



**Samoei v Kosgei & another (Civil Appeal 77 of 2019)
[2024] KECA 1276 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1276 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 77 OF 2019
SG KAIRU, FA OCHIENG & WK KORIR, JJA
SEPTEMBER 20, 2024**

BETWEEN

SARAH CHELAGAT SAMOEI APPELLANT

AND

MUSA KIPKERING KOSGEI 1ST RESPONDENT

ESTHER SEUREI 2ND RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Nakuru (A. Ombwayo, J.) dated 8th March 2019 in E&LC Case No. 511 of 2013)

JUDGMENT

1. This appeal arises from the suit lodged before the Environment and Land Court (E&LC) at Eldoret by the appellant, Susan Chelagat Samoei, vide the plaint dated 13th November 2013. Through the plaint, the appellant sought an order for the eviction of the 1st respondent, Musa Kipkering Kosgei, and the 2nd respondent, Esther Seurei, from LR No. Uasin Gishu/Tapsagoi Scheme/164 (the suit property). The appellant had also sought an order of injunction to prevent the respondents from entering the suit property; an award of mesne profits at the rate of Kshs. 5,000 per year; and the costs of the suit. After hearing the matter, A. Ombwayo J. dismissed the claim with costs on the grounds that it was *res judicata* and that the suit was not properly before the court as it had been brought through a procedure not known in law.
2. The appellant has now approached this Court on a first appeal expressing her dissatisfaction with the judgment of the E&LC on ten grounds which we reproduce as follows:
 - i. The honourable judge erred in law and fact in holding that the matter was *res judicata*;
 - ii. The honourable judge erred in law and fact in holding that a Land Disputes Tribunal had adjudicated on the matter and made a decision which was filed and adopted in Court;



- iii. The honourable judge erred in law and fact in holding that there was need to challenge a nonexistent decision of the Land Disputes Tribunal;
 - iv. The honourable judge erred in law and fact in holding that a decision of the tribunal was the subject of challenge or adjudication in the suit before the honourable court;
 - v. The honourable judge erred in law and fact in relying on a Land Disputes Tribunal Act which was not in force when the decision of the District Officer was made;
 - vi. The honourable judge erred in law and fact in failing to note that no decision of the Land Disputes Tribunal had been filed and adopted;
 - vii. The honourable judge erred in law and fact in failing to deal with the issues in controversy;
 - viii. The honourable judge erred in law and fact in making a decision which was as a whole untenable and wrong;
 - ix. The decision of the honourable judge was based on extraneous matters or issues;
 - x. The honourable judge erred in law and fact in failing to note that the decision relied upon by the defendants/respondents was admittedly a decision of a District Officer not a tribunal established under the Land Disputes Tribunals Act.
3. The appellant's claim as per the plaint was that the 1st and 2nd respondents are her brother-in-law and the wife of her deceased brother-in-law. The appellant averred that she was registered on 8th June 2010 as the owner of LR No. Uasin Gishu/Tapsagoi Scheme/164 measuring approximately 11.6 hectares and was therefore entitled to exclusive and peaceful enjoyment of the property to the exclusion of the respondents. She averred that the respondents had trespassed onto and were in illegal occupation of part of the suit property. According to the appellant, the respondents had no legally enforceable claim in respect to the land and their acts of trespass were illegal and actionable. Consequently, the appellant sought an order for eviction of the respondents, their agents and servants from the suit property and an injunction against the respondents stopping them from re-entering the property. The appellant also sought an award of mesne profits at the rate of KShs. 5,000 per acre for every year the respondents were in occupation of the land.
 4. In a defence dated 1st September 2014, the respondents denied the appellant's claim stating that the suit had been brought in bad faith and was an abuse of the court process since there was a pending case, to wit, Civil Suit No. 201 of 2011 before the Chief Magistrate's Court at Eldoret, through which the appellant was seeking similar orders against them. They also averred that Eldoret High Court Succession Cause No. 302 of 2006 through which the appellant obtained ownership of the suit property was saddled with misrepresentation and non-disclosure of full material facts and that they had applied for the revocation of the grant issued therein. It was also the respondents' defence that they had been on the subject parcel of land since early 1970s and that a dispute over its ownership was heard and determined in mid-1980s by the Land Disputes Tribunal and its findings adopted as a judgment of the court in Eldoret S.R.M Award Case No. 81 of 1986. According to the respondents, they were lawful occupants of their respective shares of the suit property and that the orders sought by the appellant could not issue as the suit was barred by the doctrine of *res judicata*.
 5. At the trial, the appellant testified that she was registered as the owner of the suit property on 8th June 2010 through transmission because the land belonged to her late husband Henry Samoei Kipruto. She stated that the respondents who are her brother-in-law and the wife of her brother-in-law respectively had trespassed upon the land. Although she acknowledged that there were prior



