Cherwon v Kisekem Limited & 3 others (Civil Appeal 240 of 2019) [2024] KECA 482 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 482 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 240 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

MAY 9, 2024

BETWEEN

MICHAEL KIPKERING CHERWON ..... APPELLANT

AND

KISEKEM LIMITED ..... 1ST RESPONDENT

THE COMMISSIONER OF LANDS ..... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Eldoret (A. Ombwayo, J.) dated 18th July, 2019inELC Cause No. 275 of 2012)

JUDGMENT

1. The 1st respondent in a plaint dated 12th October 2006 sued the appellant and the 2nd – 4th respondents. The 1st respondent claimed that they were the registered lessee of land parcel number Eldoret Municipality Block 6/231, hereinafter, "the suit land" for 99 years starting from 1st January 1984. However, sometime in the year 2004, they realized that the appellant was laying claim to a portion of the suit land.

2. The 1st respondent prayed for orders that are paraphrased as follows:

    a. A declaration that the 1st respondent is the proprietor, as the lessee of the suit land and is entitled to immediate possession and use to the exclusion of the appellant or anybody else.

b. A declaration that the lease issued and the certificate extracted therefrom in favour of the appellant over Block 6/306 was obtained by mistake and is therefore null and void ab initio and confers no title to the appellant.

c. A declaration that the appellant is a trespasser on the suit land.

d. An order directing the 2nd respondent to revoke the lease issued in favour of the appellant.

e. An order directing the 3rd respondent to cancel the registration of the appellant as a proprietor of Block 6/306.

f. A permanent injunction restraining the appellant or his agents from occupying or remaining in occupation, possession, or in any other way trespassing on the suit land.

g. General damages for trespass.

h. Costs of the suit.

3. The 1st respondent's case was that they made inquiries from the Eldoret Lands office where they learnt that the appellant had been registered as the lessee of Eldoret Municipality Block 6/306, hereinafter, "Block 6/306" for 99 years from 1st October 1991. They claimed that this particular parcel had been unlawfully created over a portion of the suit land.

4. In a letter dated 30th March 2006, the District Lands Officer, Uasin Gishu District acknowledged that Block 6/306 had been created erroneously over the suit land. The 1st respondent claimed that the creation of Block 6/306 and the registration of the appellant as a lessee thereto was done by mistake and was therefore null and void.

5. The 1st respondent cited the mistake of the appellant as having applied for the allocation of Block 6/306 when he ought to have known that the same was not available and that a lease could not have been registered over an already existing parcel. They faulted the appellant for failing to exercise due diligence in this matter.

6. The 1st respondent cited the mistakes of the 2nd respondent as; purporting to issue the appellant with a letter of allotment of land already allotted in favour of the 1st respondent, accepting premiums from the appellant, executing a lease in favour of the appellant over land that was already leased, authorizing the 3rd respondent to register a lease in favour of the appellant when there existed a lease over the suit land, failing to know that Block 6/306 was created over the suit land, and ignoring the fact that the suit land was already registered in favour of the 1st respondent.

7. The 1st respondent cited the mistakes of the 3rd respondent as purporting to register a new lease over Block 6/306 when the same was superimposed on the suit land with a lease registered in favour of the 1st respondent. These actions prompted the appellant to trespass on the suit land.

8. The 1st respondent stated that these mistakes denied them their right to possess and use the suit land, and as a result, they have suffered loss and damage.

9. According to PW1, the director of the 1st respondent, the company was registered on 8th April 1983 as per the certificate of incorporation produced. He informed the court that the 1st respondent was allotted un-surveyed plot numbers 4, 5, 6, 7, 8, and 9 combined measuring 0.2730 hectares. The letter of allotment required them to pay Kshs. 49,310/- to the 2nd respondent which they paid on 11th

November 1984. After payment, the plots were consolidated into one plot, the suit land, and registered in the name of the 1st respondent.

