Togom & another v Kipchumba (Environment & Land Case E016 of 2024) [2024] KEELC 7000 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7000 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E016 OF 2024

EO OBAGA, J

OCTOBER 23, 2024

BETWEEN

JOHN KIRWA TOGOM ..... 1ST PLAINTIFF

JOHN KIPKEMBOI KENY ..... 2ND PLAINTIFF

AND

RAYMOND KIPCHUMBA ..... DEFENDANT

RULING

1. In his Notice of Motion dated 30th April, 2024 the Defendant/Applicant is asking for the following orders:-

    a. That this honourable court lacks jurisdiction to hear and determine the instant suit before this Honourable Court as the suit herein is res judicata in that a suit the Plaintiffs' and the Defendant/Applicant's deceased grandfather, one Ngaulo Tanui had filed a suit, over the same subject matter herein and the suit was heard and determined before the Honourable court in Eldoret High Court Civil Case No. 65 of 1997 (Ngaulo Tanui vs John Kirwa Togom and 2 Others) hence the Plaintiffs' suit is incompetent as it offends the mandatory provisions of section 7 of the *Civil Procedure Act* Cap 21.

    b. That this suit against the Defendant herein is time barred and the same ought to be struck (sic).

    c. That the instant suit against the Defendant herein is filed in express violation of section 7 of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya and ought to be struck out.

    d. That costs of the application be provided for.

2. The Motion is based on the grounds on the face of it and supported by the Applicant's Affidavit of even date where he indicated that the 1st Plaintiff/Respondent is his mother's brother. He deposed that his maternal grandfather, Ngaulo Tanui (now deceased), was a Plaintiff in Eldoret High Court

Civ. Case No. 65 of 1993, which was over the same subject matter as this suit. Judgement in that suit was delivered in favour of his grandfather against the Respondents declaring that they were holding the Cheptiret/Kapkoi Block 1(KERITA) 229, 230 & 231 (the suit properties herein) in trust for the family of Ngaulo Tanui, being the Applicant herein and other family members. By reason of the said judgment, the Applicant claims that the suit herein is res judicata, in that the subject matter, the parties as well as the issues are the same in the two matters since he is a member of the family of Ngaulo Tanui. The Applicant averred that he and the family of the Late Ngaulo Tanui have been in occupation and enjoyed peaceful possession of the suit properties for over 40 years, thus this suit is time barred.

3. The Application was opposed by the separate Affidavits of the two Respondents herein both sworn on 6th May, 2024. A summary of the said Affidavits is that there is no nexus between the Applicant herein and the former Plaintiff as he is a stranger to the estate of the said Ngaulo Tanui. They claim that the judgment was delivered 26 years ago and has since lapsed by operation of law since a decree holder may not enforce a judgment for recovery of land against the judgment debtor after 12 years. That the determination of a succession matter cannot render a matter in the ELC res judicata. They also claim that they are the absolute proprietors and not holding the property in trust for anyone, adding that one cannot hold property in trust for a person who is over the age of majority.

4. The Respondents deponed that that the Applicant has never been in peaceful occupation of the suit property for 40 years, and he is in fact not 40 years old. Further that a judgment debtor may at the lapse of the judgment institute proceedings against decree holder and such a suit is not res judicata. In addition, that neither the parties nor the issues herein are the same as those in the previous suit. They are of the view that the Applicant has not met all the elements of res judicata and that the application has not raised any point of law, but it is marred with facts. They asked that the Application be dismissed with costs.

Submissions;

5. The Application was canvassed by way of written submissions. In the Applicant's Submissions dated 10th June, 2024 Counsel set out the test for determining the plea of res judicata as laid out in Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR. Counsel then compared the prayers in the Plaint of the previous suit and those in the instant suit, explaining that the determination of the former suit renders this suit res judicata. Counsel explained that the judgment in the former suit was delivered by a court of competent jurisdiction, over the same subject matter as the one herein. That the parties are the same since the Applicant is claiming through the Estate of Ngaulo Tanui. It was submitted that the suit herein is res judicata, hence incompetent and fatally defective. Counsel relied on John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Others (2015) eKLR and Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the Principal Secretary Treasury) & Another (2020) eKLR.

