



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**IN KITALE**

**LAND CASE NO. 7 OF 2018**

**ELDORET EXPRESS COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**MARTIN NYONGESA.....1<sup>ST</sup> DEFENDANT**

**GEORGE NATEMBEA WELOBA.....2<sup>ND</sup> DEFENDANT**

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

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS.....6<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF COMPANIES.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed this suit on **22/1/2018** seeking for orders of temporary injunction to restrain the defendants/respondents, their agents or servants, members and or any person or body acting for and on their behalf or otherwise howsoever from entering, occupying, trespassing, constructing subdividing, ploughing, fencing, evicting or interfering with the plaintiff's open and quiet occupation and use of its Land Reference Number **5707(6) IR No. 43019** situate at Kiungani or in any way howsoever from dealing adversely with Plaintiff's right to occupy, possess, work and quiet enjoyment of the suitland.

2. A few days thereafter the 3<sup>rd</sup> defendant entered appearance and filed a preliminary objection dated 9/2/2018 averring that:-

**(i) The suit and claims by the plaintiff against the 3<sup>rd</sup> Defendant are *res judicata*, therefore a nullity *ab initio* as a final judgment has been rendered in *Eldoret ELC 87 of 2013 Eldoret Express Company Limited -vs- Tawai Limited & Another*, in a matter between the Plaintiff and the 3<sup>rd</sup> Defendant litigating under the same title and same subject matter which mandatorily precludes any fresh trial or reconsideration of a concluded case;**

**(ii) The suit as against the 3<sup>rd</sup> Defendant offends the mandatory provisions of Sections 6 and 7 of the Civil Procedure Act.**

3. The 2<sup>nd</sup> defendant was also not to be left behind and he filed his own preliminary objection dated 15/3/2018 averring that the suit is *res-judicata* and that the same is an abuse of the court's process.

4. On 28/1/2019, the court gave directions that the preliminary objection dated 9/2/2018 be canvassed by way of written submissions. All the defendants relied on the submissions dated 27/7/2018 and filed in court on 30/7/2018 by Mr. Okwemwa Counsel appearing on behalf of the 3<sup>rd</sup> defendant. The plaintiff filed its submissions on 4/2/2019.

5. The amended plaint filed on **27/9/2018** in this suit has parties appearing as follows:- **Eldoret Express Limited - plaintiff -vs- Martin Nyongesa, George Natembea Weloba, Tawai Limited, Attorney General of Kenya, The Chief Land Registrar, the Director of Surveys and The Registrar of Companies**. In that amended plaint the plaintiff avers that the 3<sup>rd</sup> defendant has two splinter groups and two

certificates of incorporation and that bonafide members and directors are involved in a pending disputes to wit **Kitale ELC No 113 of 2008**; that **Tawai Limited [1974]** was a private company having two shareholders only; that in 2005 the Registrar of Companies fraudulently registered a second company **Tawai [2005]** with totally different directors fully knowing that **Tawai Limited [1974]** existed though it had been placed under receivership and wound-up on 14/5/1995; that **Tawai Limited 2005** is a public company with about 200 shareholders; that **Tawai Limited [1974]** was the registered proprietor of **LR. 5707 - IR No. 18511**; that **Tawai Limited [1974]** sold 124 acres of the suit land to some people in 1983 and the suit land was subdivided into 5 portions; that the remainder was 259 hectares and was assigned the number **LR.5707/R**; that owing to indebtedness to **Brooke Bond Limited** and **Kenya National Capital Corporation Limited** the 259 hectares were sold to **Kaitet Tea Estate [1977] Ltd** and the transfer was registered; that **Kaitet Tea Estate [1977] Ltd** subsequently transferred the suit land to the plaintiff; that it was after this that **Tawai Ltd [2005]** was fraudulent incorporated; that the Chief Land Registrar in collusion with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants falsely advertised loss of title deed to **LR. 5707- IR 18551** while fully aware that the same land had been already subdivided and title for 259 hectares transferred to **Kaitet Tea Estate Limited**. It is alleged that the Chief Land Registrar had knowledge even in the course of that advertisement that the title deed for **LR. 5707- IR 18551** had been surrendered to the Commissioner of Lands upon subdivision. It is also averred that the officials of the 5<sup>th</sup> and 6<sup>th</sup> defendants have continued to subdivide the land despite cancellation of the letter of consent.

6. The plaintiff avers that it is the proprietor of the suit land and that it has been in occupation thereof since 2001 and that it has developed the land, and that a recent invasion of the land by members of the 3<sup>rd</sup> defendant has denied it quiet possession and use of the land thus causing it loss and damage.

7. It is also alleged that there is a pending dispute **Eldoret ELC No. 87 of 2013** between the plaintiff and the 3<sup>rd</sup> defendant and that there is an existing court order issued on 2/10/2017 against the 3<sup>rd</sup> defendant staying the execution of the decree in the said suit pending the results of the appeal.