10. Thereafter, the 1st respondent was issued with the title to the suitland, and a lease was executed, and a certificate was issued to that effect. At the time of the hearing, the title was being held by the National Bank of Kenya, as security for a loan that had been taken out by the 1st respondent's Director. PW1 also produced a certificate of official search, showing that the suit land was owned by the 1st respondent. The registration date on the search was on 4th November 1985. He acknowledged that overlapping plots had been created on the land including Block 6/306.

11. On cross-examination, PW1 acknowledged that the letter of allotment had no date. He stated that the 1st respondent was granted leave to file the suit out of time.

12. PW2 was a senior surveyor with the survey of Kenya in Ruaraka. He informed the court that Block 6/306 existed but the existence was not proper. Block 6/306 encroached on the road by 9 meters and on the suit land by 14 meters. Block 6/306 and Block 6/301 overlapped into 1/8 of an acre of the suit land which had an earlier title. The suit land was given a new number, Block 6/302. He also informed the court that the survey of the suit land was illegal as it was done without the owner's consent, and that subdivision was done without an application in that regard. Therefore, the 3rd respondent wrote a letter to the District Land Registrar to have the titles to Block 6/301, Block 6/302, and Block 6/306 expunged.

13. On cross-examination, PW2 informed the court that the registration index map could not have the suit land because it was an amended copy. He stated that although the due procedure was followed, the product was wrong as it fell on another parcel of land.

14. The 2nd -4th respondents confirmed that they agreed with the testimony of PW2 and adopted the same.

15. The appellant's case was that he was the registered proprietor of Block 6/306 and that the suit land does not refer to the same land as Block 6/306. The 1st respondent was not in existence at the time the suit land is alleged to have been registered in their name on 4th November 1985 as the 1st respondent was incorporated on 24th January 1989.

16. The appellant pointed out that the mistake in this matter was the 1st respondent's attempt to lay claim on Block 6/306 given that it was not possible that the 1st respondent shared the same registration number (C25562), with Pew Lex Palkers Limited at the company registry.

17. The appellant stated that the 1st respondent had never been in actual possession of Block 6/306 as he has had exclusive possession of the same.

18. The appellant also claimed that the suit was res judicata having been determined in Eldoret CMCC No. 1082 of 2004 with an appeal pending before the High Court in Eldoret HCCA No. 107 of 2004 involving the same subject matter and the same parties. The appellant also claimed that the suit was time-barred and that the 1st respondent was not a legal entity to commence the suit.

19. DW1 was a state counsel and former assistant registrar of companies. He informed the court that company registration number C25562 belonged to Pew Lex Palkers Limited which was registered on 8th April 1983. He told the court that the 1st respondent was registered on 24th January 1989 under the registration number C39265. When shown the 1st respondent's exhibit PEx7, he confirmed that the document was in the name of the 1st respondent and registered under number C25562. However, he maintained that the 1st respondent was registered under number C39265 in the register.

20. On cross-examination, he told the court that no company in the name of the 1st respondent existed on 8th April 1983. He stated that the signature on PEx7 resembled that of one of the registrars called Mr. Gikonyo. The certificate also had a seal.

21. DW2 stated that he was the owner of Block 6/306 measuring 062 hectares. He held a certificate of lease issued in December 1992. He took possession of Block 6/306 in 1993. He had temporary structures on the land which he rented out. However, when he started constructing a permanent structure, he was served with an order of injunction. He alleged that the 1st respondent was fraudulently registered.

22. On cross-examination, he stated that the owner of the suit land was the 1st respondent and that there was no indication that the suit land had been subdivided. He told the court that even though he was given a letter of allotment, he did not produce the same. He had applied for allocation in the name of Grandine Limited. He also told the court that he paid premiums before being given the lease but the receipt was not in his name. He confirmed that a survey was done in 1985 and the title was issued to the 1st respondent while his title was generated in 1991.