6. Counsel submitted that the Respondents never appealed against the judgment of the High Court. It was also submitted that the Respondents filed the instant suit 20 years later to recover the suit land, which period is more than the 12 year limit prescribed under Section 7 of the *Limitation of Actions Act* (Mehta vs Shar (1965) EA 321). Counsel insisted that if the matter is statute barred, the court lacks jurisdiction to entertain it (Owners of Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd (1989) KLR and Anaclet Kalia Musau vs Attorney General & 2 Others (2020) eKLR). Counsel summed up this argument by submitting that the instant suit is time barred and this Court has no jurisdiction to hear and determine the suit. Further, since the High Court matter was heard and determined, Counsel rubbished the Respondents' claim that they can institute a fresh suit after lapse of the judgment.

7. Counsel also argued that the Respondents sued the Applicant in his personal capacity over the suit properties which belonged to and form part of the estate of the late Ngaulo Tanui. That if the Respondents wanted to recover as Judgment Debtors, they ought to have sued the Administrators of the estate of Ngaulo Tanui, the Decree Holder in the former suit. They have no claim against the Applicant in his personal capacity because he lacks locus standi to defend the suit where the Respondents seek to enforce a judgment against the deceased since he is not the decree holder. He relied on *Julian Adoyo Ongunga vs Francis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015*. The Applicant prayed for dismissal of the Application with costs.

Respondents' Submissions;

8. The Respondents' submissions in response are dated 10th June, 2024. Counsel for the Respondents chose to rely on Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited (2017) eKLR for the elements of res judicata. Counsel submitted that the Applicant had not met all the elements of res judicata, since the parties and issues in the previous suit are not the same as those in the current suit. Counsel pointed out that the Applicant was inviting the court to delve into the former suit to investigate the similarities with this suit, hence the PO does not stand out clearly from the title litigated under. Counsel asked the court to look at Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors (1969) EA 696, Mathias Dzombo Jumaa & Another (Suing as the Personal representative of the Estate of Patrick kwessha Dzombo {Deceased}) vs Crispin Mwangolo Sanga & 2 Others (2017) eKLR and The *Independent Electoral & Boundaries Commission vs Maina Kiai, Civ. Appeal 105 of 2017*.

9. Counsel added that the title in favour of the decree holder was extinguished at the lapse of 12 years from delivery of the judgment, and the proceedings leading up to it also lapsed (M'ikiara Mírinkanya Sebastian Nyamu *vs Gilbert Kabere M'mbijiwe, CA No. 124 of 2003*). That at the lapse of the judgment, the title was restored to the Respondents. Counsel submitted that Section 7 of the *Limitation of Actions Act* refers to suits for recovery of land, yet the Respondents' suit is not for recovery of land. The Respondents claimed to be the registered owners who have been in possession for more than 20 years and they were exercising their proprietary rights. It was submitted that the contention that the suit was statute barred is misplaced and does not raise pure points of law. Counsel asked the Court not to entertain the Applicant's Motion and asked that the same be dismissed with costs.

Analysis and Determination;

10. The Court has considered the Motion, affidavits filed for and against it and annexures thereto, as well as the submissions filed. The key issues for determination are;

    i. Whether the Respondents' suit is res judicata;

    ii. Whether the judgment of the High Court in Eldoret High Court Civil Case No. 65 of 1993 has since lapsed;

    iii. Whether the suit is time barred by virtue of Section 7 of the *Limitation of Actions Act*;

    iv. Whether the suit should be struck out;

    v. Who shall bear the costs?

i. Whether the Respondents' suit is res judicata

11. The Applicant herein raised an objection to the entire suit on grounds that the suit herein is res judicata citing the decision of the High Court in Eldoret High Court Civil Case No. 65 of 1993. For this reason, the Applicant has asked the court to strike out the suit.