proceedings regarding the ownership of the land, she termed the proceedings incompetent and a nullity for want of jurisdiction by the trial court. The appellant testified that she was not privy as to how her late husband acquired the suit property. She conceded that the respondents were on the land when she filed the succession cause giving rise to the transmission order. She admitted that the respondents had lived on the suit property all along.

6. The 1st respondent testified as DW1 stating that the appellant was his sister-in-law having been married to his deceased brother Henry Samoei. He stated that he had dwelt on the suit property, which measures 22 acres, for 30 years. He testified that their father bought the suit property from one Arap Matutu and when they wanted to share it, the husband of the appellant declined, asserting that the land belonged to him. This prompted them to approach the village elder and the District Officer, where upon arbitration, an order was issued for the land to be subdivided into three portions. Even after the subdivision, their late brother who received the largest share persisted in claiming the entire piece resulting in the institution of Court Case No. 81 of 1996 which settled the issue of ownership.
7. On her part, the 2nd respondent testified as DW2 and stated that she was married to the late David Kirwa Seurei in 1972. She testified that her late husband had six brothers, among them being the 1st respondent and Henry Samoei who was the husband to the appellant. She testified that the 1st respondent lived in the suit property alongside Henry and her husband. Her testimony was that the title was in the name of Henry and after he passed away the appellant carried out succession without involving them. It was her evidence that Henry held the land, which had been purchased by their father, in trust for the other family members. She recalled that in 1984, there was a case because Henry wanted to evict them. This was Tribunal Case No. 81 of 1984 before the District Officer, which was later serialized as Court Case No. 81 of 1986. The decision of the District Officer was adopted in Court in 1988 and the land shared among the three brothers with Henry being awarded 8.5 acres while David and Musa each received 7 acres. The 2nd respondent testified that the suit property was registered under the Settlement Fund Trustees in 1980 and that the case was before the District Officer and not the Land Disputes Tribunal. She also testified that her father-in-law had another property which was registered as Uasin Gishu/Tapsagoi/156.
8. Mr. Kiplagat Ngetich, the in-charge of the Civil Registry in the Chief Magistrate's Court at Eldoret, testified as DW3. He produced a skeleton file in respect of Land Case No. 81 of 1986. The record contained certified copies of proceedings and original letters.
9. On 22nd April 2024 when this appeal came up for hearing on the Court's virtual platform, learned counsel Mr. Momanyi was present for the appellant whereas learned counsel Mr. Kipnyekwei appeared for the respondents. Counsel made brief oral highlights in addition to their written submissions.
10. For the appellant, the main submissions were dated 1st March 2021, supplemented by those dated 13th May 2022. Counsel submitted that there was no order from a land disputes tribunal capable of being adopted by the chief magistrate's court. According to counsel, the order on record was of a district officer and not a tribunal as envisioned under the Land Disputes Tribunals Act. Counsel also argued that since the 1986 decision was set aside by the magistrate, the same could not have been available for adoption by the court in 1988. Counsel further submitted that the appellant's deceased husband could not be faulted for not challenging the 1988 decision under an Act (the Land Disputes Tribunals Act) which came into force in 1993. It was consequently counsel's argument that because there was no valid decision resolving the dispute, the doctrine of *res judicata* could not be invoked to bar the appellant's current claim. According to counsel, the trial court erred by dispensing the claim on the principle of *res judicata* without determining the substantive issues that had been placed before it by the parties. Counsel consequently urged us to allow the appeal with costs.