8. Further the plaintiff avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and their agents are taking advantage of **Eldoret ELC No. 87 of 2013** in **Kitale ELC No. 113 of 2008** to circumvent the said orders claiming that they were not parties in **Eldoret ELC No. 87 of 2013** and that there are no specific orders affecting them. The following prayers are sought in **Kitale ELC No. 7 of 2018**:

(a) An Injunction against the defendants restraining them from interfering them from LR. 5707/6.

(b) An injunction against the Chief land Registrar and The Director of Surveys restraining them from subdivision of or any dealings with LR.5707/6.

(c) A declaration that subdivision of and any dealings in LR. 5707/6 effected after 12/2/2001 by the defendants are illegal and fraudulent and null and void.

(d) A declaration that the process leading to issuance of a provisional certificate of title by the Registrar of Titles and/or the 5<sup>th</sup> defendant on 21/5/2008 was illegal and fraudulent and a nullity.

(e) A cancellation of that provisional certificate of title in (d) above.

(f) A declaration that the revival re: registration or taking over of Tawai Limited [1974] after it was placed in receivership in 1985 is illegal fraudulent and a nullity.

(g) A declaration that the incorporation of Tawai Limited [2005] is illegal fraudulent and a nullity.

(h) Deregistration of Tawai Limited.

(i) Costs of the suit.

9. In **Eldoret Land Case No. 87 of 2013** the court succinctly set out the plaintiff's case at the commencement of the judgment as follows:

#### “PLAINTIFFS CASE

1. The **Eldoret Express Ltd**, (Herein after referred to as the Plaintiff) is a Limited Liability Company duly registered in Kenya under the Companies Act Cap 486 -Laws of Kenya whilst **Tawai Ltd** (hereinafter referred to as defendant) also is a limited liability company duly incorporated in Kenya.

2. The Plaintiff claims to be the registered proprietor of land comprised in title land reference number 5707(6) IR No. 43019 measuring 289.1 situate in Trans Nzoia District in the republic of Kenya. The Plaintiff claims to be in lawful occupation and has been cultivating, ploughing and developing the said property since 2001 when it bought it lawfully from **Kaitet Tea Estate (1977) Ltd** sometimes in December 2007, the defendants, its agents, servants, members and shareholders without a reasonable cause or any colour of right have moved and or trespassed into part of the plaintiffs said suit land and have unlawfully put up and/or constructed illegal houses, structures thereon, thus denying the plaintiff quiet and peaceful enjoyment of the property which they own and are in possession thus causing the plaintiff loss and damage.

3. According to the plaintiff, the defendant has no proprietary interest on the suit land and has never been in possession occupation and/or part thereof since 1984 or at any one time at all hence the reasons for the defendant filing **Kitale High Court Civil Case No. 2002 Of 2006** seeking an eviction order against the Plaintiff from the suit land. He claims that land

reference numbers 5707 and 5707/R are non-existent and that land reference No. 5707/6 does not belong to the defendant. He denies any fraud associated to him and contends that he is the lawfully registered owner of land reference No. 5707/6 since 12.2.2001 and being a bonafide purchaser for value. According to the plaintiff, Land Reference No. 5707/6 was initially registered in the names of Kaitet Tea Estate (1977) Ltd on 17.7.1987 being free and discharged from any liabilities and or encumbrances and the same was endorsed by the Registrar of Titles without any objections, protests from the defendant.

4. The land was duly registered and transferred after lawful survey and a deed plan duly prepared and approved for that purpose. The plaintiff claim that there is no privity of contract between the plaintiff and the defendant and that he did not purchase the suit land from the defendant. He claims to have been in lawful occupation of the suit land and has been working on it since February, 2001 to date and therefore any claim of Mesne Profits does not arise. He further states that claims against Kaitet Tea Estate are time barred pursuant to Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya as the transfer in favour of Kaitet Tea Estate (1977) Ltd was registered on 17.7.1987.

5. The Plaintiff further contends that following the subdivision and survey of original title land Reference No. 5707 in 1987 or thereabouts, the same gave rise to 5707/1, 5707/2, 5707/3, 5707/4, 5707/5 and 5707/6. The defendant has been issued with and taken certificate of titles for land Reference Numbers 5707/1, 5707/2, 5707/3, 5707/5 hence acknowledging the validity and legality of such survey and the defendant should be estopped in law to allege otherwise. The plaintiff avers that the provisional title for Land Reference Number 5707 was issued in a vacuum as there was no such land in existence at the time of issuance of the same. The Plaintiff further avers that the Defendant was incorporated sometime in 2004 or thereabout and not in 1974 as alleged and therefore has no complaint against what happened in 1980.