12. The term res judicata is defined in the Black's law Dictionary 10th Edition as:-

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

13. 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"

14. The doctrine of res judicata prevents parties from instituting more than one suit in respect of the same or a substantially similar cause of action. It requires Courts to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. For a court to determine whether a suit is res judicata, it must look at the decision claimed to have settled the issues in question as against the instant suit to ascertain;

    i. What issues were really determined in the previous Application;

    ii. Whether they are the same in the subsequent suit and were covered by the Decision.

    iii. Whether the parties are the same or are litigating under the same Title; and

    iv. Whether the previous suit was determined by a court of competent jurisdiction.

15. The first and second elements can be discussed together. This court is required to look at the issues in the previous case and decide whether they are the same as those in the subsequent suit. In the instant suit, the Respondents claim to be the legally registered owners of the suit properties being Cheptiret/Kapkoi/Block 1(KERITA)/229, 230 and 231. By virtue of the said ownership, they seek from this court a permanent injunction restraining the Applicant from entering, trespassing, ploughing i.e. utilising or otherwise dealing with the suit properties or interfering with the Respondents' rights and ownership thereof.

16. To be specific, in this instant suit it is alleged that the 1st Respondent is the owner of Land Parcel No. Cheptiret/Kapkoi/Block 1(KERITA)/231, whereas the 2nd Respondent allegedly owns Land Parcel Nos. 229 and 230. In the previous suit, Ngaulo Tanui alleged that these three portions were created after a subdivision of the parcel of land known as Cheptiret/Kapkoi/Block 1(KERITA)/3. This subdivision was cancelled by the court in its judgment and the land was reverted to the initial plot no. There is no denial that the suit property in the previous suit is similarly the suit property in tis subsequent suit.

17. Turning to the issues in the two suits, before a court can issue the order of permanent injunction sought, it must satisfy itself that the Respondents have sufficient interest in the suit land to warrant the issuance of a permanent injunctive order as against the Applicant. Sufficient interest means ownership by registration, lease, license or any other means duly recognised under the law. One cannot deny therefore that the ownership of the suit property will be at the centre stage of this current dispute.

18. The question now is whether the issue of ownership was dealt with in the previous suit and a determination thereon made. I must indicate that the copy of the previous judgment provided by the Applicant was not clear. This court however managed to obtain the original High Court file and read the said judgment. I note that in the previous suit, the High Court made the following determinations:-

    a. An order be and is hereby issued and declared that the 1st Defendant held the original shamba in trust for himself, the Plaintiff, Defendant's mother, brothers and sisters.

    b. An order be and is hereby issued an declared that the 1st Defendant has never been entitled to sell any portion of the suit shamba and any purported subdivisions and transfer of portions of the suit shamba in breach of the trust are null and void ab initio.

    c. An order of permanent injunction be and is hereby issued against the 2nd and 3rd Defendant s restraining them from in any way dealing with the suit or portion thereof and as against the 1st Defendant from dealing with the suit land without the consent and approval of the Plaintiff, mother, brothers and sisters.

    d. An order be and is hereby issued and ordered that any money received by the 1st Defendant pursuant to any purported sale of the suit land are refundable to the 2nd and 3rd Defendants and that no valid title was passed to the 2nd and 3rd Defendant with respect to the resultant portions of the suit land.

    e. A declaration be and is hereby made to the effect that parcel nos. 229, 230 and 231 as per paragraph 9 of the Amended Plaint are trust property and rightly belong to the Plaintiff's said family.

    f. Under further or other reliefs as the court may deem fit to grant an order be and is hereby issued to the effect that the registrations in favour of the three Defendants in respect of the said parcels and the subsequent subdivisions are cancelled and the original number restored.

    g. Under further or other reliefs as the court may deem fit to grant an order be and is hereby issued and ordered that after the original title is restored the trust in favour of the Defendant alone be and is hereby brought to an end and the restored land be and is hereby ordered to be registered in the joint names of the Plaintiff, the mother of the 1st Defendant, 1st Defendant and one other adult brother or both adult brothers of the 1st Defendant as trustees for themselves and other family members of the 4th house.

