



Ngeno (Suing as the administrator to the Estate of Simon Kimeli Chumo - Deceased) v Land Registrar, Bomet County & 4 others (Environment and Land Case E018 of 2023) [2024] KEELC 229 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE E018 OF 2023
MC OUNDO, J
JANUARY 25, 2024**

BETWEEN

**BERNARD CHERUIYOT NGENO PLAINTIFF
SUING AS THE ADMINISTRATOR TO THE ESTATE OF SIMON KIMELI
CHUMO - DECEASED**

AND

**THE LAND REGISTRAR BOMET COUNTY 1ST DEFENDANT
THE ATTORNEY GENERAL 2ND DEFENDANT
KIPKIRUI ARAP CHUMO 3RD DEFENDANT
PICOTY CHEPKOECH NGENO 4TH DEFENDANT
RONALD KIBET NGENO 5TH DEFENDANT**

RULING

1. Vide a Plaint dated the 12th June, 2023, Plaintiff herein sought for Judgment to be entered against the Defendants for the orders therein contained.
2. Simultaneously with the Plaint, the applicant also filed a Notice of Motion Application of an equal date pursuant to the provisions of Articles 40, 47, 50, 162 and 165 of *the Constitution*, Section 4 and 13 of the *Environment and Land Court Act*, Section 24, 26 and 80 of the *Land Registration Act*, Section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 Rule 1, 2, and 9, and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law, wherein he had sought for interim orders of injunction restraining the 4th and 5th Defendant/Respondents whether by themselves, or their authorized agents, lessees and or employees from encroaching, fencing or yielding up land parcel Kericho/Kyogong 1036 pending the hearing and determination of the main suit.



3. The Applicant further sought for orders that the 1st Defendant be ordered to maintain status quo in registry entries to land parcel Kericho/Kyongong 1036 and Kericho/Kyongong 994, pending the hearing and determination of the main suit and that the OCS Bomet Police Station to effect the said orders. Finally he sought that the cost of the application be provided for.
4. In response, the 4th and the 5th Respondents filed a Preliminary Objection dated the 21st July, 2023 contending that the Applicant's suit was incompetent as it offended the mandatory provisions of Section 7 of the *Civil Procedure Act*. That the issues raised in the Plaintiff had been heard and determined vide Kericho CMC ELC No. 41 of 2018. That the current suit was thus an abuse of the court process and should be dismissed with costs.
5. On the 19th October 2023, the Applicant, 1st and 2nd Respondents were granted leave to file their respective responses to the said Preliminary Objection wherein on which date, parties also took directions to have the Preliminary Objection disposed of in the first instance through written submissions since it sought to oust the jurisdiction of the court.
6. The Applicant, vide his Replying Affidavit dated 25th July, 2023 and in response to the Preliminary Objection deponed that the instant suit was sui generis as no other competent court had adjudicated upon the issues in dispute with regards to land parcel numbers Kericho/Kyongong/1036 and Kericho/Kyongong/994, both registered in the name of the Applicant's father, one Simon Kemeli Chumo (deceased) and that there had been no other suit pending or alive between the parties herein.
7. The Applicant acknowledged that there was suit number Kericho CMCC No. 41 of 2018 wherein the parties were *Pigotty Chepngeno & Ronald Kibet Ngeno vs. Esther Chumo, Philemon Ngeno & Benard Ngeno*, but deponed that the said suit was premised on completely different prayers and parcels of lands, namely Kericho/Kyongong/1531 and Kericho/Kyongong/1478. That the reliefs sought and the subject matter in the said suit were thus parallel to the instant suit and the judgement entered therein said as much.
8. He deponed that the parties in the previous suit were completely different from the ones in the instant suit and further that his father passed away in October, 2015 hence any claim over his property after his death ought to have been against the administrators of the estate, which estate had never been a party to any suit on account of land parcels Kericho/Kyongong/1036 and Kericho/Kyongong/994.
9. He also deponed that the instant Preliminary Objection was fatally defective for failing to meet the threshold of being a pure point of law since for the court to ascertain whether the instant suit was *res judicata* or not, it would have to take evidence on the contents of Kericho CMCC No. 41 of 2018; *Pigotty Chepngeno & Ronald Kibet Ngeno vs. Esther Chumo, Philemon Ngeno & Benard Ngeno* which act would be in the realm of factual issues that would stain the purity of matters of law that Preliminary Objections are premised upon. He placed reliance on the decided case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1968) EA 696 on what suffices as the threshold for the entertainment of a Preliminary Objection.
10. Parties complied wherein the 4th and 5th Defendant filed their written submissions dated 3rd August 2023 on the 7th August 2023 in support of their Preliminary Objection wherein they framed two issue for determination to wit;
 - i. Whether the suit is *res judicata*
 - ii. Who should bear the costs of the preliminary objection.



