



REPUBLIC OF KENYA



KENYA LAW
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**Lengeny & 15 others v Koguls (Environment & Land Case
9 of 2021) [2023] KEELC 17439 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 9 OF 2021**

CG MBOGO, J

MAY 17, 2023

BETWEEN

LONGISA OLE LENGENY 1ST PLAINTIFF
MARTINE OLE LENGENY 2ND PLAINTIFF
FRANCIS MUTURA LENGENY 3RD PLAINTIFF
JOSEPH KASAINI LENGENY 4TH PLAINTIFF
TURANA OLE LENGENY 5TH PLAINTIFF
PARAKUO ENOLE LENGENY 6TH PLAINTIFF
NOLMEJOLI ENOLE LENGENY 7TH PLAINTIFF
NAIROSHI ENOLE LENGENY 8TH PLAINTIFF
JACKLINE RERAI KIOK 9TH PLAINTIFF
PAULINE N'TITI OLKWARRI 10TH PLAINTIFF
KUTEREI ENE LENGENY 11TH PLAINTIFF
TURANTA OLE LENGENY 12TH PLAINTIFF
SAMPAI ENOLE LENGENY 13TH PLAINTIFF
NAISUAKO ENOLE LENGENY 14TH PLAINTIFF
ENOLE LENGENY 15TH PLAINTIFF
SIKANY OLE LENGENY 16TH PLAINTIFF

AND

JOHN SALA KOGULS DEFENDANT



RULING

1. Before this court for determination is a notice of motion application dated 14th December, 2021 and a notice of preliminary objection dated 4th February, 2022 respectively.
2. The notice of motion application dated 14th December, 2022 filed by the applicant is expressed to be brought under Sections 1A, 3A and 52 of the Civil Procedure Act, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:-
 1. Spent.
 2. That this honourable court be pleased to give a clear interpretation of the legal effect of the orders pursuant to the ruling issued by this honourable court on 15th June, 2021 (sic) which effectively set aside the ex-parte judgment dated 10th March, 2016.
 3. That this honourable court does issue orders directing the District Land Registrar Narok to cancel all the titles that arose from the subdivision of land parcel no. CisMara/Nkobon/147 as the ex-parte judgment dated 10th March 2016 and the resultant decree dated have been set aside and that the same be registered in favour of the defendant.
 4. That this honourable court does direct parties on how the present suit ought to proceed in view of the fact that the suit land is currently registered in favour of the plaintiff^s/ applicants despite the suit being an adverse possession claim against the defendant.
 5. Spent.
 6. That pending hearing and determination of this suit, this honourable court be pleased to issue an order of temporary injunction restraining the plaintiffs/respondents their agents, servants and/or employees or whomsoever acts on their instructions from ploughing, planting, grazing, fencing, constructing any other structure or subdividing any portion and/or al that parcel of land known as title number CisMara/Nkobon/147.
 7. That this honourable court does direct that a commission be conducted by the court to inspect the suit property to ascertain its status including but not limited to occupation and developments by the parties pending the hearing and determination of this suit.
 8. That the officer commanding station (OCS) Ololulunga police station does ensure enforcement of these orders.
 9. That the costs of this application be in the cause.
3. The application was not premised on any grounds. That aside, the application was supported by the affidavit of the applicant sworn on even date. The applicant deposed that vide a ruling delivered by this court on 15th June, 2021, it set aside the ex-parte judgment dated 10th March, 2016 which ruling affirmed that the respondents procured the said judgment irregularly for lack of proper service upon the applicant.
4. The applicant deposed that the effect of the said ruling was that parties were to revert to the position they were before judgment including the original title to be transferred to him until a contrary decision is made following the hearing and determination of the suit herein. Further, that the respondents have commenced subdivision of the suit property which is calculated to ensure that they gain more consolidated occupation of the suit property that will enable them justify their claim for adverse



possession. As such, it is prudent that the court does give a clear interpretation of the ruling delivered on 15th June, 2021 in order to for the parties to have a clear direction on the rights of the parties to occupy the suit land.

