



**REPUBLIC OF KENYA**

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

**E&L NO. 632 OF 2012**

**Formerly HCC 105 of 2010**

**KENYA RAILWAYS.....PLAINTIFF**

**VS**

**NAMUSU ENTERPRISES LTD & 3 OTHERS.....DEFENDANT**

***(Res judicata; previous suit filed by plaintiff but dismissed on a technicality; subsequent suit filed seeking similar orders; application to have subsequent suit dismissed as being res judicata; whether such suit is res judicata; Section 7 Civil Procedure Act; whether previous suit was heard and determined; Since previous suit was never heard and determined, latter suit is not res judicata).***

**RULING**

1. The application before me is the motion dated 23rd July 2013 , filed by the 2nd and 3rd defendants. It is an application brought under Sections 1A, 1B, 3, 3A, 7, and 80 of the Civil Procedure Act, CAP 21, and Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. It seeks the following orders :-

*1. That the plaintiff's suit be dismissed for being res judicata.*

*2. The interim orders of inhibition issued by the Honourable Court on 2nd November 2010 be discharged varied and or vacated.*

*3. The outcome of this application to apply to Eldoret HCCC No. 162 of 2010 between Kenya Railways Corporation vs Kuinet Hardware & 5 others as far as Ndalaview Service Station, the 4th defendant is concerned.*

2. Initially, this application had been filed without the support of an affidavit and the plaintiff had filed Grounds of Opposition to oppose the motion. When the matter first came before me, I inquired why no affidavit had been filed in support of the motion, and Mr. Ngigi for the applicants, pointed out that an application brought under Order 2 Rule 15 does not require the support of an affidavit. I looked up at the provision, which states as much, but I was of the view that I needed some facts to enable me properly appreciate some facts which could only be done through the filing of an affidavit. I therefore directed counsel for the applicants to file an affidavit in support and granted leave to the plaintiff/respondent to file its own affidavit in opposition to the application. A supporting affidavit by the applicants was eventually filed and the plaintiff similarly filed a replying affidavit.

3. Before I go too far, I think I need to pause and give a little background to this suit.

4. The plaintiff, Kenya Railways Corporation (hereinafter Kenya Railways or simply Railways), is a corporation established vide the Kenya Railways Corporation Act (CAP 397) Laws of Kenya. They commenced this suit on 11th August 2010. In the suit, they have averred that the land parcel Eldoret Municipality Block 3/58 (the suit land) was vested upon Kenya Railways vide the Kenya Railways Corporation (Vesting Order) of 1986. That Order which was gazetted on 22 February 1986 through Legal Notice No. 24 of the same date is said to have vested land that was previously owned by the defunct East Africa Railways, to the Kenya Railways Corporation. Kenya Railways claims that the suit land was part of the lands vested upon it by the Vesting Order of 1986. They have pleaded that on the land, there stands a railway club, railways staff quarters, a football pitch and badminton courts. It has been pleaded that the Commissioner of Lands (3rd defendant), fraudulently and illegally allocated the suit land to the 1st defendant. Several particulars of fraud and illegality are pleaded, which include the averments that the Commissioner of Lands could not allocate the suit land since it was not government land; that the said allocation was done without the consent of the plaintiff and that the plaintiff was not paid monetary compensation for the acquisition of the said land. It is averred that the Commissioner of Lands purported to issue a lease to the 1st defendant who later on 3rd September 1997 transferred it to the 2nd defendant. The plaintiff's prayers are for the declaration that the allocation of the lease to the 1st defendant and the subsequent transfer to the 2nd defendant was illegal, null and void. They also want a declaration that they are the rightful owners of the suit land and have further asked for a cancellation of the lease over the suit land and an order for rectification of the register of the suit land. They also want a permanent injunction to restrain the defendants from interfering with the suit land. In the plaint, they have pleaded that there is no pending suit between the parties apart from a suit described as Kitale HCCC No. 76 of 2006 which is stated to have been dismissed on 21st May 2008. It is also pleaded that prior to filing this suit, the plaintiff was granted authority on 20th July 2010, to file suit out of the statutory time.

