



**Sawe (Suing as the personal representative of Chuma Arap Bet) v Chumo & another (Environment and Land Petition E005 of 2024) [2024] KEELC 4835 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND PETITION E005 OF 2024  
MN MWANYALE, J  
JUNE 20, 2024**

**BETWEEN**

**SAMUEL KIPKOLUM SAWE (SUING AS THE PERSONAL REPRESENTATIVE OF CHUMA ARAP BET) ..... PLAINTIFF**

**AND**

**KIBOCH CHUMO ..... 1<sup>ST</sup> DEFENDANT**

**PHILIPH KIPSUM MUREI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant vide his application dated 4/3/2024 seeks injunctive orders against the Defendant/Respondents in relation to Nandi/ Chemuswa 463 and 464.
2. The orders sought by the Applicant are as follows; -
  1. Spent
  2. Spent
  3. Pending determination of the suit there be an order of injunction, restraining the Defendant from selling, dealing and/or disposing, charging and/or doing other manner adversely dealing with land reference Nandi/ Chemuswa 463 and 464.
  4. Costs of the application to be borne by the Defendants.
3. The grounds in support of the application are inter alia; -
  - i. Land reference Nandi/ Chemuswa 463 and 464 form part of the Estate of Chuma Arap Bet's Estate who died in 1993 while the two parcels were still in his name.



- ii. In 1999 the 1<sup>st</sup> Defendant illegally, unprocedurally and fraudulently caused change of ownership of the 2 parcels into his name, and in 2016 the 2<sup>nd</sup> Defendant illegally caused change of ownership of land reference Nandi/ Chemoswa 464 into his name.
  - iii. That no succession proceedings were undertaken to pave way of transfer by transmission, and the transfers were thus acts of intermeddling with the Estate of Chuma arap Bett's Estate. Thus, the Defendants title over Nandi/ Chemoswa 463 and 464 are not legally recognized and protected; hence he had a *prima facie* case.
4. On the strength of the above grounds the Applicant sought for the injunctive orders set out at paragraph 2 of the ruling. The Applicant filed a supporting affidavit, reiterating the grounds in support and annexed annexures thereto as follows; Grant of Letters of Administration Intestate issued on 17<sup>th</sup> January 2022, copy of register of Nandi/ Chemoswa/463, copy of register of Nandi/ Chemoswa 464, copy of death certificate and he also filed a supplementary affidavit.
  5. In response to the application, the 2<sup>nd</sup> Respondent Philip Kipsum Murei deposes that the Applicant is his step brother and the 1<sup>st</sup> Defendant his brother that the deceased owned L.R. NO. Nandi/ Chemoswa 47 and Nandi/ Chemoswa 463 and Nandi/ Chemoswa 464 and the deceased had made an application to transfer Nandi/ Chemoswa 464 to him as a gift.
  6. That the 1<sup>st</sup> Defendant registered himself as the owner on both parcels on 16/11/1999, and the 1<sup>st</sup> Defendants title to Nandi/ Chemoswa 464 was cancelled on 24/3/2015 and he the 2<sup>nd</sup> Defendant was thus registered as the owner.
  7. That he instituted a case over Nandi/ Chemoswa/ 464 at Eldoret which case was decided in his favour that the Plaintiff/Applicant testified in Kapsabet Magistrate Court CC No. 110/2016 and stated that the suit property belonged to the 2<sup>nd</sup> Defendant and an appeal was against the Magistrate's decision was also dismissed.
  8. The Respondent exhibited the following annexures, the application for consent, letter of consent in relation to Nandi/ Chemoswa 464, judgment of Court in ELC Case No. 237 'A' of 2012, Applicants written statement, copy of KAPS ELCA 4/2022 order dismissing the appeal.
  9. Upon perusal of the Replying Affidavit, the Courts attention was drawn to the possibility of this suit being *resjudicata*, in view of previous suit i.e. ELC No. 237 A of 2012, and Kapsabet ELCA 4/2022 and called for the Court records and directed parties to submit orally on the application and address the issue of *Resjudicata*.

