Nguruka & 4 others v National Land Commission & 5 others (Environment & Land Case 108 of 2012) [2023] KEELC 166 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 166 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 108 OF 2012

SM KIBUNJA, J

JANUARY 25, 2023

[FORMELY ELDORET HCC NO 9 OF 2003]

BETWEEN

ERINYIT EPORON NGURUKA ..... 1ST PLAINTIFF

LODUPORO EKITUI MURECHEO ..... 2ND PLAINTIFF

STEPHEN LOIKITOI KASKOUT ..... 3RD PLAINTIFF

WILLIAM NGIRO ..... 4TH PLAINTIFF

KARIUKI GICHUHI ..... 5TH PLAINTIFF

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION SETTLEMENT ..... 2ND RESPONDENT

DIRECTOR OF SUREVEYS ..... 3RD RESPONDENT

REGISTRAR OF LANDS UASIN GISHU COUNTY ..... 4TH RESPONDENT

AND

LONRHO AGRI-BUSINESS (EA) LTD ..... 1ST DEFENDANT

FANIKIWA LIMITED ..... 2ND DEFENDANT

RULING

Introduction

1 John Kole Loseny and162 other plaintiffs commenced this suit as Eldoret HCCC No 9 of 2003 against East African Extracts Co Limited and three (3) others through the originating summon dated February

10, 2003, and filed on the February 11, 2003, through M/s Nixon Sifuna advocate, citing several provisions of the pre-2010 *Constitution*, *Judicature Act*, *Civil Procedure Act* and Rules. The suit was later transferred to this court and given the current registration reference. They sought for among others that the court to make findings that they had a legal and equitable interest in land known as LR No 7739/14 by account of adverse possession, that their constitutional rights had been violated, and that a mandatory injunction be issued against defendants to resettle them in parts of land No 7739/14. That pursuant to the order of the court dated the June 21, 2017 on an application dated the April 11, 2017, M/s Seneti & Oburu Associates Advocates were granted leave to come on record for the plaintiffs. The plaintiffs were also granted leave to file an amended originating summons. The amended originating summons dated the September 25, 2017 was then filed with five (5) plaintiffs, seven (7) defendants and one (1) interested party. The amended originating summons, is premised upon articles 1(1), 19, 20, 21, 22, 23, 28, 29 (c), (d), and (f), 35, 40, 47, 60, 70, 71, 74, 75, 81, 82, 84, 123 and 165 of the *Constitution* of Kenya; section 3(1) of the *Judicature Act* chapter 8 of Laws of Kenya; section 1A,1B, 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and order xxxvi of the *Civil Procedure Rules*. The plaintiffs seeks for determination of the following questions by the court;

a. Whether the right of the plaintiffs as protected by section 71 of the *Constitution* of the Republic of Kenya has been violated by their forcible eviction by the defendants on the 5th day of July from land parcel LR No 7739/14 known as Kambi Turkana D Block.

b. Whether the eviction o the plaintiffs from land parcel LR No 7739/14 known as Kambi No 7739/14 by the defendants and or/ their agents is a contravention of their right not to be discriminated against under section 77,81 and 82 respectively of the *Constitution*.

c. Whether the purported sale, transfer, alienation and/or allocation of the land parcel LR No 7739/14 or part therefore to other persons to the exclusion of the plaintiffs and continue settlement of such other thereon to the exclusion of the plaintiffs shall be granted.

d. Whether an order restraining the first defendant from alienating or allocating any parts of land known as Kambi Turkana D Block on which the plaintiff have been living to the exclusion the plaintiff shall be granted.

e. Whether the granting of an order restraining the 1st defendant from selling, leasing, disposition or otherwise alienating the parts of lands LR No 7739/14 shall be effected.

f. Whether a mandatory inunction can issue, compelling the 1st defendant to resettle or ensure that the plaintiffs returned to the part of land LR No 7739/14 known as Kambi Turukuna Block shall be allowed.

g. Whether the plaintiffs have a legal or equitable interests in parts of land parcel LR No 7739/14 where the defendants and their agents forcibly evicted them.

h. Whether the plaintiffs can be resettled to the part of land parcel LR No 7739/14 known as Kambi Turkana D Block since it's the home they have known for more than 12 years' prior their unconstitutional and irregular wrongful eviction therefrom.

i. Whether the defendants should compensate the plaintiffs for the loss damage suffered.

j. That the defendants pay the costs of the suit.

Application.

2. That on the February 11, 2022, the 5th defendant, through their learned counsel, M/s Kalya & Company filed a notice of motion dated February 10, 2022 seeking the following orders;

    a. This suit be and is hereby struck out for being *res judicata* and an abuse of the process of court.

    b. The 5th defendant and 6th defendant be awarded cost of this application on the higher scale.

