



**Langat (Suing on Behalf of the Estate of the Late Sophia Chelimo Kerio) v Cheruiyot & 2 others
(Environment & Land Case E011 of 2022) [2024] KEELC 3402 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E011 OF 2022**

**MC OUNDO, J
APRIL 25, 2024**

BETWEEN

**BENARD KIPNGENO LANGAT (SUING ON BEHALF OF THE ESTATE OF
THE LATE SOPHIA CHELIMO KERIO) PLAINTIFF**

AND

**RAYMOND CHERUIYOT 1ST DEFENDANT
ZAKAYO BIEGON 2ND DEFENDANT
JOSEPH MURSI 3RD DEFENDANT**

RULING

1. Vide a Complaint dated 7th July 2022 and amended on 3rd July, 2023, the Plaintiff herein sought for judgment against the Defendants and for the following orders; -
 - i. A declaration that the land parcel registration number Kericho/Kapsoit/1603 belongs to the late Sophia Chelimo Kerio.
 - ii. An eviction order directing the Defendants to hand over and/or vacate the land parcel known as Kericho/Kapsoit/1603.
 - iii. A permanent injunction order do issue to restrain the Defendants either by themselves or by their servants and/or agents or any other person acting on their behalf from trespassing upon the estate of the deceased known as Kericho/Kapsoit/1603.
 - iv. General damages.
 - v. Mesne profits from the date of illegal occupation of the estate to date.
 - vi. Costs of the suit.



- vii. Any other relief the court may deem fit to award.
2. The Defendants filed their Defence and Counterclaim dated 18th January 2023 wherein the Plaintiff filed his reply to the Defence and Counterclaim dated 3rd July, 2023. However, before the matter could be set down for hearing, the Defendants filed a Notice of Preliminary Objection dated 27th October, 2023 upon which they sought that the suit be struck out for being Res Judicata.
 3. In Response to the Defendants' Preliminary Objection, the Plaintiff filed a Replying Affidavit dated 11th August, 2023 wherein he deponed that the Preliminary Objection was fatally defective, without merit, incompetent, based on assumptions, instituted in bad faith and a mere waste of court's time. That he was the grandchild of the late Sophie Chelimo Kerio who had died on 22nd January, 2003 and who was the registered owner of the land parcel number Kericho/Kapsoit/1603. That the instant matter was not Res Judicata as contemplated in Section 7 of the *Limitation of Actions Act* as he had never filed any suit against the Defendants herein over the same subject matter in any court with competent jurisdiction, neither was he a party to the said Kericho ELC Case No. 18 of 2016 which had been filed by one of the beneficiaries of the deceased's estate who had failed to prosecute the matter leading to the same being dismissed for want of prosecution and hence the said matter was never heard and determined on merit.
 4. That he had only become eligible to commence civil proceedings upon being issued with a Grant on 23rd May, 2022 and that the Defendants were merely frustrating his efforts in seeking justice on behalf of the beneficiaries of the estate of the late Sophie Chelimo Kerio. That should the Preliminary Objection herein be allowed, all the beneficiaries of the estate of the late Sophie Chelimo Kerio would suffer irreparable harm since they would be disinherited from the deceased's estate. That subsequently, the instant Preliminary Objection had been misconceived, premature, without merit and an abuse of the court process and the same should be dismissed with costs.
 5. The Preliminary Objection was canvassed by way of written submissions which I shall herein summarize as follows:

Defendants' Submissions.