**Applicant's Submission: -**

10. It is the Applicants submission that the current Plaintiff was not a party to the previous suits Eldoret ELC No. 137/2012 whose judgment was erroneously indicate as 237'A'/2012; in which case the 1<sup>st</sup> Defendant was the Defendant and the 2<sup>nd</sup> Plaintiff was the Plaintiff.
11. That Kiboch Chumo the 1<sup>st</sup> Defendant had no capacity to sue on behalf of Estate of Chumo Arap Bett and that case No. 110/2016 Kapsabet did not deal with the ownership of the two parcels as it was about a determination of boundary by Land Registrar.
12. That the 2<sup>nd</sup> Respondent did not obtain registration of Nandi/ Chemoswa/464 in case No. 237 'A'/2012 pursuant to a decree, as during the pendency of the suit the 2<sup>nd</sup> Respondent went to the Land Registrar who transferred it to him, and the said transfer was not a transfer by transmission as the land ought to have reverted to the deceased.



13. In support of the issue of illegality of obtaining the registration, the Applicant cites the Supreme Court decision in the case of *Dinali Management v County Government of Mombasa*.
14. The Applicant is the Administrator of the Estate and has sued both Defendants who acquired title of his father's property fraudulently, thus the Applicant submits he had proven *prima facie* and that before issuance of Letters of Administration and confirmation no beneficiary could have benefited from the parcels, and that a Court of law and equity should not countenance an illegality.
15. The 1<sup>st</sup> Defendant/Respondent did not file a response not took part in the application.

**2<sup>nd</sup> Respondent's Submission: -**

16. It is the 2<sup>nd</sup> Respondents submission that the parties herein are brothers, all being the sons of the late Chumo arap Bett, and that the dispute commenced in 1999 and the 2<sup>nd</sup> Defendant filed Eldoret 137 A/2012 but judgment captured as 237 A/2012.
17. That the 2<sup>nd</sup> Respondent prayed for ownership of Nandi/ Chemuswa/464 but suit was concluded after he obtained registration of suit property.
18. That Applicant was a witness in the matter in case Kapsabet CMCC No. 110/2016 and supported the counterclaim of Kibochi Chumo the 1<sup>st</sup> Defendant, which counterclaim was dismissed and an appeal being case No. Kapsabet ELCA No. 4/2022 preferred and was equally dismissed.
19. The Respondent submits that the suit is time barred, an abuse of the Court process and it is *resjudicata*.
20. That an injunction can only be issued under Order 40 when the suit is in danger of damage, waster or alienation, hence the Applicant has not established *prima facie* case for grant of a temporary injunction.
21. The Respondent submits that the issue of Fraud and illegality can only be heard once witnesses testify. The Respondent in support of his submissions cites the decisions in the case of *Re Estate of David William Kigumy Kimemia* and on the issue of fraud, the Respondent relies on the decision in the case of *Ndolo v Ndolo*.
22. In a brief rejoinder, Mr. Momanyi for the Applicant stated that the application is based on Order 40 (2) of the Civil Procedure Rules. That there was an intention to transfer Nandi/ Chemuswa 464 to 2<sup>nd</sup> Defendant and that no transfer were executed in his favour as transfer can only be executed through an instrument. Since Plaintiff took different positions in a different case, he is not barred to take the right position that elements of *resjudicata* do not apply in this case and that the issue of limitation of actions must be raised specifically that the pposition taken by the Plaintiff in 2016 cannot be construed to mean that he was aware of situation.

**Issues For Determination: -**

23. Having analysed the application, affidavits, annexures, and the submissions, and considered the law, the Court frames the following as issues for determination; -
  - i. Whether the suit is *resjudicata*
  - ii. Whether the application is merited
  - iii. What reliefs ought to issue?



