



**Kimetto (Suing as the Administrator of the Estate of Tiongik Rotich - Deceased) v Koech
(Sued as the Administrator of the Estate of Kipkoech Langat - Deceased) & 3 others
(Environment & Land Case E006 of 2023) [2024] KEELC 3388 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E006 OF 2023**

MC OUNDO, J

APRIL 25, 2024

IN THE MATTER OF AN APPLICATION BY DAVID KIPYEGON KIMETTO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TIONGIK ROTICH (DECEASED)) FOR ORDERS THAT THE RESPONDENTS' TITLE KERICHO/LITEIN/686 HAS BECOME EXTINGUISHED AND THE APPLICANT HAS BECOME ENTITLED TO BE REGISTERED AS PROPRIETOR THEREOF BY ADVERSE POSSESSION

BETWEEN

DAVID KIPYEGON A. KIMETTO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TIONGIK ROTICH - DECEASED) APPLICANT

AND

DAVID KIPYEGON KOECH (SUED AS THE ADMINISTRATOR OF THE ESTATE OF KIPKOECH LANGAT - DECEASED) 1ST RESPONDENT

SARAH LANGAT 2ND RESPONDENT

AGNES CHEPNGENO 3RD RESPONDENT

ALBIN KIPKEMOI KOECH 4TH RESPONDENT

RULING

1. Vide an Originating Summons dated 28th August, 2023, the Applicant herein had sought for the determination that he had now acquired title to land previously known as Kericho/Litein/686 and now subdivided into No Kericho/Litein/1783 and Kericho/Litein/1784 by way of adverse possession.
2. In response, the Respondents filed a Notice of Preliminary Objection dated 9th October, 2023 stating that the Originating Summons herein was bad in law, vexatious, misconceived and an abuse of the court process for being *res judicata*. That the court thus lacked jurisdiction to entertain it.



3. In Response to the Respondents' Preliminary Objection, the Applicant vide his Affidavit dated 23rd November, 2023 deponed that the suit land that had been in controversy and had substantially been determined in Kericho ELC No 18 of 2018 (OS) had been in relation to Title Number Kericho/Litein/1783 registered in the names of the 3rd and 4th Respondents, land which had been a subdivision of the parent parcel of land known as Title No Kericho/Litein/686. That the instant Originating Summons was in respect to the parent estate land title No Kericho/Litein/686 and thus not *res judicata*.
4. In a rejoinder, the Respondents vide their Supporting Affidavit sworn on 19th January, 2024 deponed that the instant Originating Summons had raised the same issues which had been pleaded and determined by court in Kericho ELC Suit No 18 of 2018 (OS). That No Kericho/Litein/686 had been subdivided into parcels of land No Kericho/Litein/1783 and Kericho/Litein/1784 respectively hence the instant Originating Summons had automatically related to the subsequent contested title Kericho/Litein/1783. That accordingly, the restoration of the original title would involve revocation of the resultant title. That the issues raised in the present suit had been conclusively heard and determined by the court in Kericho ELC Suit No 18 of 2018 (OS)
5. The Preliminary Objection which sought to oust the jurisdiction of the court was heard in the first instance by way of written submissions which I shall herein summarize as follows:

Respondents' Submissions.

6. The Respondents, vide their submissions dated 12th February, 2024 in support of their Notice of Preliminary Objection dated 9th October, 2023 framed three (3) issues for determination as follows; -
 - i. Whether the present suit is *res judicata* contrary to Section 7 of the [Civil Procedure Act](#) and therefore the court lacks jurisdiction to entertain the same.
 - ii. Whether the suit herein is bad in law, vexatious, misconceived and an abuse of the court process.
 - iii. Who should bear the cost of the suit?
7. On the first issue for determination as to whether the present suit was *res judicata*, the Respondents' reliance was hinged on the provisions of Section 7 of the [Civil Procedure Act](#) as well as on the decision in Petition No 8 (E010) of 2021 where the Supreme Court of Kenya had referred to its earlier decision in [John Florence Maritime Services Ltd & another v Cabinet Secretary Transport and Infrastructure & 3 others](#), Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement), to submit that the Applicant and the Respondents in the present suit were the same parties as in the former suit being Kericho ELC Suit No 18 of 2018 (OS); save for the addition of the 1st Respondent in the current suit.
8. That further, the subject matter in the current suit was land formerly known as Kericho/Litein/686 which had been subdivided resulting into Kericho/Litein/1783 and Kericho/Litein/1783 respectively and which had also been the subject matter in the former suit. That the issue to be determined in the instant case was whether the Applicant had become entitled to land formerly known as Kericho/Litein/686 (currently subdivided into Kericho/Litein/1783 and Kericho/Litein/1783 respectively) by adverse possession which had also been in issue for determination in the former suit.
9. That the said former suit had been tried by way of oral evidence wherein judgment had been delivered on merit. The current suit was thus raising issues which had been conclusively determined in Kericho ELC Suit No 18 of 2018 hence it was *res judicata*.



