



**Chemweno v Kiprop (Suing as the Legal Representative of the
Estate of Luka Kiprop Kiptai) (Environment and Land Appeal
E006 of 2023) [2024] KEELC 4705 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

L WAITHAKA, J

JUNE 14, 2024

BETWEEN

SYLVESTER CHEMWENO APPELLANT

AND

**ANTHONY KIPROP (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF LUKA KIPROP KIPTAI) RESPONDENT**

*(Being an Appeal from the ruling of Hon. C Kutwa SPM
delivered on 19th April 2023 in Iten ELC case No. E 001 of 2023)*

JUDGMENT

1. By a plaint dated 13th January 2023, the plaintiff (now respondent), instituted a suit in the lower court to wit Iten SPMC ELC Case No E001 of 2023 seeking judgment against the defendant (now appellant) for:-
 1. An order of eviction to remove the defendant his agents family and/or servants from the parcel of land known as Moiben/Kimnai/276 (the suit property);
 2. A permanent injunction against the defendant his agents servants and/or any other person claiming or acting on the defendant's instruction restraining them from trespassing, constructing on, interfering, grazing cattle, destroying fence, entering, disposing and/or in any other manner dealing with the suit property;
 3. An order directing the officer in charge of police division (OCPD), officer commanding station at Kapsowar Police Station and commanding police post at Cheptongei Police Post to ensure compliance with the order issued by court;
 4. Mesne profits to be assessed by the court;



5. Costs of the suit and interest.
2. The plaintiff's suit is premised on the grounds that on 28th November 2022, the defendant forcefully moved into the suit property and destroyed the fence, cut down trees and started clearing it for the purpose of cultivation; that the defendant threatened to harm the plaintiff and the beneficiaries of the estate of Luka Kiprop Kiptai (the deceased).
3. Terming the defendant's actions complained of illegal and prejudicial to him and the estate of the deceased, the plaintiff points out that there was another suit between the deceased and the defendant which had been filed by the defendant but explains that the defendant lost the suit and the appeal he preferred in respect thereof.
4. The defendant did not file a statement of defence but filed a notice of preliminary objection, dated 27th January, 2023 through which he contended that the suit was *res judicata* Eldoret ELC Case No 549 of 2023.
5. Vide a ruling delivered on 19th April 2023, the learned trial magistrate dismissed the preliminary objection. In so doing the learned trial magistrate stated/held:-

“The single issue for determination is whether the preliminary objection by the respondent has merit and should be allowed.....

My understanding of *res judicata* is that it is meant to lock out from the court system a party who had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the court's valuable time if there was no tool for arresting such mischief. This tool is the tool the respondent deployed through the instant objection.

The question therefore is whether the applicant has satisfied the conditions for the application of the principle of *res judicata* in view of the facts of this case. It is not in dispute that there exists Eldoret ELC No 549 of 2013 between the plaintiff and the defendant. The said suit was determined by a court of competent jurisdiction in favour of the plaintiff. However, in the said claim the claimant was seeking a declaration that he is the owner of the suit land and the cancellation of the decree registered against the suit land. In the present case, the plaintiff is suing the defendant for an eviction and injunction. Clearly these issues were not dealt with in Eldoret Environment and Land Case No 549 of 2013. Further the parties in the former suit are different from the present case.

From the pleadings and the submissions, it is in dispute that the former suit and the present suit are not between the same parties. The issues in the instant suit were not adjudicated upon and/or determined in the previous litigation as the High Court dealt with the issue of section 8 of the Land Disputes tribunal Act.

Applying the stated law to the facts before me, it is clear that the plaintiff is not seeking to open issues that were raised or ought to have been raised in the earlier proceedings as they were not relevant to the issues that were decided by the High Court. In the result, I find and hold that the defendant's preliminary objection has no merit and the same is disallowed with costs”.

The Appeal

6. Aggrieved by the decision of the trial court, the defendant appealed to this court on the grounds that the learned trial magistrate erred by:-



1. Failing to apply the principles applicable in determining a matter in court which is *res judicata*;
 2. Failing to appreciate that the parties in the present suit were the same parties who appeared in the previous proceedings;
 3. Failing to acknowledge that the subject matter in the present case was the same subject matter in the previous proceedings in the superior court and in respect of which the superior court had made a determination.
 4. The defendant/appellant further contended that the learned trial magistrate was biased in his findings against him.
7. Pursuant to directions given on 5th March 2024, the Appeal was disposed off by way of written submissions.

Submissions

Appellant's Submissions

8. In his submissions filed on 14th May 2024, the appellant maintains that there was a prevailing judgment dated 2nd December 2020 and a decree dated 1st July 2022 between the plaintiff/respondent and himself over the suit property and reiterates his contention that the suit which forms the subject matter of this appeal is *res judicata* the former.
9. The defendant/appellant makes reference to section 7 of the [Civil Procedure Act](#) and the decision in the case of [Diocese of Eldoret Trustees \(Registered\) v Attorney General \(on behalf of the Permanent Secretary Treasury\) and another](#) (2020)eKLR and submits that the preliminary objection raised before the trial magistrate covered all issues raised both in the High Court and the lower court proceedings and that the issues raised in the lower court are the same as the issues raised in the High Court.
10. The defendant/appellant further submits that the only difference may be the language but all the issues were determined thus making the suit filed before the lower court *res judicata* the former.
11. The defendant/appellant urges this court to allow the appeal with costs to him.

Respondents Submissions

12. In his submissions filed on 15th May 2024, the plaintiff/respondent submits that the preliminary objection raised by the defendant/appellant did not meet the test of what amounts to a preliminary objection as it does not raise pure points of law.
13. According to the plaintiff/respondent, the preliminary objection raised by the defendant/appellant could not be determined without ascertaining of facts from elsewhere.
14. Based on the decision in the case of [Mukisa Biscuits Manufacturing Company Limited v West End Distributors](#) (1969) EA 696 and the decision in the case of [Henry Wanyama Khaemba v Standard Chartered Bank Limited & another](#) (2014) eKLR, the plaintiff/respondent reiterates that the preliminary objection taken up by the defendant/appellant is not a true preliminary objection as evidence is required to prove the issues raised therein.
15. The plaintiff/respondent further submits that the issues raised in the preliminary objection taken up by the defendant/appellant do not arise from the pleadings or by a clear implication of the pleadings. In that regard, the defendant/appellant is said to have premised his preliminary objection on an unknown



case to wit Eldoret High Court ELC Case No 549 of 2013 which does not form part of the parties' pleadings.

16. Based on the case of *Brownstone Agencies Limited & another v County Government of Bomet & another* (2022)eKLR, where it was held that a preliminary objection correctly understood, is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence, any assertion which claims to be a preliminary objection and yet bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
17. The plaintiff/respondent further submits that the issues taken up by the defendant/appellant are issues that ought to have been raised in an application that would allow the parties to argue them on merit. The plaintiff/respondent maintains that the preliminary objection taken up by the defendant/appellant was not proper and urges this court to dismiss the appeal with costs to him.

Analysis and Determination

18. As pointed out herein above, the plaintiff/respondent instituted the suit which forms the subject matter of this appeal seeking the reliefs listed herein above against the defendant/appellant.
19. Upon being served with the suit papers, the defendant/appellant did not file a defence. Instead, he filed the preliminary objection which forms the subject matter of this appeal seeking to strike out the plaintiff/respondent's suit in limine on the ground that it offends the provisions of section 7 of the *Civil Procedure Act* in that it is *res judicata* Eldoret High Court ELC Case No 549 of 2013.
20. Whilst the defendant/appellant hinged his preliminary objection in Eldoret ELC Case No 549 of 2013, it is noteworthy that the issues raised concerning that suit vis a vis the suit preferred before the lower court were neither premised on the defendant/appellant's pleadings (statement of defence nor acknowledgement of existence of the issues and admission thereof by the plaintiff/appellant). That being the case, evidence was required to prove that the issues raised in the suit and the former were similar. Evidence was also required to prove that the parties were same as the parties to the suit before the lower court and that the issues had been heard and determined by a court of competent jurisdiction to hear and determine them.
21. Since evidence and/or admission by parties through their pleading of the issues raised, was required, I agree with the plaintiff/respondent that the preliminary objection taken up by the defendant/appellant was not a pure preliminary objection as by law required.
22. In *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* (2014) eKLR, the court held that one cannot raise a ground of *res judicata* by way of preliminary objection. The court further held that the best way to deal with *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*.
23. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd* and another *supra*, the court held that issues of *res judicata*, duplicity of suits and suits having been spent, will require probing of evidence hence not capable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection. (emphasis mine).
24. I am persuaded by the decisions in the cases of *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* and *Henry Wanyama Khaemba v Standard Chartered Bank Ltd and another supra*.



25. The defendant/appellant having premised his preliminary objection on *res judicata* and the same not being hinged on admitted facts or facts discernable from the parties' pleadings could not be sustained.
26. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the plaintiff/respondent.
27. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 14TH DAY OF JUNE, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered electronically in the presence of:-

Mr. Okara for the appellant

Mr. Mukhabane for the respondent

Court Assistant: Alex