### Analysis And Determination: -

24. The Applicant submits that the issue of *resjudicata* does not arise, as some of the elements to be proved have not been met. It is the Applicants submission that the Plaintiff was not a party to the previous cases and hence *resjudicata* does not apply.
25. The issue of *resjudicata* was framed suo moto by the Court after perusal of the Replying Affidavit and the existence of Eldoret 237 A/2012 was raised therein and its judgment exhibited in the Replying Affidavit as well as the judgment in Kapsabet ELC A NO. 4/2022.
26. It is common ground between the Applicant and the Respondent that there were previous suit which was determined which related to Nandi/ Chemuswa 463 and Nandi/ Chemuswa 464, one of the suit was Eldoret ELC NO. 137 A/2012 formerly Civil Suit No. 20/2004 whose judgment was delivered by Angima J on 8<sup>th</sup> November 2018 and titled Eldoret 237 'A'/2012 and was annexure PKM3 in the Replying Affidavit of the 2<sup>nd</sup> Respondent and the second suit before the Chief Magistrates Court at Kapsabet being Civil Case No. 110/2016, which culminated to Kapsabet ELC Appeal No. 4/2022 whose judgment dismissed the Appeal preferred by the 1<sup>st</sup> Respondent against the 2<sup>nd</sup> Respondent (herein).
27. A Court of Law can frame a matter suo moto and invite the parties to submit on the same as was held by decision in the case of [John Mwaniki v Joshua Irungu & Another](#) 2016 eKLR.
28. In this case the parties were invited to submit on the issue of *Resjudicata*. *Resjudicata* is provided for under Section 7 of the [Civil Procedure Act](#).
29. The elements to be proved are as follows as stated in the decision in [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 others](#) eKLR.
  - “ 59) for *Resjudicata* to be invoked in a civil matter the 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 second action identical parties, subject matter and cause of action.”
30. The Court shall now examine the elements to see whether this suit is *Resjudicata* or not.
31. On the first three elements there are indeed two former judgments rendered in case no. 237 A/2012 Eldoret by Angima J and Kapsabet ELCA 4/2022 by this Court, no appeal was preferred against any of the judgments and they are thus final in nature. It is also undoubtedly that the Court that issued the said judgments were Courts of competent jurisdiction and the judgments were also on merit.
32. On element number 4, the Applicant submits that he was not a party to either of the two cases, and the Court shall examine the sub elements, being identical parties, subject matter and cause of action, and reliefs sought.
33. In Eldoret ELC 237 A/2012, the subject matter related to ownership of Nandi/ Chemuswa /463 and 464 as between the 2<sup>nd</sup> Defendant as Plaintiff and 1<sup>st</sup> Defendant as the Defendant.



34. The Plaintiff submits that he was not a party to the said suit but the cause of action, and reliefs sought are identical as shall be seen hereunder already the subject has been found to be the same in the preceding paragraph.
35. The prayers sought in Kapsabet ELCA NO. 4/2022 filed by the 1<sup>st</sup> Defendant herein Kiboch Chumo were the Appellant prays that the appeal be allowed and there be orders that
- a.
 