23. The 2nd - 4th respondents called a second DW1, a surveyor who testified on behalf of the Attorney General. She informed the court that a survey of the suit land was done in 1995 leading to the amendment of the Registration Index Map, and a title was issued to that effect. In 1991, there was re-planning and a resurvey which resulted in the creation of Block 6/301, Block 6/302, and Block 6/306. She confirmed that there was a road and that Block 6/302 is supposed to be the suit land as the suit land is no longer in existence.

24. She insisted that the suit land was never subdivided, it was re- planned. She informed the court that no notice was issued to the 1st respondent because there was no need for a notice as the 2nd respondent exercised the right to re-enter the suit land since it had not been developed for a period of eight (8) months as was set out in paragraph two of the special conditions of the lease. She told the court that the letter of allotment had special conditions.

25. On cross-examination, she stated that she had read the report by PW2 who was her senior and whose conclusions were different from her own.

26. The learned Judge outlined the indisputable facts of this case as follows; the suit land was surveyed in April 1985 as per the survey plan, SR 172/1 and it measured 0.2750 Ha. The amendment was done at the first entry of the Registry Index Map for Eldoret Municipality Block 6 on 23rd May 1985 and a title deed issued to the 1st respondent on 4th November 1985.

27. Re-planning was done in 1991 as part of the development plan No. Eldoret 17/91/39 of 4th September 1991. The suit land was never subdivided; it was re-planned and extinguished because it had not been developed as per the condition of the allocating activity. The Registry Index Map was amended on 8th May 1992 creating Block 6/301. The register was also amended on 16th October 1992 creating Block 6/306. Block 6/302 was reserved for the suit land.

28. The learned Judge held that the first survey created the suit land, which was registered in the 1st respondent's name under the RTA and as such it was not available for re-survey because it became private land. The learned Judge further held that the term re-planning of private property is not supported by any law in Kenya.

29. The learned Judge held that the 2nd respondent's powers under special condition 2 of the lease was subject to the rule of law that requires a party to be heard before a decision is made hence the decision was an affront to the rule of law and the principle of legitimate expectation.

30. While citing the provisions of Section 77(1) of the Government Lands Act (repealed), and Section 31(1) of the *Land Act*, the learned Judge held that these provisions did not allow the re-planning and re-survey of the suit land that was already registered in the 1st respondent's name hence the process was unprocedural, illegal and it deprived the 1st respondent of their parcel of land. The learned Judge held that the re-planning was a nullity in law.

31. The learned Judge found it surprising that the 4th respondent adopted the evidence of PW2 that the transaction creating Block 6/301, Block 6/302, and Block 6/306 was a nullity but went ahead to call the second defence witness who contradicted the said evidence. The learned Judge found the evidence of the said witness to be farfetched and not supported by any law as special condition 2 was to be read together with Section 77(1) of the GLA, (repealed).

32. The learned Judge held that the order for extension of time was made pursuant to the provisions of Sections 27 and 28 of the *Limitation of Actions Act* which provides for the extension of time due to ignorance of material facts. The learned Judge held that the action was based on a mistake which is a tort and therefore, leave was properly obtained.

33. The learned Judge held that the issue of res judicata as pleaded was not demonstrated as there was no evidence that the matter had been fully determined.

34. The learned Judge held that the certificate of incorporation of the 1st respondent company spoke for itself on the date when the 1st respondent was registered. The learned Judge found that though the certificate was not signed by hand, the name of the registrar who issued it was imprinted. The learned Judge found the evidence of DW1 to be full of suppositions and proposals, and was thus unreliable. The evidence did not come out clearly on how the 1st respondent was issued with the certificate of incorporation, nor did he produce the file to demonstrate when the 1st respondent was registered.

35. The learned Judge held that the 1st respondent had demonstrated that the creation of Block 6/301, Block 6/302, and Block 6/306 on the suit land was a mistake, illegal and unprocedural.