    The application was supported by the affidavit of David Korir who deposed *inter alia* that; Eldoret HCC No 82 of 2001 *East Africa Tanning Extract LTD v John Erinyit and 5 others* and the matter herein relates to the plaintiff in the current matter and 5th defendant and concerns a similar dispute of land parcels Ngeria Block 1 (EATEC) 471,473,474,475,476.477,1860.1861 and 1962,1852,1853. He further averred that the certificate of occupation annexed as DK-4 confirmed that the 6th defendant had purchased, F501, F502, F503, F504, F505, F506, F607, F509, F510, B290, L88 and N477, being resultant subdivisions LR No 7739/14. He further deposed that the 5th defendant had successfully sued and evicted the plaintiffs herein who were the representatives of Kambi Turkana Squatters, and annexed as DK-5 the eviction order. That the squatters had then sought settlement from the Catholic Dioceses of Eldoret, and were settled in Kapseret. That it would be an exercise in futility for the court to allow orders sought in the amended originating summons as plaintiffs were evicted from the suit property on July 5, 2001, and by their own admission, or reasons whereof, the application should be allowed with costs.

3. The application is opposed by the plaintiffs through the affidavit of Erinyit Eporon Nguruka, sworn on the February 17, 2022 who deposed interalia that the application was misconceived, bad in law and devoid in merit. That Eldoret HCC No 82 of 2001 East Africa Tanning Extract LTD V John Erinyit and 5 others, and this matter herein do not have the same parties the parties are not litigating over the same title. That the plaintiff in Eldoret HCC No 82 of 2001 East Africa Tanning Extract LTD V John Erinyit and 5 others was East Africa Tanning Extract Ltd, while in the matter herein, it is Erinyit Eporon Nguruka & 4 others representing 163 members. The Applicant had also failed to explain the link between Lornho Agri- Business (EA) LTD, who is the 5th defendant, and East Africa Tanning Extract LTD in Eldoret HCC No 82 of 2001 East Africa Tanning Extract LTD v John Erinyit and 5 others. It was further deposed that orders obtained in Eldoret HCC No 82 of 2001 East Africa Tanning Extract LTD v John Erinyit and 5 others cannot apply to the plaintiffs herein, and that in the interest of justice the plaintiffs/ respondent should be given an opportunity to be heard, and the application should be dismissed.

4. The 5th defendant filed a further affidavit sworn by David Korir, in which he deposed *inter alia* that; the case in Eldoret HCC No 82 of 2001 East Africa Tanning Extract Limited v John Erinyit was initiated by the 1st plaintiff in his capacity as the representative of Kambi Turkana Squatters; that the plaintiffs/respondents in their pleadings filed in court on June 21, 2017 admitted that after the collapse of EATEC, the government undertook to resettle them as former employees of EATEC which had metamorphosed to Lornrho Agribusiness, the 5th defendant. He averred that the suit be struck off on the basis of failing to meet the threshold set in order 2 rule 15 of the *Civil Procedure Rules*.

5. The learned counsel for 5th defendant, plaintiffs, and 1st to 3rd defendants filed their written submissions dated the May 16, 2022, June 2, 2022 and June 13, 2022 respectively, which the court has considered.

6. The following are the issues for the determination by the court;

a. Whether the 5th defendant has established that the suit herein is *res judicata* and or an abuse of the process of the court.

b. Who pays the costs of the application.

7. The court has carefully considered the grounds on the application, affidavit evidence, written submissions, superior courts decisions cited thereon, the record and come to the following conclusions;

a. Section 7 of the *Civil Procedure Act* sets out the doctrine of *res judicata*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been determined by a court of competent jurisdiction in a former suit involving the same parties or parties acting under the same title. In order for a party to effectively raise and uphold the bar of *res judicata*, a party raising it must satisfy the five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. That the former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

The Court of Appeal held in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR), that; -for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; a) The suit or issue was directly and substantially in issue in the former suit. b) That former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally determined in the former suit. e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. The court went on to state on the role of the doctrine:

> '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 favorable 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.

In the *Maina Kiai case* (supra), the Court also quoted with approval the Indian Supreme Court in the case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 where it was stated;

> " The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also

> founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

b. In *Gurbachau v Yowani Ekori* (1958) EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the judgment of the Vice Chancellor in *Henderson v Henderson* (1) 67 ER 313 at page 319 wherein it was stated that:

> " In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time.'

c. Supreme Court of India in the case of *State of Haryana & rs v MP Mohla* (2007) 1 SCC 457 held as follows:

> " The dispute between the parties has to be decided in accordance with law. What, however, cannot be denied or disputed that a dispute between the parties once adjudicated must reach its logical conclusion. If a specific question which was not raised and which had not been decided by the High Court the same would not debar a party to agitate the same at an appropriate stage, subject, of course, to the applicability of principles of res judicata or constructive *res judicata*. It is also trite that if a subsequent cause of action had arisen in the matter of implementation of a judgment a fresh writ petition may be filed, as a fresh cause of action has arisen."

d. The facts and circumstances under which the current litigation emanates is the ownership of land parcels Pioner/Ngeria Block 1 (EATEC) 471, 473, 474, 475, 476, 477, 1860,1962,1852,1853 and 1855, in which the plaintiffs claim adverse possession among other reliefs. In the previous suit, Eldoret HCC No 82 of 2001 East Africa Tanning Limited v John Erinyit & 5 others the applicant herein claimed that it was the registered proprietor of land known as LR No 7739/14, land parcels F504, F505, F507, F486, F487, F488,489, F490,491 and F492 and the 1st respondent/1st plaintiff among other defendants had encroached the land and damaged it. The applicant was seeking a mandatory injunction and special damages. That whereas in both suits the subdivisions in question emanate from land parcel LR No 7739/14, the issue brought forth are different as those in the former pertains to encroachment

and damage of land, and the current suit pertains to mainly a claim of adverse possession and violation of constitutional rights.

e. From the evidence on record, the former suit, Eldoret HCC No 82 of 2001 East Africa Tanning Limited v John Erinyit & 5 others was instigated by East Africa Tanning Extract Limited, which the applicant argued had morphoed into Lonrho Agri-business (EA) LTD. However, no evidence to prove that claim has been presented to the court. The 1st respondent/ 1st plaintiff was a member of the previous suit, as a defendant whereas the four other respondents were not parties to the suit. The applicant argued that the respondent/ plaintiffs were representatives of squatters from Kambi Turkana Camp in the former suit, but there was no evidence on record to confirm that assertion, as the pleadings and rulings tendered as evidence emanating from Eldoret HCC No 82 of 2001 East Africa Tanning Limited v John Erinyit & 5 others never indicated that the defendants were representing other squatters. In the current suit there are five plaintiffs with the 1st respondent/ plaintiff being the only recurring member from the Eldoret HCC No 82 of 2001 East Africa Tanning Limited v John Erinyit & 5 others whereas the other respondents/plaintiffs were never parties to the former suit. The issue in question in the previous suit was encroachment of the defendants therein on the current 5th defendant's land known as LR No 7739/14; land parcels F504, F505, F507, F486, F487, F488,489, F490,491 and F492. The defendants defence was that they were squatters and they had been occupants of land since the 1950's, and had a genuine case for adverse possession. The court made a ruling dated June 20, 2001 granting the 5th defendant a mandatory injunction directing the defendants therein to vacate the land parcels, and to pay costs to the 5th defendants. The issue in question in the current suit pertains to violation of constitutional rights and a claim of adverse possession. The matter herein is in my considered opinion raising novel issues that had not been addressed by the court in the previous matter, in regards to violation of constitutional rights. Further the previous suit, Eldoret HCC No 82 of 2001 East Africa Tanning Limited v John Erinyit & 5 others was filed under the ambit of the pre-2010 constitution in which the High Court had unlimited and original jurisdiction to deal with disputes and was competent to determine the matter. This court was then not in existence, and the High Court was then a competent court to hear and determine that suit. That court's decision does not, as shown above, make the current suit res judicata or an abuse of the process of the court.

f. Having analyzed the issues above it is my finding that the 5th defendant has not met the bar to effectively prove res judicata as issues raised in the two suits are not similar and the parties are not the same. Consequently, I find that their application has no merit. The 5th defendant are not entitled to the reliefs sought.

g. It is trite law that costs are a matter of court's discretion, as can be deduced from section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya. The court in Republic v *Rosemary Wairimu Munene, Ex-Parte applicant v Ihururu Dairy Farmers Co-operative Society Ltd* held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

That as this case though filed in 2003 is interestingly fresh, the court is of the view that it is just and proper to order that the costs of the application be in the cause.

8. In view of the foregoing conclusions, the court finds the 5th defendant's application to be unmerited and it is hereby dismissed with costs in the cause.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JANUARY 2023.

S.M.Kibunja, J.

IN THE PRESENCE OF;

PLAINTIFFS : Absent

DEFENDANTS : Absent

COUNSEL : Mr. Odongo for 1st to 4th Defendants.

WILSON .. COURT ASSISTANT.

S.M.Kibunja, J.

ELC MOMBASA.