“The judgment and Decree issued by Hon. J. A. Orwa (Senior Principal Magistrate) in Kapsabet SPMCC No. 110/2016 delivered on 16/7/2021 be and is hereby set aside and in its place, there be an order dismissing the Respondent’s suit and allowing the Appellant’s counterclaim in its entirety.
  - b. ....”
36. In his counterclaim the Appellant as defendant in Kapsabet 110/2016 had sought interalia
- “.....the Defendant prays that the Plaintiffs suit against him be dismissed with costs and in its place there be a judgment in his favour as per the counterclaim for orders.....
- i. ...
  - ii. There be orders of a Mandatory Injunction directing the Nandi County Land Registrar to cancel titles to Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 and to re – issue the same in the original number Nandi/ Chemoswa/47 in the name of the Defendant. Alternatively, the said original parcel be reverted to the name of Chumo Arap Bett and the same be subject to the laws relating to succession and transmission of deceased person’s estates.”
37. Having sought to have Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 revert back to Chumo Arap Bett in the counterclaim that was dismissed and whose appeal was equally dismissed and seeing that the reliefs sought by the Plaintiff in this suit to wit,
- i. A declaration that the Defendants have no valid title over land reference Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 as the titles they hold were illegally, unprocedurally and fraudulently obtained
  - ii. A declaration that land reference Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 is part of the Estate of Chumo Arap Bett.
  - iii. Cancellation of the title deeds to land reference Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 held by the Defendants and restoration of the register to land reference Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 to the deceased Chuma arap Bett.
38. It follows that the reliefs sought in the present case was also a relief sought in the counterclaim in Kapsabet CMCC No. 110/2016 which was dismissed and the resultant appeal equally dismissed.
39. The issue of ownership of Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 was an issue directly in issue in Eldoret 237 /2012, as it is issue herein. This is because at paragraph 3, 4, and 5 of the judgment, the Learned Judge observed that the Plaintiff therein had pleaded that Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 had been gifted to the Plaintiff and Defendant, as gifts.



40. At paragraph 14 of the said judgment the Court found that the Plaintiff had proven his case against the Defendant but did not grant the reliefs which had been overtaken by events.
41. It follows that the issue of ownership of Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 was resolved in the decision by Angima J and cannot be reopened in this new suit. From the above analysis, thus the reliefs sought, the subject matter and cause of action in this suit are similar to the previous suits.
42. On the issue of identical party, under explanation 6 of Section 7 of the Civil Procedure Act, which provides;
- Explanation 6 “where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this Section, be deemed to claim under the persons so litigating.”
43. Under explanation 6, above, it must be deemed that Kibochi Chumo having sought to have Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 revert back to Estate of Chumo Arap Bett, was litigating for a private right and litigating on behalf of all persons interested. In such a right including the Plaintiff under explanation 6 of Section 7 as was observed in the case of Monica Ruthi & another v KCB & another 2010 eKLR where the Court in reference to explanation 6 of the Section 7 of the Civil Procedure Act, stated inter alia, “this explanation clearly romps in the Applicants. For as long as the 2<sup>nd</sup> Respondent was litigating over the suit premises on the basis of family land, he was litigating as well as behalf of the Applicants, on that basis the application for injunction is clearly *Resjudicata*; matters not that in this suit the Applicants are Plaintiffs whereas the Respondents are Defendants.”
43. The issue of the Plaintiff herein being a different party is answered by the decision in the case of Diocese of Eldoret Trustees (registered) v Attorney General (on behalf of the Principal Secretary Treasury) and Another 2020 eKLR) which held as follows;
- “Courts must always be vigilant to guard against litigants who metamorphize to bring suits as new litigants or add others to circumvent the doctrine of *Resjudicata*. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”
44. From the above, the Plaintiff herein actually litigating on a matter that was already determined in two previous suits where Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 were found to have been gifted *inter vivos* to Kiboch Chumo and Philip Murei respectively and further where a plea to merge Nandi/ Chemoswa/463 and Nandi/ Chemoswa/464 into Nandi/ Chemoswa/47 in the name of Chumo Arap Bett was also litigated by way of counterclaim in Kapsabet CMCC NO. 110/2016 Appeal No. 4/2022.
45. Thus, the subject matter, reliefs sought and cause of action as well as the parties herein being identical the 4<sup>th</sup> element of *Resjudicata* has also been established.
46. The upshot is that the Court find the suit herein as *Resjudicata*, and the application having been founded on a suit that is *Resjudicata*, and the same is not merited. The suit and the application are hereby dismissed with costs to the 2<sup>nd</sup> Defendant/Respondent.

**RULING, DELIVERED AND DATED AT KAPSABET THIS 20<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**



In the presence of;

Mr. Maritim for 2<sup>nd</sup> Defendant/Respondent

Mr. Momanyi for Plaintiff/Applicant