36. The learned Judge granted the orders paraphrased as follows:

    a. A declaration that the 1st respondent was the proprietor as a lessee from the Government of Kenya over the suit land and is entitled to immediate possession and use thereof to the exclusion of the appellant or anybody else.

    b. A declaration that the lease issued and the certificate extracted therefrom in favour of the appellant over Block 6/306 was obtained by mistake and is therefore null and void ab initio and confers no title to the appellant.

    c. An order that the 2nd respondent revokes the lease issued in favour of the appellant over Block 6/306.

    d. An order directing the 3rd respondent to cancel the registration of the appellant as proprietors as lessees of Block 6/306.

    e. A permanent injunction restraining the appellant or his agents or any person howsoever acting on his behalf from occupying or remaining in occupation, possession or in any other way whatsoever trespassing on the suit land.

    f. Costs to the 1st respondent.

1. Aggrieved by the decision of the court, the appellant lodged the appeal in which he raised 14 grounds but focused on the following five (5) issues as deserving this court's determination;

> " a) Whether the learned Judge erred by conferring himself jurisdiction to determine the matter brought after 12 years as required by law;
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> b. Whether the learned Judge erred by disregarding the doctrine of res judicata;
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> c. Whether the learned Judge erred by failing to exercise the correct principles of law by holding that Block 6/302 and Block 6/301 were the 1st respondent's land without joining the respective owners to the suit;
>
> d. Whether the learned Judge erred by considering extraneous and irrelevant facts to the detriment of the facts in issue;
>
> e. Whether the creation of Block 6/301, Block 6/302, and Block 6/306 was a mistake, illegal and unprocedural."

38. When the appeal came up for hearing on 6th December 2023, Mr.

Othuro, learned counsel appeared for the appellant, whereas Mr. Mwanza learned counsel was present for the 1st respondent. Counsel relied on their respective written submissions which they briefly highlighted.

39. Mr. Othuro faulted the learned Judge for failing to consider the evidence of DW1 who was an officer in the office of the Attorney General stating that the witness produced a register showing that on 8th March 1983 only six (6) companies were registered, and the 1st respondent was not among them.

40. The appellant submitted that the learned Judge had disregarded evidence that he was in exclusive possession of Block 6/306 since 14th December 1992, and that the 1st respondent instituted the suit against him 14 years after he had been issued with a certificate of lease.

41. While citing the provisions of Section 7 of the *Limitation of Actions Act* and the case of Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR, the appellant pointed out that the question of limitation goes to the jurisdiction of the court and the learned Judge ought to have downed his tools and dismissed the suit ab initio for being filed after the lapse of 12 years.

42. The appellant submitted that parties are bound by their pleadings and in this case the 1st respondent did not plead a tort, and the learned Judge relied on the provisions of Sections 27 and 28 of the *Limitation of Actions Act* in finding that the action was based on a mistake and therefore leave was properly obtained.

43. The appellant pointed out that this matter had been heard and determined in the case of National Bank of Kenya v Attorney

General & Another [2009] eKLR and that the suit was res judicata by virtue of Section 7 of the *Civil Procedure Act*. To buttress the submission that a previous matter with similar facts and issues as the present case had been determined, the appellant relied on the case of Benedict Obat & 3 Others v Pius Onyango Obat [2021] eKLR.

44. The appellant was of the view that the learned Judge misguided himself when he made a finding on Block 6/301 and Block 6/302 when the owners were not parties to the suit in contravention of Article

50 of *the Constitution*. The appellant relied on the case of Alice Ayuma v Edward Chakava & Another; Land Registrar Mbale Office (Interested Party) [2021] eKLR to buttress this submission.

45. The appellant further submitted that the learned Judge took into consideration irrelevant facts including fraud which had not been pleaded, and also failed to consider the evidence of the appellant's witnesses. The appellant submitted that the learned Judge had shifted the burden of proof to the appellant which is contrary to Sections 107 and 108 of the *Evidence Act*, also failing to acknowledge that the 1st respondent was not in existence at the time of allotment of the suit land.