6. The Plaintiff prays for a declaration that he is the lawful owner of title LR No. 5707/6 (1R 43019) and therefore an order of eviction should issue against the defendant, its agents, servants, employees, members, shareholders and/or any other person whatsoever acting or claiming through or on its behalf from the suit land and demolition of all illegal structures and houses erected thereon.

7. The Plaintiff prays for a permanent order of injunction restraining the defendant by itself, its agents, servants, members, shareholders and/or other person whatsoever acting for or through or on its behalf from trespassing upon the suit land. The plaintiff prays for costs of the suit.”

10. The issue for determination is whether the plaintiff's case is *res judicata*.

11. All the defendants in this suit save the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants appear to be of the view that this suit is *res judicata*. The argument by 3<sup>rd</sup> defendant on this point is that the issues in this suit have already been litigated upon and concluded in **Eldoret ELC No. 87 of 2013 (*Eldoret Express Co. Limited v Tawai Limited & Another (2017) eKLR*)**.

12. It is further averred that in the aforementioned case judgment was delivered in favour of the 3<sup>rd</sup> Defendant and that being dissatisfied with the said judgment, the Plaintiff lodged an appeal being **Eldoret Court of Appeal in Civil Appeal 39 of 2017**.

13. It is argued that the parties are litigating on the same title and that the Plaintiff is seeking similar reliefs, while enjoying *status quo* by consent of parties as the appeal is being dealt with. The 3<sup>rd</sup> Defendant argues that the Plaintiff and “its director” are “*vexatious litigants*” and have employed two firm of advocates “*to try their luck again*” in the present suit. It is the 3<sup>rd</sup> Defendant’s further contention that, litigating a similar matter after being defeated, hoping for a favourable outcome is unacceptable, in bad faith, mischievous and contravenes the principles of public interest that there ought to be an end to **litigation**.

14. To buttress its case, 3<sup>rd</sup> defendant relied on the cases of **Nancy Mwangi T/A Worthlin Marketers -vs- Airtel Networks (K) LTD & 2 others (2014) eKLR** and **Njangu vs Wambugu & Another Nairobi HCCC No. 2340 of 1991(unreported)**, where the court held that:-

**“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 in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*.....”**

15. Reference was also made to the Indian Supreme case of **LAL Chand V. Radha Kishan Air 1977 SC 789** quoted with the approval of the Court of Appeal in **William Koross(Legal personal representative of Elijah C.A Koross) Vs. Hezekiah Kiptoo Komen & 4 others (2013)eKLR** where it was held that:-

**“..... the principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner or later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issues”**.

16. The 3<sup>rd</sup> defendant has concluded on this point by stating that the court cannot allow the Plaintiff to reopen a matter that has already been decided upon by a court of competent jurisdiction.

17. In its submissions, the Plaintiff avers that the suit is not *res-judicata* as the parties in this case are different from the parties in **Eldoret ELC No. 87 of 2013**. It is also contended that in the present suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been sued in their private and individual capacities and not as officials of the 3<sup>rd</sup> Defendant. It is also the plaintiff's position that the prayers sought are totally different from **Eldoret ELC No. 87 of 2013**. The Plaintiff has urged the court, to consider that there are special circumstances in this case that will not allow the

court to uphold this doctrine should the court find that the suit is *res judicata*.

18. As pointed out by all the defendants, the guiding law on the issue of *res judicata* is **Section 7 of the Civil Procedure Act** which provides as follows:

**“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”.**

19. The above provision of the law embodies the common law doctrine of which:-

**(i) prevents multiplicity of suits which would ordinarily clog the courts,**

**(ii) ensures litigation comes to an end;**

20. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

**(i) The matter in issue is identical in both suits;**

**(ii) The parties in the suit are the same;**

**(iii) Sameness of the title/claim;**

**(iv) Concurrence of jurisdiction; and**

**(v) Finality of the previous decision.**

21. The Court in the English case of ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, observed thus:

**“...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 litigations 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.”**

22. Applying the above principles to the suit herein, and having looked at **Eldoret ELC No. 87 of 2013**, I am convinced that the instant suit is *res judicata* as this suit touches on issues that have been litigated upon before a competent court by the same parties. What the plaintiff has done is to apply a facelift to the prayers sought. The plaintiff has also purported to add more parties as defendants. However I note that nothing new which could not have been pleaded in **Eldoret ELC No. 87 of 2013** as against those added parties is contained in this suit.

23. I therefore find that this suit runs afoul of **Section 7 of the Civil Procedure Act**. I therefore strike out this suit with costs to the Defendants.

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of May, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani for 1<sup>st</sup> defendant

Mr. Karani holding brief for Omboto for 2<sup>nd</sup> respondent

N/A for the plaintiff

Mr. Kuria for Attorney General

N/A for the 3<sup>rd</sup> defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**