19. From the above determination, it is clear that the issue of ownership of the suit property was also central to that suit. It goes without saying that the judgment of the High Court effectively dealt with the issue of the ownership of the suit property, making a finding that the 1st Defendant therein held the suit property in trust for his parents and siblings. To entertain this suit, the court will have to once again make a determination on the ownership thereof, before it can determine the Respondents' entitlement to the orders sought. Such an exercise is contrary to the doctrine of res judicata, and will amount to the court sitting on appeal of the high court's decision, a matter for which it has no jurisdiction. For this reason, the limb of common issues has therefore been satisfied.

20. The second element is whether the parties in the two suits are the same or are litigating under the same title. In making this determination, I am guided by the decision of the supreme court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR), where it was held as follows:-

> " The answer may be found in explanation no 6 of section 7 of the *Civil Procedure Act* which provides as follows:
>
> > 'Explanation (6)? Where persons litigate bona fide 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.'
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> The commonality is that the appellants herein and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such."

21. Eldoret High Court No. 65 of 1993 was instituted by the late Ngaulo Tanui against John Kirwa Togom, John Kipkemboi Keny (the 1st and 2nd Respondents herein respectively) and Ignatius Kibiwot Masai. The Applicant herein has indicated that he is a grandson of the late Ngaulo Tanui, the Plaintiff in the former suit. From the extract of the orders of the High Court above, it is clear that the judgment was made not only in favour of the Plaintiff in that suit, but also for the members of his family. The Applicant herein claims to have gained entry onto the land as a member of that family by virtue of the fact that he is a grandson of the late Ngaulo Tanui. No evidence has been tendered to disprove this allegation.

22. Going by the finding of the supreme court in the John Florence Case (Supra), if the suit is allowed to proceed, the Applicant being a member of the late Ngaulo Tanui's family would be litigating under the same title. The removal of the 3rd Defendant in the previous suit, and the addition of the Applicant as a Defendant in this suit does not change the fact that the parties are the same in both suits. The parties in this suit and those in the previous suite are similar, and I note that the instant suit is framed with the intention of evading or avoiding the doctrine of res judicata.

23. The last element is whether the previous suit was determined by a court of competent jurisdiction. There has been no allegation that the high court lacked jurisdiction to hear and determine the previous suit. In any event, the previous suit was filed in 1993 before the 2010 Constitution which created the Environment and Land Court. At the time, the high court was vested with jurisdiction to hear land matters if they met the requisite pecuniary or physical jurisdiction. That limb has therefore also been satisfied.

24. It follows therefore that all the elements for the plea of res judicata have been met. That being the case, this court agrees with the Applicant that it has no jurisdiction to entertain this current suit. In addition, with regards to the transfers to the 2nd and 3rd Defendants in the previous matter, the High Court at page 16-17 held that:

> " As regards the transfers, there is no doubt that they were effected and separate titles issued. However, having found that this was trust land the 1st Defendant as trustee could not deal

with it without the knowledge, consent and approval of the other beneficiaries. It is on record that he never informed the other family members about the sale and when he went to the Land Control Board for consent."

25. At page 19 of the said judgment, the court went on to find that:

> " The Defendant as Trustee had no right to sell without the knowledge and consent of the other beneficiaries. In doing so he passed a non-existent title which cannot be given effect to by this court. it follows that the sale and transfers have to be set aside."

26. The 2nd Respondent herein was the 2nd Defendant in the High court suit, who had purchased the suit properties from the 1st Respondent herein, (also the 1st Defendant in the Previous suit). The sale and transfer of the said portions of the suit property to the 2nd Respondent were set aside. As a result, the 2nd Respondent has no interest in the said suits capable of being enforced by this court. He therefore has no locus standi to institute a suit against the Applicant claiming ownership of the suit property.