10. As to whether the instant suit was bad in law, vexatious, misconceived and an abuse of the court process, the Respondents' submission was in the affirmative wherein they sought for the same to be dismissed in the first instance. They placed their reliance on the provisions of Section 1A, B and 3A of the Civil Procedure Act, Order 2 Rule 15 of the Civil Procedure Rules and the decided case of Kivanga Estates Limited v National Bank of Kenya [2017] eKLR to submit that the doctrine of res judicate existed to ensure that litigation came to an end by preventing re-litigation of a matter that had previously been decided on merit by a competent court. That therefore, the Applicant's suit in Kericho ELC Suit No 18 of 2018 having been dismissed, instead of using the available avenue to appeal, he had chosen to abuse the court process by filing the same suit for determination by the same court that had heard and determined the former suit on merit.
11. That the Applicant had thus brought the instant suit in bad faith, to embarrass the court process and cause injustice to the Respondents which was contrary to the overriding objectives of Article 159(b) of the Constitution and Civil Procedure Act.
12. On who should bear the costs of the suit, the Respondents urged the court to find that the present suit was *res judicata* and grant them costs. Applicant's Submissions.
13. The Applicant, vide his submissions dated 27th November, 2023 framed three issues for determination as follows; -
 - i. Whether the instant suit is *res judicata*.
 - ii. Whether the Originating Summons and/or suit is instituted contrary to provisions of Section 7 of Limitation of Actions Act (Cap 22) Laws of Kenya.
 - iii. Who will bear the costs of the Preliminary Objection?
14. On the first issue for determination as to whether the instant suit was *res judicata*, the Applicant placed his reliance on the provisions of Section 7 of the Civil Procedure Act and the definition of *res judicata* as defined in the Black's law Dictionary 10th Edition, to reiterate that the instant suit was in regard to Title Number Kericho/Litein/686 wherein the estate of Tiongik Rotich (Deceased) had been in uninterrupted and peaceful occupation and utilization of since the year 1960s until the same had been partitioned, by the 1st Respondent in the year 2013, through the operation of a Succession Cause.
15. That what had been canvassed and determined in Kericho ELC Suit No 18 of 2018 had been in regard to the parcel of land Title Number Kericho/Litein/1783 hence the issue raised in the instant suit was totally different from the one raised in the former suit and therefore the instant suit was not *res judicata*. Reliance was placed on the decision in the case of C.K Bett Traders Limited & 2 others v Kennedy Mwangi & another [2021] eKLR where the court had cited the Court of Appeal's decision in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (sic).
16. On the second issue for determination, the Applicant hinged his reliance on the provisions of Section 7 of the Limitation of Actions Act to reiterate the contents of his Affidavit in Response to the Preliminary Objection to the effect that 12 years had not elapsed since the 3rd and 4th Defendants were issued with the title deed to parcel number Kericho/Litein/1783 so as to attract the provisions of 12 years as is provided for under section 7 of the Limitation of Actions Act. That in the circumstances, the Respondents had failed to demonstrate that the Applicant was barred by limitation of time. That the Respondents' Preliminary Objection therefore had no merit and should be dismissed with costs.



Determination.

17. Upon consideration of the Preliminary Objection raised by the Respondents herewith, I am obliged to revisit the all-important case decided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 A Preliminary Objection per Law J.A. was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘.....a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

18. From the submissions and pleadings filed, it is clear that the Defendants/Respondents are challenging the court’s jurisdiction over the Applicant’s Originating Summons dated 28th August, 2023, to the effect that the same was *res judicata* by virtue of the proceedings in the Kericho ELC suit No 18 of 2018 (OS)
19. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which 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”
20. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;
- i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
 - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
21. In order therefore to decide as to whether this case is *res judicata*, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.



- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction
22. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other.
23. The Court of Appeal in the case of *James Njuguna Chui v John Njogu Kimani* [2017] eKLR held that
“The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation”
24. I have carefully considered the prayers sought in the current Plaintiff’s Originating Summons wherein he has sought that for the following orders:
 - a. A declaration that the applicant’s deceased father namely Tiongik Rotich during his life time and his estate have acquired ownership of land previously known as title number Kericho/Litein/686 and now subdivided into resultant title numbers Kericho/Litein/1783 and Kericho/Litein/1784 by adverse possession and the 1st Respondent’s Ownership over the said title have extinguished after expiry of 12 years.
 - b. An order directing land Registrar, Kericho County for the cancellation of registration of the Respondents as the proprietors of land title previously known as Kericho/Litein/686 and now subdivided into resultant numbers Kericho/Litein/1783 and Kericho/Litein/1784 and the same be restored to original title number Kericho/Litein/686 and the said title be registered in the names of the late Ttiongik Rotich(deceased),
 - c. Costs of the suit.
25. It is not in dispute that vide Kericho ELC suit No 18 of 2018 (OS), the Applicant herein, who had filed suit as the Administrator of the estate of Tiongik Rotich (deceased) had sought for a determination of the following;
 - i. Whether the Plaintiff is entitled to the parcel of land known as LR No Kericho/Litein/1783 measuring 0.15 acres registered in the name of the 2nd and 3rd Defendants by virtue of the Plaintiff’s adverse possession of the said in open quiet and peaceful occupation for a period of over 50 years
 - ii. Whether the said Plaintiff should be declared as proprietor of the said 0.15 acres in the suit property LR No Kericho/Litein/1783, currently registered in the name of the 2nd and 3rd Defendants



- iii. Costs of this suit to be provided by the Defendants.
26. The Plaintiff also sought that judgment be entered against the Defendants for;
- i. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as LR No Kericho/Litein/1783.
 - ii. An order directing the cancelation of LR No Kericho/Litein/1783 by the registrar Kericho and restoration of the original title Kericho/Litein/686.
 - iii. An eviction order against the Defendants herein.
 - iv. Costs of the suit.
27. It is also not in dispute that the matter had been heard and determined via a judgment dated the 15th day of June 2023 wherein the Plaintiff's Originating Summons dated the 6th March 2018 and amended on the 10th January 2020 had been found to be devoid of merit and was dismissed with costs. The said decision has neither Appealed against nor set aside
28. The test in determining whether a matter is *res judicata* as stated was summarized in Bernard Mugo Ndegwa v James Nderitu Githae and 2 others (2010) eKLR, as follows that:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
29. I am reminded that in an application based on the principle of *res judicata*, the same being a point of law, it must not be blurred with factual details liable to be contested and or proved through the process of evidence. On the first issue as to whether parties in the current suit were the same as parties in the previous suit, I find that the Plaintiff/Applicant herein was also the Plaintiff in the previous suit while the 2nd 3rd and 4th Defendants/ Respondents in the current suit were the 1st 2nd and 3rd Defendants in the previous suit. There has however been added to the current suit the 1st Defendant, David Kipyegon Koech who has been sued as the Administrator of the estate of Kipkoech Langat (Deceased).
30. As to whether there was sameness in the title/claim, I find that in Kericho ELC No 18 of 2018 the subject parcel of the suit was Kericho/Litein1783 which was registered to the 2nd and 3rd Defendants therein and which parcel of land had resulted from the subdivision of Kericho/Litein/686. The Plaintiff/Applicant in the present case seeks for a determination that he had now acquired title to land previously known as Kericho/Litein/686 and now subdivided into No Kericho/Litein/1783 and Kericho/Litein/1784 by way of adverse possession. Clearly and without going into the merits of the case, I find that there is sameness in the subject matter.
31. On the third issue as to whether there was concurrence of jurisdiction, I find that the judgment delivered in Kericho ELC 18 of 2018 had been by this same court which had jurisdiction to hear and determine the matter and whose determination has never been appealed against.
32. On the last issue as to whether the orders issued in the previous court were of a nature of finality, the answer is affirmative as herein above explained. There having been a Judgment from a Court of



competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

33. It was held in the case of *E.T v Attorney General & another* (2012) eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....”

34. In *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) At paragraphs 8 and 9 the Supreme Court observed as follows:

“The doctrine of *res judicata* was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where *res judicata* was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. *res judicata*, was embodied in section 7 of the *Civil Procedure Act*.

The elements to be proven before a court could arrive at the conclusion that a matter was *res judicata* were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed *res judicata* on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.”

35. The upshot of the foregoing is that the Preliminary Objection dated the dated 9th October, 2023 herein succeeds. The Applicant’s Originating Summons herein lacks merit, this matter having been heard and conclusively decided vide the Judgment of 15th June 2023. I find that the current suit herein filed by the Plaintiff is therefore *res judicata* Kericho ELC No 18 of 2018 and an abuse of the court process. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to. The Plaintiff/Applicant’s Originating Summons 28th August 2023 is herein dismissed with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