11. On the first issue for determination as to whether the suit was *res judicata*, the 4th and the 5th Defendants/Respondents submitted that they had been the 1st and the 2nd Plaintiffs respectively in Kericho CMCC No. 41 of 2018 which suit involved land parcels No. Kericho/Kyongong/1531 and Kericho/Kyongong/1478 which parcels of land are again mentioned in prayer (b) in the instant suit. That the matter having been determined, judgment delivered and a decree issued wherein execution had already commenced, the instant suit was *res judicata*.
12. Reliance was placed on the Provisions of Section 7 of the *Civil Procedure Act* as well as on the decision in the decided case in Eldoret High Court, E and L Case Number 19 of 2019, *Diocese of Eldoret Trustees (Registered) versus Attorney General and Land Registrar Uasin Gishu County* (sic) to submit that although issues in relation to parcels of land registered as Kericho/Kyongong/1531 and Kericho/Kyongong/1478 ought not to feature in the current suit, yet the Plaintiff/Applicant sought that the Land Registrar be compelled to recall and cancel title deeds in respect to the said parcels and that the 4th and 5th Defendants/Respondents be restrained from dealing in them in any way.
13. That the Plaintiff proceeded to mention Kericho/Kyongong/1036 and Kericho/Kyongong/1345 despite the County Surveyor's report dated 26th November, 2018 having explained that they no longer existed following the legal and procedural sub-divisions. That the Plaintiff had only added more parties in a desperate and futile attempt to conceal the fact that the subject matter in the instant suit was the same as that in Kericho CMCC No. 41 of 2018 which matter had been fully settled.
14. That pursuant to a court's order in Kericho CMCC No. 41 of 2018, the county surveyor Bomet County had visited the suit properties being Kericho/Kyongong/1478 and Kericho/Kyongong/1531 wherein vide a report dated 26th November, 2018, the county surveyor submitted their findings on land parcel numbers Kericho/Kyongong/1036, 1345, 1478 and 1531 which report aided the court in making its determination in the judgment dated 7th November, 2021 which determination has not been appealed against or vacated.
15. That the Applicant's suit was thus rendered moot by virtue of the principle of *res judicata*. They placed reliance in the decided case in Mombasa Court of Appeal, Civil Appeal No. 50 of 1989, *Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* (sic) to submit that jurisdiction was everything and should be raised at the earliest opportunity.
16. Further reliance was placed on the decided case in Nairobi Court of Appeal, Civil Appeal No. 244 of 2010, *Phoenix of EA Assurance Company Limited versus S. M. Thiga t/a Newspaper services* (sic) where it had been held that a suit filed devoid of jurisdiction was dead on arrival and could not be remedied and that without jurisdiction, the court could not confer jurisdiction to itself. They thus submitted that the instant suit ought to fail in its entirety.
17. On the second issue for determination as to who should bear the costs of the Preliminary Objection, the 4th and the 5th Defendants/Respondents submitted that costs should follow the cause hence they should be awarded the costs of the instant Application. Reliance was placed on the Provisions of 27(1) of the *Civil Procedure Act* and the decided case of the *Diocese of Eldoret Trustees (Registered)* (*supra*).
18. In opposition of the Preliminary Objection, the Plaintiff/Applicant filed their submissions dated the 1st November 2023 on an equal date giving a brief history on the matter in issue and stating that the reliefs sought in the previous suit were different from the reliefs sought in the current suit in that in the former suit the same be involved land parcels Kericho/Kyongong/1531 and 1478 while the current suit was in relation to land parcels Kericho/Kyongong/1036 and 994 registered the name of Simeon Kimeli Chumo now deceased and was the estate was yet to be subjected to succession proceedings.



