



**Maiyo v Kipkoech & 3 others (Environment & Land Case
E025 of 2023) [2024] KEELC 3485 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E025 OF 2023
MN MWANYALE, J
APRIL 29, 2024**

BETWEEN

JOEL MAIYO PLAINTIFF

AND

JOHANA KIPKOECH 1ST DEFENDANT

HASSAN KIPKEMBOI NGENY 2ND DEFENDANT

LAND REGISTRAR NANDI COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This Ruling is in respect of two applications, the first application was filed by the Plaintiff and it is dated 28th November 2023, where the Plaintiff/Applicant sought temporary injunctive orders against the 1st, 2nd and 3rd Defendants/Respondents, so as to restrain them against interfering with his quiet possession of Nandi/Ndurio/1018 and Nandi/Ndurio/1019 pending determination of the suit.
2. A replying affidavit in respect of this application was filed by the 2nd Defendant/Respondent on 15/01/2024 in which the Respondent raised the issues that the suit was bad in law and a gross abuse of Court process by virtue of the same offending Section 7 of the *civil Procedure Act* Cap 21.
3. The Defendant/Respondent exhibited a title in respect of Nandi/Ndurio/1019 claiming to have bought the same from Barnaba Kimeli. A Kichwen in 2012, and exhibited copies of pleadings in Eldoret ELC Case No. 358/2014 as well as pleadings in Eldoret HCC No. 201/2012, and Eldoret ELC Case 484/2013 (Originating Summons).
4. The 2nd application was filed by the 2nd Defendant/Applicant on the same date that he filed his replying affidavit in opposition to the first application.



5. In this 2nd application, Hassan Kipkemboi Ngeny sought that this suit be struck out for being Resjudicata, on grounds that the Plaintiff and Julius Maiyo as well as Benjamin Maiyo being biological brothers had already litigated over Nandi/Ndurio/1019 being a subdivision of Nandi/Ndurio/117 and had sued seeking that Nandi/Ndurio/117 be declared as part of their late father's Estate (Kimaiyo Barno).
6. They had initiated separately Eldoret ELC Case No. 358/2014, Eldoret ELC Case No. 992/2012 (formerly Eldoret HCCC No. 201/2012 and Eldoret HC JR No. 38/2010).
7. Beside these suits, there was also Eldoret ELC case No. 481 of 2013 (Originating Summons) and Kapsabet SRMCC No. 120/1995.
8. In opposition to this application the Plaintiff/Respondent filed a replying affidavit denying the knowledge of the existence of the other previous suit, and that the suits were technically concluded without evidence being adduced in the cases.
9. That as the suit were not heard on their merits this suit cannot be resjudicata and since he was not a party to the same he is not bound by the final findings of the Court.
10. The Court directed that both applications be heard together and parties were directed to file written submissions on the same.
11. The 3rd and 4th Defendant/Respondents in both applications were represented by the state law office.
12. The State Law Office did not file any response to he 1st application but stated outrightly that it was not opposed to the 2nd application.
13. The main protagonists being the Plaintiff and the 2nd Defendant who were the Applicant and Respondent in respect of the 1st application and vice versa in respect of the 2nd application filed their respective submissions, on 4th March 2024 and 20/2/2024 respectively.
14. Noting that the 2nd application raised a preliminary issue of law that this suit is Resjudicata and the response to the 1st application raises the same issues the Court shall first determine the preliminary issues of law raised in the 2nd application first which have the potential of disposing the entire suit and the 1st application.
15. For good order and clarity, the 1st application shall be referred to as the "injunction application" while the 2nd application shall be referred to as "the striking out application".
16. The parties filed single sets of submissions in each respect of both applications.

Applicant's Submissions (Striking Out Application)

17. In his submissions the 2nd Defendant as Applicant framed and submitted on a single issue for determination as follows; whether the suit is resjudicata and otherwise an abuse of the Court process.
18. Placing reliance on Section 7 of the *Civil Procedure Act* as well as the decision in the case of the *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR, the Applicant submits that this suit is resjudicata as the same relates to the same subject matter being Nandi/Ndurio/117 and that this claim is similar to the claim brought by the Plaintiff and his siblings against him and Barnaba K. Kichwen who sold the suit premises to the 2nd Defendant. Their first of the suit was filed by the Plaintiff's father (Kimaiyo) against Barno (Barnaba K. Kichwen's father being Kapsabet SRMCC No. 12) 1995 over title No. Nandi/Ndurio/117.



19. In this suit, so submits the Applicant the claim was for specific performance with regard to Nandi/Ndurio/117.
20. The parties to the original claim passed on and another suit was filed by Benjamin Kimaiyo against Barnaba Kichwen being Eldoret ELC No. 992/2012 over NANDI/NDURIO/117, which the Court in view of the Kapsabet SRMCC No. 12/1995 dismissed Eldoret ELC No. 292/2012 as resjudicata.
21. Another suit was filed by the Respondent and Julius Kipyego Maiyo his brother vide Eldoret ELC OS no. 484/2012 which claimed Nandi/Ndurio/117 and the subdivisions therefore being Nandi/Ndurio/1018, 1019, 1020, 1021 and 2022 and this suit was equally dismissed.
22. The Respondent filed Eldoret ELC Case No. 358/2014 against Julius Kipyego Maiyo the Plaintiff's brother who filed a defence and counterclaim and claimed Nandi/Ndurio/1019 necvi, neclam nec precario. The counterclaim was equally dismissed.
23. On the strength of the above the Applicant submits that the present suit is thus resjudicata.