6. The Defendants vide their submissions dated 27th November, 2024 and in support of their Notice of Preliminary Objection dated 27th October, 2023 summarized the factual background of the matter before framing three issues for determination as follows; -
 - i. Whether the suit is Res Judicata
 - ii. Whether the suit offends the provisions of Section 7 of the *Limitation of Actions Act*.
 - iii. Whether the court has jurisdiction to preside over the instant matter
7. On the first issue for determination as to whether the instant suit was Res Judicata, the Defendants' submission was in the affirmative to the effect that the issues concerning the instant matter had been directly and substantially in issue in Kericho ELC Case No. 87 of 2016 which case had been dismissed for want of prosecution. That pursuant to the provisions of Section 7 of the *Civil Procedure Act*, the former suit had sought inter alia orders restraining them and/or any person claiming under them from interfering in any manner and/or trespassing into L.R No. Kericho/Kapsoit/1603 which parcel of land was the subject matter in the instant suit.
8. The Defendants further placed reliance in the decided case of Benard Mugo Ndegwa v James Nderitu Githae and 2 others [2010] eKLR as well as on the Court of Appeal's decision in the case of James



- Njuguna Chui v John Kimani [2017] eKLR to implore the court to allow their Preliminary objection and strike out the Plaintiff's suit for being Res Judicata.
9. On the second issue for determination as to whether the suit offended the provisions of Section 7 of the Limitation of Actions Act, the Defendant's submitted in the affirmative. That it had been evident from the Plaintiff that the cause of action in the instant suit had arisen on or about the year 2005, when the Defendants had allegedly encroached on the Deceased's estate, erected houses and other developments on the said estate without any lawful justification. That it had now been almost 18 years since the cause of action arose which was 6 years outside the statutory limitation of 12 years, thus the instant suit had offended the provisions of Section 7 of the Limitation of Actions Act. Reliance was placed on a combination of decisions in the decided case of Serem v Serem (Environment and Land Case Civil Suit E007 of 2021) [2023] KEELC 21693 (KLR) (23 November 2023) and the Court of Appeal decision in Mukuru Munge v Florence Shingi & 2 others [2016] eKLR.
 10. The Defendants then placed their reliance in the decided case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited, (1969) E.A. 696 cited with approval in Rebecca Chumo v Christina Cheptoo Chumo [2021] eKLR, to submit that the instant Preliminary Objection had been premised on a pure point of law which was, limitation of time which had arisen by a clear indication of the Plaintiff's pleadings.
 11. Regarding whether the court has jurisdiction to preside over the instant matter, the Defendants submitted in the negative. They placed their reliance on a combination of decisions in the case of Bosire Ongero v Royal Media Services [2015] eKLR cited with approval in Koros (Suing as Personal Representative of the Estate of Anthony Kipkoros Towett) v The County Government of Kericho (Environment and Land Case 50 of 2016) [2022] eKLR, The Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1, Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR and Samuel Kamau Macharia v KCB & 2 Others [2011] eKLR to reiterate that the court lacked the requisite jurisdiction to handle the present matter and urged the court to allow their Notice of Preliminary Objection dated 27th July, 2023.

Plaintiff's Submissions.

12. The Plaintiff vide their submissions dated 2nd December, 2023 in opposition to the Defendants' Notice of Preliminary Objection dated 27th July, 2023,
joined issues with the Defendants to wit; -
 - i. Whether the suit is Res Judicata
 - ii. Whether the suit offends the provisions of Section 7 of the Limitation of Actions Act.
 - iii. Whether the court has jurisdiction to preside over the instant matter.
 - iv. Costs of the suit
13. On the first issue for determination as to whether the instant suit was Res Judicata, the Plaintiff's reliance was anchored on the provisions of Section 7 of the Civil Procedure Act to reiterate that he had never sued the Defendants herein in any court of law over the issues raised in the instant suit. He further reiterated the contents of his Replying Affidavit to the effect that he was never a party in Kericho ELC Case No. 87 of 2016 which had been dismissed for want of prosecution and thus the instant suit was not Res Judicata as envisioned by the provisions of Section 7 of the Civil Procedure Act. That whilst the provisions of Section 7 of the Civil Procedure Act were aimed at barring litigants whose matters had



been determined from bringing up the same matter before court with the aim of bringing an end to litigation, Kericho ELC Case No. 87 of 2016 was never heard and determined on merit.