11. Through the submissions dated 27th April 2024, counsel for the respondents argued that the award adopted by the Eldoret Chief Magistrate’s Court was an elders’ award and not an award by a tribunal. Counsel conceded that the Land Disputes Tribunals Act was not in existence at the material time and the award could not therefore have been made under that Act. However, after revisiting the background of the dispute, counsel asserted that the award was legal and valid and was properly adopted as a judgment of the Chief Magistrate’s Court. Counsel relied on [*Paul Muraya Kaguri v. Simon Mbaria Muchunu*](#) [2015] eKLR and [*Florence Nyaboke Machani v. Mogere Amose Ombui & 2 others*](#) [2014] eKLR in support of the proposition that an elders’ award was lawful and could only be overturned through an appeal, once adopted.
12. The respondents’ counsel supported the finding of the trial court that the appellant’s claim was *res judicata* asserting that the suit fell within the definition of the *res judicata* principle by section 7 of the [*Civil Procedure Act*](#). Counsel relied on [*Florence Nyaboke Machani v. Mogere Amose Ombui & 2 others*](#) (*Supra*) to submit that were the award made by the Chief Magistrate’s Court to be upheld, then the present suit must be barred by *res judicata*. Counsel consequently urged us to dismiss the appeal with costs.
13. This being a first appeal, rule 31(1)(a) of the [*Court of Appeal Rules*](#), 2022 requires us to re-evaluate, re-assess and re-analyse the evidence on record before arriving at an independent decision. In doing so, we must appreciate and give room to the fact that unlike the trial court we did not see and hear the witnesses testify in order to be in a position to gauge their demeanour. The duty that we are required to discharge was expressed in [*Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates*](#) [2013] eKLR thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
14. Having considered the record, the submissions of the parties and the applicable law we are of the view that the key issue for determination in this appeal is whether the judgment in Eldoret S.R.M. Award Case No. 81 of 1986 was valid and binding on the parties, and if so, whether the appellant’s suit before the trial court was barred by the principle of *res judicata*.
15. DW3 produced a skeleton copy of the court file in respect to Eldoret S.R.M. Award Case No. 81 of 1986. The parties do not dispute what transpired before the award was made. For purposes of completeness of this judgment, we will restate the facts of the case. The appellant’s husband (Henry), the 1st respondent (Musa) and the 2nd respondent’s husband (David) were brothers. In the 1970s, or thereabouts, their deceased father bought the property in dispute and they all lived with him on the land. Sometime in 1984, Henry lay a claim on the disputed property wanting it all for himself. This prompted Musa and David to pursue a resolution of the dispute before the District Officer (DO). The DO constituted a panel of elders nominated by the parties and the dispute was heard leading to a decision on how the property would be shared. In 1986, the resolution by the elders was presented before the Senior Resident Magistrate’s Court in Eldoret for adoption but it was opposed by the appellant’s husband and the court returned the matter to the elders for further hearing. In 1987, an award similar to the previous one was filed. The magistrate noted that although David had requested for the dispute to be sent back to the elders so that he could call witnesses, he had not done so. It this second award, albeit being similar to the 1986 one, that was adopted as the judgment in Award Case No. 81 of 1986.



16. It is true as agreed by counsel for the parties that the Land Disputes Tribunals Act had not come into force at the time the dispute was being determined by the elders and the Senior Resident Magistrate's Court. Indeed, the repealed *Land Disputes Tribunals Act*, Cap 303A came into force on 1st July 1993 and was clearly not in existence in 1985 when the dispute over the suit property arose and was determined. The relevant statute was the repealed *Registered Land Act*, Cap 300. Of relevance to this appeal is section 159 which provided as follows:

“159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of part IIIA of the Magistrates' Courts Act, in accordance with that Part.” (Emphasis ours)

17. Another relevant provision was section 9A of the repealed *Magistrates' Court Act*, Cap 10 which provided as follows:

“9A (1) Notwithstanding the provisions of sections 5 and 9 or of any other written law conferring jurisdiction, but subject to the provisions of this Part, no magistrate's court shall have or exercise jurisdiction and powers in cases of a civil nature, involving –

- a. the beneficial ownership of land;
- b. the division of, or the determination of boundaries to, land, including land held in common;
- c. a claim to occupy or work land;
- d. trespass to land.

(2) An issue relating to any matter set out in paragraphs (a) to (d) of subsection (1) shall be referred to a panel of elders to be resolved.”