46. The appellant faulted the learned Judge for failing to consider the evidence of the second DW1 stating that there was no subdivision of the suit land, only re-planning, and also by disregarding the terms of the lease agreement between the Government of Kenya and the 1st respondent and especially special condition number 2.

47. The appellant submitted that by invoking Section 77(1) of the GLA, (repealed), the learned Judge failed to consider that the parties were bound by the terms of the lease agreement. The appellant submitted that the learned Judge overlooked the doctrine of freedom of contract. The appellant relied on the cases of Photo Production Limited v Securicor Transport Limited [1980] AC 827, 848, National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited & Another [2011] eKLR, and Johnsons Tyne Foundry Pty Limited v Maffra Shire Council [1948] 77 CLR 544 at 568 in support of this submission.

48. Opposing the appeal, Mr. Mwanza submitted that the 1st respondent was allocated the suit land two (2) years after its incorporation, and the title is still being held by the National Bank of Kenya. The report from the district surveyor in the supplementary record explains how there was an attempt to subdivide the suit land while the original title was held by the bank as security.

49. Counsel pointed out that the appellant had not produced any document to demonstrate how he acquired ownership of Block 6/306.

50. The 1st respondent submitted that the appellant did not tender any evidence to satisfy the principles of res judicata and as such the prayer was misplaced.

51. The 1st respondent invoked the provisions of Article 40(2)(a) of *the Constitution* on the right to protection of property from forceful seizure; and Section 31 of the *Land Act* which repealed Section 77(1) of the Government *Land Act* on the procedure to be followed to actualize re-entry into a leased property.

52. The 1st respondent submitted that the alleged re-planning of the suit land ought to have been conducted within the precincts of the law; and given that the suit land had already been registered in the name of the 1st respondent, it was unavailable for re- planning, as it was private land.

53. While citing the cases of Kenya National Highways Authority v Shalien Masoon Mughal & 5 Others [2017] eKLR and Mohamed v Commissioner of Lands & 4 Others, the 1st respondent submitted that the learned Judge was properly guided in making a finding in favour of the 1st respondent as the lawful owner of the suit land.

54. The 1st respondent submitted that prior to filing the suit, they filed an application seeking extension of time to file a suit out of time. The application was allowed and the 1st respondent directed to file the suit within 21 days. Although the order formed part of the 1st respondent's pleadings, the order was not challenged before the trial court. The issue has only been raised on appeal. The 1st respondent reasoned that it was an afterthought as the appellant had never challenged the order since 2006.

55. This being a first appeal, we are mandated to re-evaluate the evidence that was placed before the learned Judge and draw our own conclusions on matters of fact. Rule 31(1) of the Court of Appeal Rules, 2022 provides that:

56. However, in doing so, we are obliged to bear in mind that we did not have the advantage of seeing and hearing the witnesses and therefore, we must give allowance for the same. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

> " An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether
>
> the conclusion originally reached upon that evidence should stand."

57. We have carefully considered the appeal, submissions by counsel, the authorities cited, and the law. The issues for determination are:

a. Whether the trial court had jurisdiction to determine the suit in light of the *Limitation of Actions Act*.

b. Whether the doctrine of res judicata was disregarded by the trial court.

c. Whether the 1st respondent was properly incorporated at the time of acquisition of the suit land.

e. Whether the creation of Block 6/301, Block 6/302, and Block 6/306 was a mistake, illegal and unprocedural.

f. Whether the appellant had acquired a good title to Block 6/306.

58. It is common ground that an action to recover land ought to be initiated within 12 years. In this instance, the cause of action arose on 14th December 1992 when the appellant is alleged to have been registered as the proprietor of Block 6/306. Therefore, any lawsuit should have been initiated by 2004. As a result, the lawsuit that led to this appeal was filed late in 2006.

59. The 1st respondent claimed to have only learnt about the unlawful curving out of a portion of the suit land into Block 6/306 when attempting to fence the land and encountering resistance from the appellant. The appellant had also filed a suit seeking a permanent injunction against the 1st respondent which suit was struck out on 24th November 2004.