19. That the original documents in his possession in relation to parcels of land Kericho/Kyongong/1036 and 994 had not been nullified (as the lower court had no jurisdiction to nullify or revoke titles on to correct entries made to the land records in the registry) in the previous suit. That the said titles therefore needed to be protected and preserved hence the institution of the suit.
20. That all the pieces of land had not been amalgamated as a deceased person could not sanction such amalgamation or sub-division of his piece of land which was therefore the questions he sought to be answered through the institution of the current suit because the said question had not been determined in the previous suit being Kericho CMCC No. 41 of 2018 as alluded to by the 4th and 5th Defendants.
21. Further that the substratum and parties in the current suit were different from the parties in the previous suit. The estate of the deceased Simeon Kimeli Chumo had not been involved in the previous suit, and the same case applied to the current suit which did not involve Esther Chumo, Philemon Ngeno and Bernard Ngeno in person. The applicant placed reliance on the provisions of Section 7 of the *Civil Procedure Act*, Section 79 and 80(1) of the *Land Registration Act* in support of his submissions.
22. That the filing of the current suit was to rectify land parcels Kericho/Kyongong/1036 and 994 which was the preserve of the function of the court and the Land Registrar. That any rectification of the said registrars by way of nullification or revoking was had happened without jurisdiction and should be voided by this court.
23. The Applicant further submitted that the Preliminary Objection was fatally defective as it was not based on a pure point of law as was held in the cases of *Mukisa Biscuit Manufacturing Co. Ltd (supra)* and the decision by the Supreme Court in *Independent Electoral & Boundaries Commission vs. Jane Cloperenger & 2 Others* Civil Application No. 36 of 2014. That in this regard therefore the preliminary objection fell short of the requirements as it was marred with factual imprints which would require the court to first ascertain before delving into the concerned legal provisions. That the Preliminary Objection should therefore be dismissed with costs.

Determination.

24. Upon consideration of the Plaintiff Applicant's Application and the Preliminary Objection raised by the 4th and 5th Respondents herewith, I am obliged to revisit the all-important case decided 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 thus:-

“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.”

In the same case Sir Charles Newbold, P. stated:

“.....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. The improper raising of preliminary objections does nothing but



unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

25. From the submissions and pleadings filed by the 4th and 5th Respondents in response to the Applicant’s Application, it is clear that they are challenging the court’s jurisdiction over the Applicant’s suit in a Plaint dated the 12th June 2023 to the effect that the same was *res judicata* by virtue of the proceedings in the Kericho CMC ELC No. 41 of 2018.
26. 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.”
27. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;
 - i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
 - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
28. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other
29. The Court of Appeal in the case of [James Njuguna Chui v John Njogu Kimani](#) [2017] eKLR held that

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.”
30. I have carefully considered the prayers sought in the current Plaintiff’s suit wherein he has sought that for the following orders:
 - i. The purported sub-division and/or amalgamation and subsequent transfer of parcel No. Kericho/Kyongong/1036 into a subsequent offshoot(s) be declared null and void and the original title be preserved/retained till a proper succession cause is issued.



- ii. The land Registrar be compelled to recall and cancel title deeds in respect to land parcels Kericho/Kyongong/1531 and Kericho/Kyongong/1478 and the Defendants be restrained/ stopped from dealing in any way with the suit lands.
 - iii. Eviction order against the 3rd, 4th and 5th Defendants from land parcel land parcels Kericho/ Kyongong/1036 and status quo be maintained thereof till the issue of proper succession proceedings in respect of the estate of the late Simon Kimeli Chumo is determined.
 - iv. A Declaration be and is hereby issued annulling the land title certificate to Land Parcel Kericho/Kyongong/1345 and its resulting offshoots, if any.
 - v. The land Registrar be compelled to regularize title deeds in respect to land parcel Kericho/ Kyongong/994 and its resulting offshoots as to protect the interest of the estate of the late Simon Kimeli Chumo.
 - vi. The 1st Defendant be ordered to rectify registry entries made to land parcel Kericho/ Kyongong/1036 to effectuate prayer (i) above.
 - vii. An Order of permanent injunction be issued against the 3rd -5th Defendants with respect to land parcel Kericho/Kyongong/1036.
 - viii. Costs of the suit.
31. It is not in dispute that previously the 4th and 5th Respondents herein had filed suit against the Kipkirui A Chumo, Philemon Ngeno, Esther Chumo and Bernard Ngeno (Applicant herein) in Kericho CMCC No. 41 of 2018 wherein they had sought for the following orders;
- i. A declaration that the actions of the 2nd, 3rd and 4th Defendants amounts to violation of the right to property in land parcel numbers Kericho/Kyongong/1831 and Kericho/Kyongong/1478 and the 1st and 2nd Plaintiffs' are entitled to damages thereof respectively.
 - ii. An order of Permanent injunction restraining the Defendants from interfering with the Plaintiffs' quiet possession and trespassing on land registered as Kericho/Kyongong/1531 and Kericho/Kyongong/1478.
 - iii. To vacate and/or handover vacant possession of Kericho/Kyongong/1531 and Kericho/ Kyongong/1478 to the Picoty Chepkoech Ngeno (1st Plaintiff) and Ng'eno Ronald Kibet (2nd Plaintiff) respectively with immediate effect.
 - iv. Mesne profits from the date of expiry of the date of occupation of the parcel of land till possession is delivered up to the Plaintiffs;
 - v. General damages for violation of the Plaintiffs' rights to quiet possession;
 - vi. In the alternative to prayers i-v above, this Honorable court be pleased to order a refund for amount paid as purchase price being Kenya Shillings Two Million sixty thousand shillings (Kshs. 2,060,000/=) together with 50% interest per the Agreement to the 1st Plaintiff by the 1st Defendant.
 - vii. In the alternative to prayers a-e above, this Honorable court be pleased to order a refund for amount paid as purchase price being Kenya Shillings one Million one hundred thousand shillings (Kshs, 1,100,000.00/ =) together with 50% interest per the Agreement to the 2nd Plaintiff by the 1st Defendant.