(Emphasis ours)

18. The cited provisions confirm that the exercise of the jurisdiction donated to the courts under section 159 of the repealed *Registered Land Act*, Cap 300 was subject to section 9A (2) of the equally repealed *Magistrates' Court Act*, Cap 10. That was the law applicable at the time of the resolution of the dispute between the parties and it follows that the mechanism adopted in the resolution of the dispute was legal and had recognition in the laws in existence then. Therefore, the elders' award adopted by the learned magistrate as the judgment of the court was legal and so was the action of the magistrate.

19. The other argument raised by the appellant in support of her appeal was that the 1986 award having been sent back for further deliberation by the elders was not available for adoption in 1987. We do not find this argument to be supported by the record. It must be recalled that when the 1986 award was sent back to the elders, it was because of the request of the appellant's husband to have Arap Matutu testify. This is well captured in the ruling of the magistrate dated 6th February 1987. When the 1987 award was filed in court, the magistrate noted that it was similar to the previous one and that the appellant's husband had not called Arap Matutu to testify as he had requested. The learned magistrate captured



this on 4th November 1987 when adopting the award filed on 24th September 1987. In our view, this new award constituted a separate decision from the earlier one regardless of the similarities between the two.

20. From the foregoing, it is our finding that the order of the learned magistrate dated 8th April 1988 confirming the elders' award as the judgment of the court was legally sound. Despite our concurrence with the learned Judge of the E&LC that the decision of the magistrate was backed by the law, we, however, observe that the learned Judge erred by relying on the provisions of the Land Disputes Tribunals Act as that Act had not been enacted by the time the dispute between the parties was concluded at the magistrate's court.

21. In light of the foregoing conclusion, the question that follows is whether the appellant's new case whose decision has given rise to this appeal was *res judicata* as determined by the learned Judge. The doctrine of *res judicata* is legislated under section 7 of the [Civil Procedure Act](#) 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.”

22. The function of the principle of *res judicata* was explained by the Supreme Court in [Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & Another](#) [2016] eKLR as follows:

“(52) *res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights....

(54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

23. Similarly, in [John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others](#) [2021] KESC 39 (KLR) (Civ), the Supreme Court reiterated the elements of the principle of *res judicata* thus:

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;



- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action.”

24. Subjecting the stated test to the facts of the present appeal, we concur with the trial Judge that the case before him was barred by *res judicata*. From the outset, we must point out that this appeal is not an appeal against an appeal arising out of the decision in Eldoret S.R.M. Award Case No. 81 of 1986. What we have before us is an appeal against the judgment of the E&LC in a suit instituted by the appellant through a plaint dated 13th November 2013. The orders that were sought by the appellant in the new case included a finding of trespass to land, an order of eviction, an award of mesne profits and a permanent injunction against the respondents. There is no dissimilarity between those prayers and the dispute over the suit property which had earlier been determined by the elders.

25. As we have already concluded, there was a valid judgment emanating from the Senior Resident Magistrate’s Court at Eldoret which had determined the question of the ownership of the suit property. The suit before the learned magistrate concerned parties who had similar claims and interests over the suit property as the ones in this appeal. It is also not disputed that the learned magistrate had jurisdiction to entertain the dispute. The dispute had therefore been resolved before a court of competent jurisdiction. A finding of trespass and an order of eviction cannot be issued without determining the question of ownership which was long determined in the earlier proceedings. We therefore find no error on the part of the learned Judge in holding that the appellant’s claim was *res judicata*.

26. The final issue relates to the costs of this appeal. Ordinarily, costs follow the event unless the court for good reason determines otherwise. From our analysis, this appeal only partially succeeds to the extent that the learned Judge erred in relying on the provisions of the repealed Land Disputes Tribunals Act since the Act had not been enacted at the time material to the dispute between the parties. Although the partial success bears no fruits for the appellant, we find this to be sufficient reason to depart from the norm that costs follow the event. In the circumstances, the appropriate order is for the parties to bear their own costs of the appeal.

27. For avoidance of doubt, our final findings and orders are:

- i. That the learned Judge erred in relying on the repealed Land Disputes Tribunals Act in determining the dispute;
- ii. That the holding of the trial court on the legality of the judgment in Eldoret S.R.M. Award Case No. 81 of 1986 is hereby upheld;
- iii. That the finding of the trial court that the appellant’s suit was *res judicata* is hereby upheld; and
- iv. That the appeal is dismissed with an order that the parties shall bear their own costs of the appeal.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