5. The applicant further deposed that he has every right to occupy his property without any interference and that he also has every right to have the titles that resulted from the judgment cancelled and the same to be reverted back to him. Further, that the ruling delivered by the court on 15th June, 2021 only directed that a caveat be placed by the District Land Registrar despite a finding that judgment issued by the court was irregularly procured hence the need to have the court clearly direct that the said titles currently registered in favour of the respondents be cancelled.
6. The applicant deposed that as it stands, the suit land is registered in the names of the plaintiffs which effect is as though the burden of proof has shifted towards him to prove his case against the respondents. Further, that he has every constitutional right to have his property safeguarded against illegal occupation and unnecessary contestations as he has always been in occupation of the suit property either personally or through his representatives.
7. The applicant further deposed that he sold the land to John Raffles Nyauma who proceeded to utilise his land and that the orders of status quo issued by the court on 13th November, 2021 granted him the right to cultivate the land which was within his legal right. Further, that the respondent created disturbance by threatening John Raffles Nyauma and later proceeded to file an application before this court dated 3rd February, 2019 seeking interpretation of the status quo orders dated 13th November, 2019.
8. The applicant further deposed that the respondents commenced a suit against the said John Raffles Nyauma being ELC Case No. 003 of 2021 while there were stay orders issued by the court on 13th November, 2019. Further, that the injunctive orders issued in ELC Case No. 003 of 2021 cannot purport to override his rights over the suit land following the order setting aside the *exparte* judgment.
9. In opposition thereto, the respondents filed a notice of preliminary objection dated 4th February, 2022 challenging the application on the following grounds:-
 1. The said application is *res judicata*.
 2. The application is filed contrary to Section 7 of the [Civil Procedure Act](#) and therefore the honourable court lacks jurisdiction to grant the order as prayed for.
 3. The application raises similar facts and issues raised by the plaintiffs/respondents in the application dated 9th March, 2012 in the present suit that was Formerly Nakuru High Court Civil Suit No. 75 of 2012 (OS).
 4. The honourable court on 9th July, 2012 gave orders in the said application to the effect that the court restrained the defendant/applicant herein by himself, his agents and/ or servants from entering, selling, transferring, evicting or in any other manner dealing and/ or interfering with the plaintiffs possession use and occupation of the parcel of land known as Narok/Cis-Mara/Nkoben/147 pending the hearing and determination of this suit.
 5. The said orders have not been set aside and are still in effect pending the hearing and determination of this suit.
10. The application and the preliminary objection were canvassed by way of written submissions.