14. As to whether the instant suit offended the provisions of Section 7 of the Limitation of Action's Act, his submission was in the negative. He reiterated that he had only earned the right to institute the instant suit on 23rd May, 2022 upon being issued with a grant, prior to which he had no such authority.
15. On the third issue for determination as to whether the court has jurisdiction to determine the instant matter, the Plaintiff submitted in the affirmative to the effect that nothing had been presented by the Defendants to prove that the court had no jurisdiction to entertain the matter.
16. Regarding the costs, he placed reliance on the provisions of Section 27(1) of the *Civil Procedure Act* and the decided case in Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-Operative Society Ltd (sic) to submit that the costs be awarded to him. He thus submitted that the Defendants' Notice of Preliminary Objection was devoid of merit and the same should be dismissed with costs.

Determination

17. From the submissions and pleadings herein filed by the parties, it is clear that the Defendants/ Respondents are challenging the court's jurisdiction to hear and determine the Plaintiff's suit on his amended Plaint of 3rd July 2023 to the effect that the same was Res Judicata Kericho ELC suit No. 87 of 2016 which case had been dismissed. Indeed the Plaintiff herein at paragraph 13 of his Replying Affidavit to the Notice of Preliminary Objection had confirmed that Kericho ELC suit No. 87 of 2016, filed by one of the beneficiaries to the estate of the deceased, had been dismissed for want of prosecution.
18. Having regard to the submissions by both sides as well as to the authorities herein cited, consequently I find the issues for determination as being;
 - i. Whether the dismissal of the suit constituted a determination of a suit.
 - ii. Whether the Plaintiff's suit is Res Judicata.
 - iii. Whether the Preliminary Objection raised is sustainable.
19. A Preliminary Objection was held by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696 as 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.’



20. It is therefore evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. An example would be an objection to the jurisdiction of the court. The next question would therefore be whether the dismissal of the suit constituted its determination and/or judgment and therefore lack of jurisdiction of a court to hear and determine a subsequent similar suit.
21. The Court of Appeal sitting in Nyeri in the case of Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR had asked themselves whether a dismissal of a suit amounted to a judgment wherein they had held as follows;

“Another issue may arise as to whether a dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. Stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the Plaintiff.” It uses the word “dismissed.” The *Civil Procedure Act* does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order; “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.” [Emphasis added] “

21. In the case of Co-operative Bank of Kenya vs Cosmas Mrombo Moka and another (2019) eKLR, the Court of Appeal had also held as follows:

“As stated hereinbefore, this court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of Res Judicata. Consequently, this matter being completely on all fours with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issue to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter was Res Judicata and cannot stand. The 1st Respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake



up again and decide to start the same process again. We agree with the Appellant that this would be contrary to public policy that litigation must come to an end and the best the 1st Respondent could do was to invoke the appellate process and not filing a fresh suit.”

22. From the above decision which is binding to this court, it is clear that where a suit is dismissed for want of prosecution, the affected party can only apply for review of such a decision, or appeal but cannot resuscitate the same suit through a fresh suit as doing so would offend the doctrine of Res Judicata.
23. The Doctrine of Res judicata was discussed in the case of Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others [2010] eKLR, to mean that that a matter was res judicata if;
 - 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.
24. In the present suit, it has not been contested that the previous suit, being ELC 87 of 2016, had been, save for the Plaintiff herein who had no locus at the time, between the same parties, over the same subject suit parcel of land, and had been dismissed by a court of competent jurisdiction.
25. Indeed in the case of Omondi Vs 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 vs 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”
26. Now keeping in mind that the previous matter had been dismissed for want of prosecution, wherein the Plaintiff in the present matter has now added another party, and being mindful of attributes of the decision in the Co-operative Bank case (supra), I find and hold that the Plaintiff herein cannot thus prosecute a fresh suit in respect of the same issues and against the same Defendants after the dismissal of the suit in ELC 87 of 2016. The Plaintiff’s suit vide his amended Plaint of 3rd July 2023 is therefore incompetent and bad in law. I uphold the Preliminary Objection as raised and proceed to dismiss the Plaintiff’s suit with costs.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

