



REPUBLIC OF KENYA



KENYA LAW

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Barasa v Kibogy (Administrator of John Kiplagat Kibogy) & another (Environment & Land Case E034 of 2023) [2024] KEELC 3903 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E034 OF 2023**

EO OBAGA, J

APRIL 30, 2024

BETWEEN

WELLINGTON BARASA PLAINTIFF

AND

**JEREMY KIPTOO KIBOGY (ADMINISTRATOR OF JOHN KIPLAGAT
KIBOGY) 1ST DEFENDANT**

KIBOGY PROPERTIES LIMITED 2ND DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 30.11.2023 in which the Defendants/Applicants seek to have the plaint dated 6.6.2023 struck out with costs on the ground that the same is res judicata.
2. The Plaintiff/Respondent claims to be holder of a power of Attorney from his father William Lusweti Nabiswa. He filed a suit against the Applicants in which he sought a declaration that his father is the bonafide owner of LR. No. 8319 and LR. No. 8321; that the title issued to the 2nd Applicant be cancelled; that an order of permanent injunction be issued against the Applicants whether by themselves, their agents, servants, and/or employees from re-entering, selling, leasing, charging, cultivating, ploughing and/or in any manner whatsoever dealing with parcel No. 8319 and 8321; general damages and costs of the suit.
3. The Respondent and 74 others had filed an originating summons against Lands Limited and the 2nd Applicant. The Respondent and his co-applicants were seeking orders of adverse possession against Lands Limited and the 2nd Applicant in respect of LR. No 8379. This was in Eldoret E&L case No. 931 of 2012. This case was fully heard and was dismissed vide a judgment delivered on 30.10.2014.
4. The Respondent and others then petitioned National Land Commission to investigate how the Applicants obtained title in respect of LR. No. 8319 and 8321. The National Land Commission issued summons to the Applicants seeking to investigate on how the 2nd applicant obtained title to the



- two properties. The 2nd Applicant filed Judicial Review proceedings in which it sought to quash the decision of National Land Commission to investigate how it obtained title to the two properties.
5. In a judgment delivered on 28.6.2016, the court prohibited the National Land Commission from re-opening the issue of ownership of title to the two properties as the court had already rendered a judgment on the same. There was no appeal either against the judgment in Eldoret ELC No. 931 of 2012 or Judicial Review No. 3 of 2016.
 6. The applicants contend that this suit is res judicata as the issues which are being raised were determined in the two suits which have been mention hereinabove. The suits were in respect of the same properties and were involving the same parties.
 7. The Respondent was initially represented by a lawyer who was allowed to cease acting for him. This application was served upon the Respondent in person. He neither filed grounds of opposition nor replying affidavit. The application therefore remains unopposed.
 8. I have looked at the judgement in ELC 931 of 2012 and Judicial Review No. 3 of 2016. The parties in the two suits were the same and were litigating over the same suit properties as in this case.
 9. The doctrine of res judicata is predicated on section 7 of the Civil Procedure Act which states 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”.
 10. The Court of Appeal in the case of Independent Electoral Boundaries Commission –Vs- Maina Kiai & 5 others (2017) eKLR stated as follows:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That the former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
 11. The Respondent was one of the parties in the suits which were determined earlier on. He cannot therefore bring the present suit. I find that this suit is not only res judicata but it is an abuse of the process of the court. The plaint in this suit is struck out with costs. The Applicants shall also have costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF APRIL, 2024.



E. O. OBAGA

JUDGE

In the virtual absence of parties who had been notified of the date of ruling.

Court Assistant –Laban

E. O. OBAGA

JUDGE