- viii. Interest on (vi) and (vii) above.
 - ix. General damages for breach of contract by the 1st Defendant
 - x. Costs of this suit; and
 - xi. Any other relief the Court deems fit to grant.
32. It is also not in dispute that the matter was heard and determined wherein the trial court had delivered its verdict via a judgment dated the 7th September 2021 in favor of the Plaintiffs wherein it had been ordered that the Defendant (Applicant herein) and his co-defendants to vacate from parcels No. Kericho/Kyongong/1531 and 1478 within 45 days. There had also been issued a permanent injunction against them by themselves, their agents and servants restraining them from dealing whatsoever with the said parcels of land. An award for general damages of trespass amounting to Ksh. 100,000/= had also been issued to each of the Plaintiffs. Pursuant to the delivery of the court's judgment, the order of the court was extracted and a Decree dated 14th July 2023 issued wherein execution had commenced. The said decision had neither been Appealed against nor set aside
33. The test in determining whether a matter is *res judicata* as stated was summarized in [Bernard Mugo Ndegwa v James Nderitu Githee 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.
34. I am reminded that in an application based on the principle of *res judicata*, the same being a point of law, it must not be blurred with factual details liable to be contested and or proved through the process of evidence. On the first issue as to whether parties in the current suit were the same as parties in the previous suit, I find that the Plaintiff/Applicant herein was the 4th Defendant in the previous suit while the 3rd, 4th and 5th Defendants/ Respondents in the current suit were the 1st Defendant, 1st and 2nd Plaintiffs respectively in the previous suit.
35. As to whether there was sameness in the title/claim, I find that in Kericho CMCC No. 41 of 2018 the Plaintiffs therein had been found to be the proprietors of land parcels No. Kericho/Kyongong/1531 and 1478 respectively, which parcels of land had comprised land parcel No. Kericho/Kyongong/1036 the Estate of the deceased Simon Kimeli Arap Chumo.
36. The Plaintiff/Applicant in the present case seeks for an orders that the purported sub-division and/ or amalgamation and subsequent transfer of parcel No. Kericho/Kyongong/1036 into a subsequent offshoot(s) be declared null and void and further that the land Registrar be compelled to recall and cancel title deeds in respect to land parcels Kericho/Kyongong/1531 and Kericho/Kyongong/1478 and the Defendants be restrained/stopped from dealing in any way with the suit lands. Clearly and without going into the merits of the case, I find that there is sameness in the subject matter.
37. On the third issue as to whether there was concurrence of jurisdiction, I find that the orders issued in Kericho CMCC No. 41 of 2018 were issued by the Chief Magistrate's Court which had jurisdiction to grant the relief claimed and whose determination has never been appealed against.



38. On the last issue as to whether the orders issued in the previous court were of a nature of finality, the answer is affirmative as herein above explained. There having been a Judgment from a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.
39. It was held in the case of *E.T v Attorney General & Another* [2012] eKLR 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 v 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 face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”
40. The upshot of the foregoing is that the Preliminary Objection dated the 21st July, 2023 herein succeeds while the Applicant’s application herein lacks merit this matter having been conclusively decided vide the Judgment of 7th September 2021. I find that the current suit herein filed by the Plaintiff is therefore *res judicata* Kericho CMCC No. 41 of 2018 and an abuse of the court process. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to. The Plaintiff/Applicant’s application dated the the 12th June, 2023, as well as his suit of an equal date are herein dismissed with costs.

DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