Respondents Submissions (Striking Out Application): -

24. In his submissions the Respondent has intertwined the said submissions in relation to both applications framed and submitted on issues for determination to wit;
 - a. whether the Plaintiff has established a prima facie case of being heard and stay of action pending and disposed of the suit can be issued.
 - b. whether the suit before Court should be allowed to be heard on merits or determined on principles of resjudicata
 - c. whether the Defendants preliminary objection are merited
 - d. whether there are sufficient grounds to determine the suit on the plea of resjudicata
25. The Court shall condense the Respondents submissions on the three issues of resjudicata and consider them as one.
26. The Respondent submits that the principles of resjudicata has the potential of stiling the rights of parties at the preliminary stage; since the issues in consideration are law other than facts.
27. The Respondent submits that the parties litigating must be same and litigating under the same title used in the previous title and determined and that the actual production of copies of pleadings, issues and judgment in the previous case is paramount.
28. Placing reliance in the decision in the case of Gurbux Singh v Bhooralal (AIR) 1964 SC 1964 7CSR 831..... where the Court held that "It is risky to speculate about pleadings merely by summary of recitals of litigation made in the pleadings maintained in the judgment...."
29. The Respondent submits further that there is a change in jurisprudence. In other jurisdictions, where Courts have to interrogate the pleadings and judgment before establishing whether the same are resjudicata and the Respondent cites the decision in Syde Mohammed S. Lablail v Mohamed Harita (1976) 4 SCA 780 and Alka Gupta v Nevaandra Kamara Gupta (2010) 10 SCC 119.
30. The Respondent submits that when the Court looks beyond pleadings and annexures the same goes to the right to fair hearing under Article 50, 159 (a) (e) and that the principles pf resjudicata stifles the expansion of the law since the Court cut short the life of a suit in Court such horizons would never have a day before the temple of justice.



31. I have considered the applications the affidavits in support and in opposition to the application as well as submissions of the Learned Counsels on record, Mr. R.M. Wafula for the 2nd Defendant/Applicant in the striking out application and Mr. Bitok for the Plaintiff/Respondent in the said application, and the only issue for consideration is here the suit is resjudicata.
32. The Applicant in his application for striking out, the supporting affidavit therefrom has annexed annexure HN1 a and HN1b copies of Replying Affidavit, Annexure HN2 (a) and 2 (b). An agreement for sale, Annexure HN3 pleadings in Eldoret No. 358/2014 and its judgment as HN5. Pleadings in Eldoret HCCC No. 20/2012 were annexed as HN6 and the judgment as HN 7 (a). pleadings in Eldoret case No. 484/2013 (Originating Summons).
33. From the above, it is not contended that there were previous suits filed against the Plaintiff by the 2nd Defendant and filed against the 2nd Defendant by the Plaintiff and Benjamin Maiyo and Julius Kipyego and all these suits related to ownership of Nandi/Ndurio/117 and its subsequent subdivisions.
34. The initial suit was filed by the Patriarch of the Kimaiyo family against the vendors father.
35. Benjamin Maiyo as an Administration of his late father's Estate similarly filed Eldoret HCC No. 201/2012 which later changed to Eldoret ELC No. 992/2012. While filing the suit he did so as the administrator of his late father's Estate, and since the Plaintiff and his other brother were beneficiaries of their late father's Estate, the suit by Benjamin Maiyo under explanation 6 of Section 7 of the Civil Procedure Act would be deemed that have been filed on behalf of the Plaintiff. Consequently, ELC No. 992/2012 was dismissed for being resjudicata, because of Kapsabet SRMCC No. 120/1995.
36. It is evident that there have been previous suits by the Plaintiff and his brothers and his father against the 2nd Defendant, his father and the vendor of Nandi/Ndurio/1019. (Subdivision of Nandi/Ndurio/117).
37. It is also evident from that the previous suits have being in relation to Nandi/Ndurio/117 and its subsequent subdivisions.
38. Is this suit thus resjudicata as claimed by the 2nd Defendant/Applicant and ought to be caught by the principles of resjudicata or should it proceed to be heard on it merits as submitted by the Plaintiff/Respondent?
39. Two previous judgments in Eldoret ELC No. 992/2012, as well as Eldoret ELC No. 358/2014 handled by Munyao Silla J and Obaga J respectively have been exhibited before Court.
40. From the above the elements provided for under Section 7 of Civil Procedure Act on resjudicata have been met and as correctly submitted by the Applicants' Advocates.
41. This suit is clearly resjudicata as the claim herein was raised in previous suits that were heard and determined and the Plaintiff is a trespasser on Nandi/Ndurio/1091 his counterclaim having been previously dismissed.
42. It follows therefrom that the Plaintiffs suit being resjudicata, the same is herewith dismissed and the 1st application having been founded on a suit that is resjudicata has no foundation to stand on and is equally dismissed.
43. The Plaintiff shall bear the costs of this suit and the application.
44. Orders accordingly.

RULING, DATED AND DELIVERED AT KAPSABET THIS 29TH DAY OF APRIL 2024.



HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Bitok for the Plaintiff/Applicant
2. Mr. Wafula for the Defendant/Respondent