27. The Respondents deponed that the Application herein does not raise any points of law and that it is marred with facts. That is true, however, it is the very nature of Applications like this instant one to delve into facts as opposed to Preliminary Objections which strictly require the objector to only raise pure points of law. It is for this reason that courts have discouraged the practice of raising the plea of res judicata through a preliminary objection. This is because, for a court to satisfy itself that a suit is res judicata, the court must dig into the evidence and compare the judgement, issues and parties in the two cases to determine if they are the same. This cannot be done through a Preliminary Objection, but can be undertaken where the plea is raised in an Application. The Applicant is not only well within his rights to raise the plea as an application, but procedurally correct.

ii. Whether the judgment of the High Court in Eldoret High Court Civil Case No. 65 of 1993 has since lapsed;

28. The argument that the judgment has lapsed after 12 years from the date of delivery thereof and therefore the same cannot be executed, is anchored on Section 4(4) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, which provides as follows:-

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

29. From the above, it will be observed that no action may be brought in respect of a judgment after lapse of 12 years. Section 4(4) of the *Limitation of Actions Act* would however apply in in the judgment of the previous suit in so far as the delivery of the suit property to the then Plaintiff is concerned. Since the majority of the orders are negative orders in nature, the only executable portion of the orders was that of registration of the suit property in the name of the Ngaulo Tanui, his wife and sons. This is the only part of the judgment that lapsed after the 12 years, which ended on 2nd April, 2010.

30. However, the argument that the judgment lapsed would have been tenable if the Applicant had sought to execute the judgment by attempting to have the land registered as the court directed. On this issue, it must be noted that the Applicant has not sought to execute the judgment of the High Court. That

is not the case at all, and in fact, it is not the Applicant who moved this court in the first place it is the Respondents.

31. Furthermore, the majority of the orders given in the High court were declaratory in nature and as earlier stated, were in the nature of negative orders. The orders did not require the parties and specifically the Plaintiff therein to do anything, as they only clarified the positions of the parties. These orders/ declarations took effect immediately, and being that they were clarifying the rights of the parties to the suit property, they do not lapse. They were final and binding with regards to the ownership of the suit property and the rights arising therefrom. Time and again, courts have insisted on the need for finality in litigation. The need for finality is the reason for existence of the plea of res judicata. The Court of Appeal held in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (2017) eKLR that:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

32. The rationale behind this is that a judgment must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court. Such a determination, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be substantially undermined if the courts were to revisit them every 12 years in order to determine parties rights over the same subject matter. The Respondents never contested the judgment of the high court or through Appeal or Review. That judgment stands to date and is final, but as earlier explained, the only portion thereof that lapsed was the executable order directing the registration of the suit property in favour the late Ngaulo Tanui, his 4th wife and their children.

iii. Whether the suit is time barred by virtue of Section 7 of the *Limitation of Actions Act*;

33. At prayers 2 and 3 of the Motion, the Applicant sought to have the suit struck out for being time barred by reason that it offended Section 7 of the Limitations of Actions Act. The question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it. Section 7 of the Limitations of Actions Act it provides that:-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

34. The nexus between the issue of limitations and the jurisdiction of a court to hear a suit was affirmed in the case of Sohanladurgadass Rajput and another vs Divisions Integrated Development Programmes Co Ltd (2021) eKLR where the Court held:-

> " The question of limitation is a question that goes to the jurisdiction of this Court. It is a clear point of law, which if argued as Preliminary Objection point may dispose of the suit."

35. The Respondents have alleged that their suit is not for recovery of land and so Section 7 of the *Limitation of Actions Act* does not apply. However, since they were divested of the suit property yet they now seek a permanent injunction against the Applicant, the suit herein can be nothing else but an attempt to recover the land from the family of the late Ngaulo Tanui. Yet, under Section 7 of the *Limitation of actions Act*, a suit for recovery of land should be brought before expiry of 12 years.