5. The 2nd and 3rd defendants filed a statement of defence, through the law firm of M/s Ngigi Mbugua & Company Advocates. They denied all the allegations in the plaint, and averred that the suit land came into being in the year 1997, when the register of the same was opened by the Government of Kenya, with the Government as Lessor, and the 1st defendant, among other entities, as Lessees. It is further averred that the 2nd defendant acquired the suit land for valuable consideration on 3 September 1997. The defendant also contended that on 4th April 2002, the plaintiff placed a caution in the register of the suit land, but did not move the court to determine any of their rights until the year 2006 when they filed the suit Eldoret HCCC No. 76 of 2006 which was dismissed on 21 May 2008 with costs. The 2nd and 3rd defendants have averred that the land was acquired procedurally and above board. They have refuted the particulars of fraud. It was further pleaded in the defence that the suit Eldoret HCCC No. 76 of 2008 is a previous suit, and therefore this suit offends the provisions of Section 7 of the Civil Procedure Act. It also asserted in the statement of defence that this suit is statutory barred pursuant to the provisions of the Limitation of Actions Act, the Government Proceedings Act, the Government Land Act, and the Public Authorities Limitations Act.

6. An application asking for orders of inhibition was filed on 1st November 2010 by the plaintiff. An order ex-parte was granted, which lapsed, and which the parties themselves vide a consent filed on 17 November 2010, agreed to extend to the 19th January 2011. Nothing happened on that day, and I have not seen any record that the plaintiff pursued that application any further. At some point the plaintiff filed an application for leave to amend the plaint to include some parties, but again, that application was never pursued. It is then that this application was filed by the 1st and 2nd defendants.

7. The State Law Office for the 3rd and 4th defendants, have never filed any pleadings and never made a reply to the subject application. Mr. Wabwire, and Mr. Ngumbi, of the said office, have however made appearances in court on behalf of the 3rd and 4th defendants.

8. As I stated earlier, the 1st and 2nd plaintiffs want this suit dismissed for the reason that it is *res judicata*. In the grounds in support of the application, they have alluded to the suit Eldoret HCCC No. 76 of 2008 as being a former suit which settled the matter between the litigants. There is also a ground that the claims herein are statute barred and no amount of amendment can revive them. The supporting affidavit has been sworn by Japheth Kipkemboi Magut, who has described himself as a director of the 1st defendant. In the affidavit, it is contended that through a plaint filed on 4th July 2006, registered as

Eldoret HCCC No. 7 of 2006, the plaintiff instituted suit against the same defendants herein. Mr. Magut has deponed that they lodged an application in the former suit, and the court made a ruling on 21 May 2008 which "*settled and conclusively determined all issues in controversy between the plaintiffs (sic) and defendants.*" It is further deponed that no appeal or review against the said order was ever filed and instead the plaintiff has brought a fresh action over the same subject matter. He has averred that this matter is directly and substantially similar to the former suit and therefore offends the provisions of Section 7 of the Civil Procedure Act. It is also deponed that the suit herein is statute barred.

9. Kenya Railways, as respondents, filed a replying affidavit through its counsel Mr. Tom Mutei. He reiterated the grounds of opposition earlier filed and annexed the pleadings in the case of *Kenya Railways vs Kuinet Hardware & 5 Others*.

10. The counsels did not wish to make any submissions either in support or in opposition to the application but relied on what they had filed and to several authorities.

11. I have looked at the pleadings, the application herein, the material in support and in opposition filed by the parties, and the authorities. I have also seen the plaint in Eldoret HCCC No. 76 of 2006 which was annexed in the supporting affidavit of Mr. Magut.

12. Although in the plaint, the plaintiff has alluded to the suit Kitale HCCC No. 76 of 2006, as being the former suit, there is no question that the correct previous suit is Eldoret HCCC No. 76 of 2006. I have seen the plaint in the said suit. There are three plaintiffs namely Kenya Railways, John Bosco Musyimi T/A Muskat Commercial Agencies, and Benjamin Tireito T/A Oetgei Enterprises. The defendants are four, and they are the same four defendants in this matter. The subject matter in that suit is Eldoret Municipality Block 3/58, which is the same subject matter in this suit. In that suit, Kenya Railways contended that it had sold part of the suit land to the 2nd and 3rd plaintiffs at a consideration but that they were later surprised to discover that what had been sold formed part of the land parcel Eldoret Municipality Block 3/58. Just as in this suit, it is contended that the allocation of the suit land to the 1st defendant and latter transfer to the 2nd defendant was fraudulent. The same particulars of fraud are pleaded. The same prayers in that suit are also the same prayers herein.

13. It appears as though the defendants in the former suit, raised various preliminary objections. The 1st and 2nd defendants inter alia contended that the suit violates the provisions of the Law of Contract Act, CAP 23, Laws of Kenya. On their part, the 3rd and 4th defendants, in their preliminary objection, inter alia contended that the suit could not be maintained as the mandatory notices under the Government Proceedings Act, had not been issued, and that the plaintiff's suit is time barred by dint of the provisions of Section 3 of the Public Authorities Act, CAP 39, Laws of Kenya and Section 136 (2) of the Government Land Act, CAP 280 (now repealed by the Land Registration Act, 2012). The preliminary objections of the 1st and 2nd defendants was dismissed. Ibrahim J (as he then was), however held that there was non-compliance with the provisions of Section 136 (2) of the Government Lands Act, (which requires a notice prior to commencement of suit), and on that ground, the suit could not stand, as no notice had ever been issued. Ibrahim J, was also of the view that since the suit against the 3rd and 4th defendants could not stand, then the entire suit had no legs to stand on. He exercised his discretion and dismissed the entire suit with costs vide a ruling delivered on 21st May 2008.

14. It is now the contention of the 1st and 2nd defendants that the said ruling settled the issue between the parties, and that no new suit may be brought under the same cause of action. Is that the case ?

15. Section 7 of the Civil Procedure Act, provides as follows :-

#### *S. 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.*

*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.*

16. It will be seen from Section 7 above, that for a matter to be declared *res judicata*, at least four ingredients must be met. These are as follows :-

- (a) There must have been a former suit.
- (b) The matter in the subsequent suit must have been directly and substantially in issue in the former suit.
- (c) The former suit must have been between the same parties or between parties under whom they or any of them claim, litigating under the same title.
- (d) The issue in the subsequent suit must have been heard and finally decided.

The explanations 1 to 6 above, elaborate on the above four issues.

17. I have no doubt in my mind that there was a former suit. That former suit was Eldoret HCCC No. 76 of 2006. I am also not in doubt that the matter in this suit was directly and substantially in issue in the former suit. The subject matter is the same and the claim is the same. The plaintiff, alongside two others, claimed that the suit land was illegally and fraudulently allocated to the 1st defendant and that a lease was issued illegally. That is exactly what the plaintiff wants in this suit, although in this matter she is a sole plaintiff. Though the parties are not exactly the same, as there is now only one plaintiff as opposed to three in the previous suit, the third ingredient in my view is also met, since in the former suit, Kenya Railways was still plaintiff and the same parties named herein were defendants. I am not however convinced that the fourth ingredient has been met, that is, that the issue in the former suit must have been heard and finally decided.

18. The former suit was actually never heard. The issues therein were never decided. The court never got an opportunity to determine whether or not the title issued to the 1st and later to the 2nd defendant, were properly issued. It never got to determine whether Kenya Railways is entitled to claim the land. What it decided in the ruling of 21st May 2008, was that the suit could not stand because the required statutory notice under Section 136 (2) of the Government Lands Act was never issued. It cannot therefore be said that the issues in the former suit were actually determined. They never were.

19. Mr. Ngigi for the applicants referred me to the authorities of ***Kamunye vs Pioneer Assurance Ltd (1971) EA 263, Kiprono arap Biegon vs John arap Bii & Another (Kericho HCCC No. 38 of 2003,***

(2005 eKLR) , **Kamorero River Farm Ltd vs National Bank of Kenya Ltd (2002) 2KLR 207**), **Delphis Bank Ltd vs Samuel O. Oballa (Eldoret HCCC No. 277 of 1997)** and the book *Judicial Hints on Civil Procedure* by Retired Justice Kuloba.

20. In the **Kamunye vs Pioneer Assurance** case, the issue in the suit had arisen in a former suit. The former suit had proceeded for full hearing and judgment delivered on merits. The court held that the latter suit was therefore barred. This was the same situation in the **Kiprono arap Biegon vs John arap Bii** case. There was a former suit that had been heard and determined on merits by the Kericho Chief Magistrate's Court. The Kericho High Court, (Kamaru J) held that the latter suit filed in the High Court was therefore *res judicata*. The case of **Kamorero River Farm vs National Bank** does not support the applicants either. In that case, the plaintiff had filed suit against the defendant seeking to stop the exercise by the defendant of its statutory power of sale. It was contended that the requisite statutory notices were never issued. The parties by consent agreed to settle the interlocutory application for injunction with liberty to the defendant to issue fresh statutory notices. These were duly issued. The bank then moved to sell the properties and the plaintiff again sought a stay of the intended sale. The bank raised the issue that the matter was *res judicata*. The court (Ringera J) held that the matter was not *res judicata* as the issuance of the latter notices constituted new facts within which to found a new application. The issue in the latter application was the latter statutory notices which were not in issue in the first application. That authority does not assist the applicant in any way. In the case of **Delphis Bank vs Samuel Oballa**, a second application similar to that which had earlier been heard and determined was brought. The court upheld a preliminary objection that the application was *res judicata*. Nowhere in the above authorities was it ever held that a matter later brought, where the previous suit had been dismissed on technicality without the issues having been determined, is *res judicata*.

21. Mr. Mutei on the other hand relied on the case of **Francis Kariuki Kinja vs Firoze Construction Company Ltd (2004)eKLR**. In that case, the plaintiff brought a suit for compensation arising out of injuries sustained in the workplace. That suit was "struck out", although it seems as if it had proceeded for hearing. The worker filed a second suit. The court (Musinga J as he then was) held that the latter suit was not *res judicata*. I mean no disrespect, but that ruling is rather brief and I have been unable to grasp the proper reasoning behind the decision and I have therefore not been persuaded by it.

22. My own assessment, is that the present suit is not *res judicata*, as the matters in issue were never heard and decided. I am buttressed in coming to this conclusion, by the decision in the case of **Keharchand vs Jan Mohamed (1919) 2 EACA 64**. In that case, a suit had been filed under summary procedure on two promissory notes. The limitation period under that procedure was six months. The suit was dismissed as being out of time. A latter suit filed through ordinary procedure was then brought. An objection was raised that the suit was *res judicata*. The High Court held that the suit was *res judicata* and the plaintiff appealed. On appeal, it was held that the latter suit was not *res judicata*. Although the causes of action were one and the same, i.e, the liability of the defendant under the promissory notes, the issue was never heard and finally decided in the first suit. Lyall Grant J put the matter thus at page 68 :-

*"The broad rule appears to be that the plaintiff can bring a second action unless he has in the first action had an opportunity of being heard on the merits. Here the plaintiff has not had the opportunity of being heard on the merits, the case having been dismissed on a preliminary point."*

23. It is the same situation in this matter. Although the cause of action in the previous suit is the same as this one, the issues in the former suit were never heard and determined.

24. I therefore dismiss prayer 1 of the application as I am not convinced that this suit is *res judicata*.

25. Prayer 2 of the application asks that the orders of inhibition, issued herein be varied or vacated. I think, the applicants made that prayer in anticipation that I will allow prayer 1, which I have not. That said, as far as I am concerned, the interim orders lapsed by effluxion of time, and therefore I need not make any ruling varying or vacating them, as to me, the orders no longer exist and there is nothing to vary or vacate.

26. Prayer 3 of the application seeks to have the orders herein apply to the suit Eldoret HCCC No. 162 of 2010. I may be wrong, but again, I think the applicants asked for this prayer in the hope that I will allow prayer 1, which I have not. Be as it may, I have looked at the pleadings in that suit. They relate to the land parcel Eldoret Municipality Block 3/ 56. That is not the subject matter in this suit, the subject matter herein is Eldoret Municipality Block 3/58. Save that Kenya Railways is also the plaintiff in that suit, the parties are different. It has also not been claimed that there was a previous suit touching on the land parcel Eldoret Municipality Block 3/56. Maybe the issues regarding how title was received are the same issues, but the subject matter is different, and that suit and this one are completely distinct. There is no way that I can have the orders herein apply to that suit as well. Moreover, the parties in that suit have not been involved in this application. They also deserve a hearing and also deserve an input before I can issue any order to apply to that suit. Prayer 3 of this application therefore fails.

27. I think I have dealt with all the prayers as drawn and sought in this application. But I think, the applicants also made an attempt to have this suit dismissed because it was filed out of time. This was never contained in the prayers noted on the face of the application. It was in my view it was neaked in, with the grounds, and in a small reference in the supporting affidavit. Neither was any material placed to support this contention. I think its placement prejudices the plaintiff/respondent who actually has barely replied to it. In my view, if the applicants want to raise an issue that this suit ought to be dismissed, or struck out, because it has been filed out of time, they ought to file the requisite application for consideration. I think it would be inappropriate for me to consider that issue, in this application, as it was neither in the prayers, nor was it ably amplified and ample opportunity given to the plaintiff/respondent to reply.

28. The upshot of the foregoing is that this application must fail. It is hereby dismissed with costs to the plaintiff. For the avoidance of doubt I have not made any decision on whether or not this suit is statute barred.

29. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. A.M. Ngigi for the 1st & 2nd defendants/applicants*

*Mr. T. Mutei for the plaintiff/respondent*

*N/A for the state Law office for the 3rd & 4th defendants*