60. The 1st respondent then made inquiries at the Eldoret Lands Office as to why the appellant was laying claim on a portion of the suit land. The District Land Officer responded vide the letter dated 30th March 2006 informing the 1st respondent through its advocates that Block 6/306 was created by mistake. This prompted the 1st respondent to file a suit seeking to cancel the lease for Block 6/306, and the eviction of the appellant from the suit land.

61. The only hurdle was that the time for instituting the suit had lapsed. It is trite that under Section 7 of the *Limitation of Actions Act*, the question of limitation goes to the jurisdiction of the Court. However, where one applies for an extension of time to file a suit out of time, the Court may grant an extension in certain circumstances where there is reasonable cause for the delay, and the plaintiff has given sufficient and reasonable reasons for any delay on its part.

62. In this instance, the 1st respondent filed an ex parte application dated 25th July 2006, seeking an extension of time, under Sections 27 and 28 of the *Limitation of Actions Act*.

63. The principles governing an ex-parte application in respect of leave to file a suit out of time were enunciated in the Supreme Court case of County Executive of Kisumu v County Government of Kisumu & 8 Others (2017) eKLR as follows:

> " a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
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> b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
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> c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;
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> d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
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> e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
>
> f. Whether the application has been brought without undue delay; and
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> g. Whether in certain cases, like the election petitions, public interest should be a consideration for extending time."

64. In this case, the court directed that the application be served upon the appellant. When the application came up for hearing on 3rd December 2006, the appellant sought an adjournment, which was denied. The court then allowed the application for an extension of time.

65. The procedure for obtaining leave under Section 28 of the *Limitation of Actions Act* is provided for as follows:

> "1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

2. Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—

   a. to establish that cause of action, apart from any defence under section 4(2) of this Act; and

   b. to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.

3. Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—

   a. to establish that cause of action, apart from any defence under section 4(2) of this Act; and

   b. to fulfil the requirements of section 27(2) of this Act in relation to that cause of action,and it also appears to the court that, until after the commencement of that action, it was outside the

knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.

2. In this section, "relevant action" in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

3. In this section and in section 27 of this Act "court", in relation to an action, means the court in which the action has been or is intended to be brought."

66. In the circumstances, we find that although the appellant invited us to hold otherwise, the procedure set out for seeking leave to file the suit out of time was followed. The grant of leave conferred jurisdiction on the learned Judge to determine the suit.

67. On the question as to whether the issue in dispute was res judicata, Section 7 of the *Civil Procedure Act* 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."

68. The Section goes on to give the following explanations;

> "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.
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> 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.
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> 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.
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> 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.
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> 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."

69. The appellant relied on explanation 6. In the case of Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 Others [2018] eKLR, the court held that for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

70. The suit cited by the appellant was between National Bank of Kenya v Attorney General & Another [2009] eKLR. In the said case, the bank sued the Attorney General and the Chief Land Registrar regarding the suit land in respect of which a charge had been registered in its favour against the 1st respondent on 8th November 1993 for a sum of Kshs. 1,500,000/-. The loan was defaulted and the bank sought to realize the security only to learn that the suit land had been subdivided and allocated

to third parties. The bank faulted the defendants for failing to close the register for the suit land upon subdivision and sought indemnity from the defendant for the sum of Kshs. 8,844,702.80 with interest at the rate of 28% per annum from 29th October 2002 until payment in full.

71. It follows that the issues raised in the said case were not substantially in issue as the issues raised in this case. In any event, the suit was not between the same parties or the parties under whom they or any of them came. Therefore, we find that the doctrine of res judicata was not applicable in the circumstances of this case.

72. On whether the 1st respondent was properly incorporated at the time of acquisition of the suit land, the learned Judge stated thus;

> "On the issue, as to when Kisekem Ltd was registered, I do find that the certificate of incorporation speaks for itself on the date of registration. Though it is not signed by hand, the name of the registrar who issued the certificate is imprinted."