36. None of the parties herein was clear on the exact date of delivery of the judgment in the previous suit. It has been explained earlier in this decision that this court took time to peruse the High Court file and it was confirmed that the judgement was delivered on 2nd April, 1998. As explained above, only the order of the high court regarding the registration of the suit property in the names of the late Ngaulo Tanui's family lapsed on 2nd April, 2010.

37. It is not in dispute that the High court extinguished the 2nd Respondents' title and declared that the 1st Respondent herein held the suit property in trust for the late Ngaulo Tanui, his 4th wife and their children. The fact that the Title remains in the name of the 1st Respondent herein does not terminate the trust declared by the High Court over the suit property. Therefore, even if the judgment lapsed, the title would not automatically revert back to the Respondents as they have alleged.

38. However, if indeed the Respondents' title had reverted upon such lapse of the judgement, which contention this court has already denied, they ought to have brought suit within 12 years from 2nd April, 2010. The deadline for the Respondents to institute such suit would have been 2nd April, 2022. They did not do so and waited more than two years to institute the present suit. For that reason, the suit is indeed time barred.

iv. Whether the suit should be struck out

39. As to whether the suit should be struck out, the Court of Appeal in the case of Ramji Megji Gudka Ltd vs Alfred Morfat Omundi Michira & 2 Others (2005) eKLR held as follows:

> " In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT Dobie & Company (Kenya) LTD. V. Muchina [1982] KLR 1 in which Madan J.A. at p. 9 said:-
>
> > 'The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross- examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.'
>
> In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."

40. This court has examined the objections raised in the Application herein and found that not only is the suit res judicata, but that any claim the Respondents may have had over the suit property, or at all, has been barred by the statute of limitations. For that reason alone, the suit is ripe for striking out.

41. That aside, the court has also noted that the 1st Respondent is on the land by virtue of being a member of the family of his deceased father, in whose favour judgment was entered. He is a trustee as the court declared, and he cannot seek orders baring the other beneficiaries from accessing the land. For the 2nd Respondent, he is not entitled to an order of permanent injunction over the suit property since he is not the owner thereto in any shape or form. On that score therefore, the suit is incompetent and fatally defective for not disclosing any reasonable and/or suitable cause of action, and ought to be struck out.

42. I should also point out that the Trust declared by the High Court in its judgment of 2nd April, 1998 still exists. However, the order on registration of the suit land in the name of the other family members has lapsed. Therefore, the Applicant and other family members are at liberty to pursue legal avenues to bring the said trust to an end and have their names registered on the Title as absolute owners of the suit land, or otherwise have it vested in different trustees.

v. Who shall bear the costs?

43. Costs of an action or proceeding are awarded at the discretion of the court. The general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). Ordinarily therefore, a successful party in any action should be awarded costs of the litigation unless the court, for good reason, directs otherwise.

44. The Applicant has succeeded in this Application and is therefore entitled to costs. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the Applicant shall be awarded costs of this Application and of the suit.

Orders;

45. The upshot is that the Defendant/Applicant's Application dated 30th April, 2024 has merit. The same succeeds in the following terms:-

    a. That this honourable court lacks jurisdiction to hear and determine the instant suit before this Honourable Court as the suit herein is res judicata by virtue of Eldoret High Court Civil Case No. 65 OF 1997 (Ngaulo Tanui vs John Kirwa Togom and 2 Others).

    b. The Plaintiffs'/Respondents' suit offends the mandatory provisions of Section 7 of the *Limitation of Actions Act* Cap 22 and is thus struck out.

    c. That the Plaintiffs/Respondents shall bear the costs of this Application and the suit.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 23RD DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kipkoech for M/s Lelei for Plaintiff.

M/s Sielei for Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

23RD OCTOBER, 2024