11. The applicant filed two sets written submissions both dated 17th January, 2023. The 1st set of written submissions was with respect to the notice of preliminary objection. The applicant raised one issue for determination which is whether the application dated 14th December, 2021 is res judicata.
12. On this issue, the applicant submitted that the temporary orders issued on 9th July, 2012 in favour of the respondents were issued e-parte devoid of any merit and never served upon him and in this regard, the said orders have since lapsed since the 12 month mandatory period has lapsed. The applicant submitted that the respondents should have moved this court accordingly and sought extension. The applicant relied on the case of *Maxam Limited & 2 Others versus Heineken East Africa Import Co. Limited & 2 Others [2017]* eKLR.
13. The applicant further submitted that the instant application shows that new issues have arisen which interfere with the status quo of the suit property. That illegal activities have been happening despite existence of the interim orders issued on 13th November, 2019 by this court which means that the respondents have no regard to the authority of this court.
14. That even if this court were to refer to the interim orders issued on 9th July, 2012, the same cannot be the case for the reason that the respondents are interfering with the status quo through their recent activities. The applicant relied on the cases of *Popat Investments Limited & Another v Barclays Bank of Kenya Limited [2009]* eKLR and *Kanorero River Farm Limited & Others v National Bank of Kenya [2002] 2 KLR 207*.
15. The second written submissions is with regard to the instant application. The applicant raised six issues for determination as follows:-
 1. What is the legal effect of setting aside the exparte judgment dated 10th March, 2016.
 2. Whether this honourable court has jurisdiction to order cancellation of all the titles that arose from subdivision of land parcel no. Narok/Cis-Mara/Nkoben/147 the suit property herein.
 3. Whether the current suit can proceed in its nature as adverse possession claim despite the suit land parcel no. Narok/Cis-Mara/Nkoben/ 147 being registered in favour of the plaintiffs.
 4. Whether a temporary injunction ought to issue pending the inter parties hearing of this application.
 5. Whether a temporary injunction ought to issue pending the hearing and determination of this suit.
 6. Whether this honourable court should proceed and conduct a commission on the suit property before hearing and determination of this suit.
16. On the first issue, the applicant submitted that he moved this court on 12th October, 2019 seeking orders inter alia to set aside the judgment issued on 10th March, 2016 vide ELC Case No. 207 of 2013 at Nakuru and the court vide its ruling delivered on 15th June, 2021, set aside the exparte judgment issued on 10th March, 2016. While relying on the case of *Pilot Technical Services Limited v Amenan Electrical Services Limited [2011]* eKLR, the applicant submitted that the legal effect of setting aside an ex-parte judgment is that parties revert back to the position they were before the suit was heard by the court determining so.



17. On the second issue, the applicant submitted that this court should be inclined to order the District Land Registrar to cancel all the title deeds issued in favour of the respondents and the same be legally registered in his name. The applicant relied on the case of *Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 Others [2022]* eKLR.
18. On the third issue, the applicant submitted that the claim for adverse possession as currently commenced in this suit will not be sustainable as the applicant whom the respondents are claiming a right of ownership is not the registered owner. The applicant relied on the case of *Gabriel Mbui versus Mukindia Maranya [1993]* eKLR.
19. On the fourth issue, the applicant submitted that this honourable court deemed it fit to issue orders of temporary injunction on 16th December, 2021 and pray for extension of the same.
20. On the fifth issue, the applicant submitted that he has demonstrated that he was the registered and absolute proprietor of the suit property herein, further that he has suffered enormous loss associated with the encroachment by the respondents and that the respondents do not stand to suffer any harm if the present orders sought are granted. The applicant relied on the following cases:-
 - a. *Giella v Cassman Brown [1973] EA 358*;
 - b. *Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR 125*;
 - c. *Korari Agencies Limited v Epcu Builders Limited [2013]* eKLR.
 - d. *Joseph SiroMosiomo v Housing Finance Company of Kenya Nairobi HCCC No. 265 of 2007 [2008]* eKLR; and
 - e. *Virginia Edith Wambui v Joash Ochieng Ougo, Civil Appeal No. 3 of 1987 [1987]* eKLR.
21. On the sixth issue, the applicant submitted that proof of the prescriptive rights in this case is juridical and that the respondents have to demonstrate by way of evidence before this court that a trust has accrued in their favour for a period of twelve years. Reliance was placed in the case of *Mweu v Kiu Ranching & Farming Co-operative Society Limited [1985]* KLR 430.
22. The applicant further submitted that owing to the vehement contestation in regards to occupation on the ground, it is critical that this court conducts a commission to ascertain who indeed occupies the suit property as provided pursuant to Section 52 (b) of the *Civil Procedure Act*. Further that the applicant is entitled to an administrative process in conformity with Article 47 of *the Constitution* and deserves to have these proceedings commence upon full satisfaction that the suit before him is regular as an adverse possession claim since he is currently not the registered owner.
23. I have considered the application, preliminary objection and the written submissions filed by the applicant and the issues for determination is whether the notice of preliminary objection ought to be upheld and whether the applicant is entitled to the orders as sought.
24. Before I delve into the merits of what is before me, it is necessary that I point out that when this matter came up for mention on 18th April, 2023, both parties informed this court that they had filed their respective written submissions. However, the respondents despite alluding to the said assertion, had not filed their written submissions as at the time of writing this ruling. The respondents filed their written submissions on 12th May, 2023 and the same was therefore, not considered.
25. I will begin with the notice of preliminary objection filed by the respondents. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed.



Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the court stated as follows: -

“So far as I’m 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.”

This was followed up by the judgment of Sir Charles Newbold in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

26. In the case of *Lemitei Ole Koros & Another v Attorney General & 3 others* [2016] eKLR, Munyao, J stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

27. The respondents contended that the application is res judicata for the reason that the instant application raises similar facts and issues raised by the respondents in their application dated 9th March, 2012 in the present suit that was formerly Nakuru High Court Civil Suit No. 75 of 2012 (OS).

28. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* 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”

29. The *Black’s law Dictionary 10th Edition* defines “res judicata” 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...”

30. It is, therefore, trite law that a party may not commence more than one action in respect of the same or a substantially similar cause of action which has been heard and determined and the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

31. In order therefore to decide as to whether an issue in the instant application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant application to ascertain;



- i. What issues were really determined in the previous application;
 - ii. Whether they are the same in the subsequent application and were covered by the decision.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction.
32. I have perused the said application and I note that parties in this application are similar to the application dated 9th March, 2012, the respondents sought restraining orders pending hearing and determination of this suit among other prayers. The said application was heard ex-parte and orders were issued restraining the applicant from dealing with the suit land pending hearing and determination on 9th July, 2012 which orders were issued on 10th July, 2012.
33. The issues raised in the application dated 9th March, 2012 were heard and determined albeit in the absence of the applicant herein and as such, it cannot be said to be that it was heard on merit as the applicant did not have an opportunity to defend himself.
34. In a ruling delivered by my brother Mutungi J on 15th June, 2021, the court set aside the ex-parte judgment and it is on this strength that the applicant contends that they are entitled to the orders sought in the instant application and which they seek an interpretation of the same. I do also take note of the observations made by my brother in arriving at the conclusion in the said ruling.
35. Paragraph 25 of the said ruling noted the concerns of the applicant as raised in the instant application and directed that inhibitions be registered against the subtitles pending hearing and determination of the suit on merits. It was the applicant's contention that the respondents have consolidated their occupation of the suit property to his detriment and to safeguard his right to the property, it would be necessary that the court grants the orders as sought.
36. In my view, the ruling by my brother Mutungi J, by and large dealt with the concerns of the applicant especially concerning subdivision of the suit land. The court noted that indeed the suit land was subdivided and registered in the names of the respondents, the District Land Registrar was directed to register inhibitions against all the subtitles and the ruling also took care of the right of the applicant to a fair trial by granting him leave to defend the suit.
37. On the issue of interpretation, this court has no jurisdiction to give an interpretation of the ruling made by a court of concurrent jurisdiction. That would be akin to reviewing a decision of a court which performs similar roles and functions and which has no place in our statutes.
38. Also, it is my belief that pursuant to the ruling delivered by the court on 15th July, 2021 it would be in the interest of justice that prayer 6 of the instant application is allowed as prayed.
39. Arising from the above, the notice of preliminary objection dated 4th February, 2022 is dismissed. The notice of motion application dated 14th December, 2021 is hereby allowed as follows:-
- i. An order of temporary injunction is hereby issued restraining the respondents, their agents, servants and/ or employees or whomsoever acts on their instructions from ploughing, planting, grazing, fencing, construction, leasing, subdividing, charging or selling or any other dealing or disposition of all that parcel of land known as title no. Cis-Mara/Nkobon/147 pending hearing and determination of this suit.
 - ii. That the Officer Commanding Station (OCS) Ololulunga police station does ensure compliance with order i. above.
 - iii. Costs to be in the cause.



It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 17TH DAY OF MAY, 2023.

MBOGO C.G.

JUDGE

17/5/2023.

In the presence of:-

CA:T.Chuma