73. It is trite that he who alleges must prove. The appellant alleged that the 1st respondent was incorporated in 1989 after the suit land had been allotted in 1983. He adduced a certificate of incorporation of the 1st respondent on 24th January 1989. He also called DW1 to testify to the validity of the said certificate.

74. The learned Judge found the evidence of DW1 not to be reliable, as it appeared to the court that he had not thoroughly investigated how the 1st respondent obtained its certificate of incorporation. He did not produce a duplicate certificate of incorporation of the 1st respondent, which is supposed to be kept in the file. He also did not produce the 1st respondent's file to demonstrate when the 1st respondent was registered.

75. We have carefully analyzed the record and we find that the suit land was allotted to the 1st respondent sometime in 1984. On 4th November 1985, a lease was registered in favour of the 1st respondent for a lease of 99 years from 1st November 1984. This lease has not been challenged by the appellant.

76. It follows, therefore, that in all probability, the issuance of the lease in 1984 is more consistent with the 1st respondent company being incorporated in 1983 as opposed to 1989. This is so because a lease could not have been registered in the name of a non-existent body or entity. Without any other evidence to the contrary, we find that the 1st respondent was incorporated in 1983.

77. It is common ground that both the appellant and the 1st respondent were allotted land by the government. The 1st respondent was allotted the suit land while the appellant was later allotted Block 6/306 after the government had done a re- planning. This is a matter that cannot be determined by merely looking at the three titles, Block 6/301, Block 6/302, and Block 6/306 as they are, without looking at the suit land and the root of the title, the procedure in obtaining the title, and the title that was issued first.

78. Section 26(1) of the *Land Registration Act* provides that:

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except —

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

79. It is not in dispute that the 1st respondent acquired the suit land through government allotment in 1984 and after payment of Kshs. 49,310/-, the 1st respondent was issued with a title to the suit land. The appellant confirmed that he did not have an allotment letter from the government or proof of payment of the purchase price, but that he had title to Block 6/306. No evidence was led before the trial court on how the appellant was allocated Block 6/306 or how he obtained a certificate of title, save that the 2nd respondent undertook a re-planning exercise which resulted in Block 6/306, and the appellant holds title to it. The procedure for the acquisition of the suit land by the 1st respondent was not in contention. Therefore, the 1st respondent acquired a good title to the suit land.

80. Be that as it may, the acquisition of the suit land was done in 1984, while the creation of the new blocks was done in 1991. Therefore, the registration of the suit land in the name of the 1st respondent meant that it became private land. The Supreme Court in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) held as follows:

> "In view of these dealings, could the suit property retain the status of "unalienated government land"? The answer to this question must be in the negative considering the fact that once an individual or entity acquires any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from "public" to "private" land. Article 64(a) of *the Constitution* defines private land as consisting of 'registered land held by any person under any freehold tenure'."

81. Therefore, the failure by the 2nd respondent to notify the 1st respondent of the re-planning, and also given that the title to the suit land was still being held as security by the bank as it had not been canceled, we find that the 1st respondent still holds a valid title over the suit land and that the creation of the three blocks was illegal and unprocedural. The Supreme Court in the Torino case held thus:

> "There being no question as to the regularity and legality of the process by which the said land was alienated in favour of Kayole Estates Ltd, we find and hold that the same was effectively divested from the purview of the regulatory regime of the Government Lands Act (now repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done."

82. Having so determined, we find that the appellant ought to have exercised due diligence before accepting the letter of allotment and a certificate of lease for Block 6/306, and determined whether or not the re-planning by the 2nd respondent was done within the law and that the re-planning resulted in a good title. If the appellant had exercised due diligence, he would have established that the suit land belonged to the 1st respondent and was therefore not available for alienation to him. In the result, we find that the appellant did not acquire a good title to Block 6/306.

83. Accordingly, we find that the appeal lacks merit and it is hereby dismissed with costs to the 1st respondent.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR