



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC MISC NO. 2. OF 2021

SIMON KISHANTO KUDATE.....PLAINTIFF

VERSUS

DISTRICT LAND REGISTRAR..... DEFENDANT

AND

TIKOISHI OLE NAMPASO.....1ST INTERESTED PARTY/APPLICANT

KIPAILOI OLE MUNKA.....2ND INTERESTED PARTY/APPLICANT

RULING

1. What is before this court for determination is a Notice of Preliminary Objection dated 6th July, 2021 filed by the 1st and 2nd Interested Parties herein challenging the plaintiff's notice of motion application dated 27th January, 2021 on the grounds that: -

- 1. That the issues canvassed in support of the said application are res judicata the same having been directly and substantially in issue between, inter alia, the same parties herein in ELC Appeal No. 10 of 2019 where this honourable court directed on the 12th day of March 2020 that it lacked jurisdiction in this matter and the same was transferred to the High Court.**
- 2. That there is no suit properly filed before this Honourable court for determination.**
- 3. That the present Miscellaneous ELC No. 2 of 2021 has been commenced through unprocedural means and thus fatally defective and incapable of obtaining the orders sought.**
- 4. That the application before this Honourable Court is clear contravention of Article 159 of the Kenya Constitution, Section 1A, and 1B of the Civil Procedure Rules, 2010 for commencement of suits and should therefore be rejected.**
- 5. That the Miscellaneous ELC No. 2 of 2021 is fatally defective, incompetent, bad in law and should be struck out with costs to the Plaintiff.**

2. Parties agreed to dispose off the notice of preliminary objection by way of written submissions. The 1st and 2nd interested parties filed their written submissions dated 24th January, 2021. It is the 1st and 2nd interested parties submission that the matter is res judicata as the same having been directly and substantially in issue between the same parties in **ELC Appeal No. 10 of 2019** was determined on the 12th of March, 2020. That the court, in its decision stated that it lacked jurisdiction on the matter as it was more of a succession matter than the ELC and therefore transferred it to the High Court and it is pending determination. The 1st and 2nd interested parties rely on **Sections 6 and 7 of the Civil Procedure Act**. They also rely on the case of **Kenya Bankers Association versus Kenya Revenue Authority [2019] eKLR** and submit that the rationale behind sub-judice rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter.

3. The 1st and 2nd interested parties further submitted that there is no suit properly filed before this court. They rely on **Section 19 of the Civil Procedure Act** and **Order 3 Rule 1 of the Civil Procedure Rules**. The 1st and 2nd interested parties rely on the case of **Peter Kwema Kahoro versus Benson Maina Githethui [2005] eKLR** and **Rajab Kosgei Magut versus Nuru Jepleting Choge [2020] eKLR**.

4. The applicant filed undated written submissions on the 17th February, 2022. The applicant submits that the preliminary objection raised by the 1st and 2nd interested parties can be described to be that of a litigant who is happy to discharge inhibition orders placed by this honourable

court over parcel number Cis-Mara/Oleleshwa/ 162 so as to render ELC Appeal No. 10 of 2019 and Succession Appeal No. 1 of 2018 nugatory. The applicant submits that the application is not res judicata as the issues for determination have never been previously conclusively determined by a court of competent jurisdiction for the reasons that the application before this court squarely touches on inhibitions and **Section 68** of the **Land Registration Act** bestows upon this honourable court the sole mandate and jurisdiction to adjudicate matters inhibition. The applicant relies on the case of **RW versus JMN [2022] eKLR**.

5. I have analysed the notice of preliminary objection and the written submissions filed by both parties and the authorities relied thereon and the issue for determination is whether the issues canvassed in the application dated 27th January, 2021 are res judicata the same having been directly and substantially in issue between the same parties herein in ELC Appeal No. 10 of 2019.

6. In the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

7. The doctrine of *res judicata* is set out in **Section 7 of the Civil Procedure Act**. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

8. A close reading of **Section 7** of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s 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.

9. In determining whether the application is res judicata, I have perused the notice of motion application dated 27th January, 2021 and the issue arising is that the applicant is apprehensive that the District Land Registrar may remove or cause the removal of a caution presently placed on parcel number Cis-Mara/Oleleshwa/162 which would highly be prejudicial to the two pending cases-ELC Appeal Number 10 of 2019 and Succession Appeal Number 1 of 2018 and as such, the applicant is seeking orders of inhibition pending hearing and determination of ELC Appeal No. 10 of 2019 and Succession Appeal Number 1 of 2018. I have also perused ELC Appeal No. 10 of 2019 in which the parties therein are Simon Kishanto Kudate as the Appellant and Tikoishi Ole Nampaso and Kipailoi Munka as the 1st and 2nd Respondents and which was before my brother Justice Mohammed Kullow.

10. From the proceedings, I noted that on 12th March, 2020 the court observed as follows: - **‘Even though the matter was filed before the ELC court on perusal of the pleadings I did find that the same is on succession which is active before the high court and I thus find that I lack jurisdiction and I therefore transfer the same to the High Court for determination’.**

11. I checked further with the High Court registry and indeed found out that the matter is actively before the High Court in Succession Appeal Number 1 of 2018-In the Estate of Karasinka Ole Samurui Alias Karasinka Samurui with a mention date slated on 16th March, 2022.

12. Arising from what I have observed and having perused the two files-ELC Appeals Number 10 of 2019 and Succession Cause 1 of 2018, I do find that the application herein is not res judicata for the reasons that in ELC Appeal 10 of 2019, the court before pronouncing itself, observed that it lacked jurisdiction to entertain the matter. The file was then transferred to the High Court. On the other hand, at the High Court, the matter is active with a mention date on 16th March, 2022.

13. I do not have reason to interfere with the observation by my brother, Justice Kullow in ELC Appeal No. 10 of 2019. Equally, the matter is before another court of competent jurisdiction which, an attempt to interfere with the going-ons in Succession Appeal No. 1 of 2018 would amount to subjudice. Having stated the above, I will not go further into the other grounds raised in the preliminary objection and for this reason the Notice of Preliminary Objection dated 6th July, 2021 is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 24TH DAY FEBRUARY, 2022.

MBOGO C.G

JUDGE

24/2/2022

In the presence of: -

CA: Chuma