</sup> defendant in the previous suit then represented the public offices and responded to the issues raised. That in the case referred to earlier of **E. I. Versus Attorney General & Another (2012) eKLR**, the Court had referred to the decision in the case of **Omondi Vs National Bank of Kenya Ltd & Others (2001) E.A. 17**, where it was held that "**Parties cannot evade the doctrine of res-judicata by merely adding other parties or cause of action in a subsequent suit.**" In that case, the court quoted *Kuloba J*, in the case of **Njangu Vs Wambugu & 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 face lift every occasion he comes to court, then I do not see the use of the doctrine of res judicata...**"

That this Court is in agreement with the position taken by the courts in the foregoing decisions.

(d) That the averments and prayers in the Petition and Notice of Motion dated the 29<sup>th</sup> January, 2020 and filed on the 20<sup>th</sup> January, 2020 and the supporting affidavit leaves no doubt that though the claim is brought through a Constitutional Petition alleging contravention of Fundamental Rights and Freedoms under **Articles 19, 20, 21, 22, 23, 27, 28, 40, 43, 47, 48, 50, 64 and Chapter six of the Constitution of Kenya 2010**, the subject matter is ownership of land parcels Eldoret Municipality Block 8/592, 594 and 595 which are subdivisions of Eldoret Municipality Block 8/53. That the contention of the 4<sup>th</sup> Respondent, and the basis of their preliminary objection is that the issue of ownership of the said parcels of land has already been decided as between the parties herein through Eldoret ELC No. 71 of 2013, through the judgment delivered on 30<sup>th</sup> January, 2015 by *Munyao, J.* That as earlier pointed out, the Petitioners did not participate in the hearing of the preliminary objection though given adequate opportunity like the other parties to file and serve their written submissions. That the 4<sup>th</sup> Respondent's contention therefore remains unchallenged as the 2<sup>nd</sup> and 5<sup>th</sup> Respondents who filed written submissions did not also challenge it. That the Court has perused the judgment of 30<sup>th</sup> January, 2015 in Eldoret ELC No. 71 of 2013 attached to the 4<sup>th</sup> Respondent's Replying affidavit and marked "CN-1" and noted that paragraphs 3 and 6 carries a summary of the pleadings in the Plaints and statements of defences respectively filed in the suit. The pleadings leaves no doubt that the dispute was over ownership of Eldoret Municipality Block 8/53, that was subdivided into parcels 591 to 598. The Court held at paragraphs 64, 68, 71, 72, 73, 78 and 79 inter-alia that the five Defendants and Hosea Ruto (3<sup>rd</sup> Petitioner herein) did not obtain title to their respective parcels in accordance with the law; that they were not innocent purchasers for value of the said parcels; that their titles for the respective parcels should be cancelled as they are not protected by the law; and that the Plaintiff (Kenya Industrial Estates Limited) who is the 4<sup>th</sup> Respondent herein, should be registered as proprietors of Eldoret Municipality Block 8/592, 594, 595, 596 and 597. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners herein are pursuing interests over Eldoret Municipality Block 8/594, 592 and 595 as shown by among others paragraphs 11, and prayers (a), (b) and (c) of the petition. That those three (3) parcels of land were among the five (5) the Court pronounced itself on in Eldoret ELC No. 71 of 2013 impugning the titles the Petitioners, who were then among the Defendants, held and in favour of the 4<sup>th</sup> Respondent, who was then the Plaintiff. That there is therefore no doubt that the issue of title to Eldoret Municipality Block 8/592, 594 and 595 or their ownership having been decided by the Court in Eldoret ELC No. 71 of 2013, as between the Petitioners herein who were then among the Defendants, and the 4<sup>th</sup> Respondent herein who was then the Plaintiff, the issues raised in the Petition and Notice of Motion filed herein contravenes **Section 7 of the civil Procedure Act** for being res judicata.

(e) That there has been no suggestion that the grounds raised in the Notice of Preliminary Objection dated 12<sup>th</sup> February, 2020 are

not points of law. That in the celebrated case of Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Ltd (1969) E.A. 696 Law J. A opined as follows;

***“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings and which if argued as a preliminary point of law 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.”***

That in the same case Newbold P, stated that;

***“A preliminary objection is in the nature of what used to be a demurrer. 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.”***

That the findings set out above show that the preliminary objection raised by the 4<sup>th</sup> Respondent is undoubtedly a pure point of law of whether this Court has jurisdiction to hear and determine the Petition in view of the decision on the same subject matter, between more or less the same parties by a court of competent jurisdiction in Eldoret ELC No. 71 of 2013 on the 30<sup>th</sup> January, 2015. That none of the facts set out in the said judgment was disputed by any of the parties and the Court is entitled to take them as correct. That what is sought of this Court through the preliminary objection is not an exercise of the Court’s judicial discretion. That upon determining that the issues herein are res-judicata, then this Court is without jurisdiction to make any further determination as per the Court of Appeal decision in case of the owners of the Motor Vessel “Lillian S” Versus Caltex Kenya Limited (1989) KLR.

9. That flowing from the foregoing, the Court finds merit in the 4<sup>th</sup> Respondent’s preliminary objection dated the 12<sup>th</sup> February, 2020 and orders as follows;

(a) That the Petitioners’ Petition and Notice of Motion dated the 29<sup>th</sup> January, 2020 and filed on the 30<sup>th</sup> January, 2020 are hereby struck out with costs for being res judicata and a contravention of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

(b) That in view of **Order (a)** above, the Notice of Motion by the two Intended Petitioners dated the 29<sup>th</sup> February, 2020 has been overtaken by event and no order can issue on it under the circumstances.

Orders accordingly.

**Delivered virtually and signed at Eldoret this 14<sup>th</sup> day of October, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Petitioners: Absent.

Respondents: Absent.

Intended Petitioners: Absent.

Counsel: Mr. Njuguna for Petitioners

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.