



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 19 OF 2020 (OS)

DAVID MUTUTO MUMO.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, NAROK NORTH DISTRICT.....1ST RESPONDENT

MOSES KOSENCHA.....2ND RESPONDENT

RULING

A. INTRODUCTION

1. The 2nd Respondent has filed a Notice of Preliminary Objection dated 28th September, 2020; objecting the Applicant's suit instituted by way of an Originating Summons dated 13th March, 2020 in entirety premised on the following points of law that: -

- a) That Order 37 Rule 8 of the Civil Procedure Rules, 2010 does not enable the filing of an Originating Summons where what is sought is the rectification of the Land Register by an order of the court.
- b) That there is pending Civil Suit No. 115 of 2019 at the Chief Magistrate's Court at Narok between the same parties herein over the same subject matter (parcel Title No. CIS MARA/ OLKINYEI/ 793) and the Applicant is thereby further precluded from filing this Originating Summons by the provisions of Order 37 Rule 3 of the Civil Procedure Rules, 2010.
- c) That there being no vendor/ purchaser relationship between the Applicant and either or all of the Respondents an Originating Summons under Order 37 Rule 3 of the Civil Procedure Rules, 2010 does not lie.
- d) That the question of the validity of the contract of sale subject of the Applicant's Originating Summons arises and accordingly the suit cannot be heard or determined by means of an Originating Summons.
- e) That the form of the Originating Summons dated 13.003.2020 substantially offends the mandatory provisions of Order 37 Rule 14 of the Civil Procedure Rules, 2010.

2. When the matter came up before me on the 19. 10. 2020, I gave directions that the Preliminary Objection dated 29.08.2020 be disposed by way of written submissions.

3. It was the 2nd Respondent contention that the O.S has been filed pursuant to the provisions of Order 37 Rules 3 & 8 of the Civil Procedure Rules, seeking orders for the rectification of the register to the parcel of land comprised in Title No. Cis Mara/Olkinyei/ 793 whereas such an Order can only be issued pursuant to the provisions of Section 80 of the LRA, 2012. Order 37 Rule 8 of the Civil Procedure (Amendment) Rules 2020 expressly prohibits such an application for rectification of the register being made through the process of an OS.

4. Further, Order 37 Rule 8 of the Civil Procedure, 2010 further prohibits the filing of an OS where there is pending a suit involving the same land. The rule directs a party to lodge the application in the pending suit. He maintained that there is a pending suit before the Chief Magistrates at Narok ELC Cause No. 115 of 2019 between the applicant herein (who is the plaintiff in that other suit) and the 1st and 2nd Respondents herein (who are the 1st and 2nd Defendants respectively in that other suit). The subject matter of the other suit is the parcel of land comprised in Title No. Cis Mara/Olkinyei/793, the same land in issue in this suit. Thus the Applicant is precluded from instituting a multiplicity of similar suits.

5. The 1st Respondent on the other hand did submit that the suit as filed is sub judice. Based on the grounds; the Applicant has filed another

suit by way of a plaint dated 11th September, 2019 being Narok CMCC ELC No. 115 of 2019 – David Mututo Mumo vs The District Land Registrar, Narok North, Moses Kosencha & Nareiyon Ologesa; wherein one of the prayers sought in the said suit is; “Cancellation of entry number 12 made by the 1st Defendant in the land registry green card for CIS MARA/ OLKINYEI/ 793 and rectification of the green card to read the plaintiff’s name as the registered proprietor with all rights appurtenant thereto.

6. The matter in issue in both suits is similar; which is whether the applicant is the bonafide and legal owner of land parcel number Cis Mara/ Olkinyei/ 793 having purchased the same from the previous owner. Both suits are pending before different courts both having jurisdiction to hear and determine the respective cases being the Chief Magistrates Court Narok and the Environment and Land Court, Narok.

7. The Applicant’s submissions on the other hand was that the Notice of Preliminary Objection by the 2nd Respondent does not meet the threshold set for a Preliminary Objection and urged the court to dismiss the same with costs. It was his assertion that; the Preliminary Objection as filed is marred and blurred with factual details and thus does not meet the threshold and thus the same amounts to an exercise to dispose the matter by way of a Preliminary Objection.

8. Further, it was his assertion that an analysis of the 2nd Respondent’s Preliminary Objection raises no valid points of law at all. Paragraphs 1,3,4 &5 comprise argumentative legal issues that cannot be entertained and sustained through a P.O.

9. On the existence of a parallel suit; CMCC ELC No. 115 of 2019, he submitted that the same is not an issue that the court can determine without looking into the facts. For a court to determine the issues of sub-judice and res- judicata as raised in sections 6 & 7 of the Civil Procedure Act, the court has to look at and analyze evidence in the other files and where possible it has to call for the other files from their respective trial courts before deciding on the issue stay orders.

10. It was his contention that the present suit is not sub- judice and further, even if it were the case, the court cannot consider the same via a P.O.

11. I have read and considered the Preliminary Objection and the rival submissions thereto by both the Applicant and the 1st and 2nd Respondents in this case and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

B. DETERMINATION AND ANALYSIS

12. The sole issue for determination from the present Application is whether the Preliminary Objection dated 28.09.2020 has merit. The crux of the objection raised by both the 1st and 2nd respondents is that the Applicant has filed similar case between the same parties which is still pending in court; hence raising the issue of sub judice and res judicata.

13. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

14. Section 7 on the other hand provides as follows:-

“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.”

15. This court has perused the application and indeed the plaintiff/applicant does not deny the existence of a similar case as evaluated by the respondents but insists that the court should look at the facts in order to determine the application.

16. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean: -

“So far as I am 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

17. Further Sir *Charles Nebbold, JA* stated that:-

“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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

18. The above being the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

19. In determining a **Preliminary Objection**, the Court will also take into account that the **Preliminary Objection** must stem from the pleadings and raises pure point of law. In the case of **Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**,the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

20. Before the Court embarks on determining the merit of the **Notices of Preliminary Objections**, it will first determine whether what have been raised by the parties herein satisfy the ingredients of a **Preliminary Objection**.

21. The 1st and 2nd Respondents have in their submissions on Preliminary Objection averred that the suit herein is *Sub judice* as it relates to **CMCC ELC No. 115 of 2019**, in Narok, which is still ongoing. The Plaintiff on the other hand has disputed that fact that the suit herein is *Sub judice*. It is the Plaintiffs contention further that the issue of whether or not the suit is *Sub judice* will require the ascertaining of facts; though he has not directly commented on the actual existence of the said suit as alleged by the Respondents.

22. I do note with concern that the plaintiff is being evasive on the issue as to whether there is a similar case which has been filed in the lower court. It is clear from the submissions of the respondents that the claims directly and substantially in issue in the present Application are similar to the claims that are directly and substantially in issue in the lower court matter; **CMCC ELC No. 115 of 2019** which is pending for determination in the lower court are the same. Thus, the same amounts to an abuse of the judicial process and waste of the judicial precious time.

23. In the upshot, I do hereby find and hold that the Notice of Preliminary Objection dated 28th September, 2020 and consequently, direct that the Originating Summons filed by the Applicant dated 13th March, 2020 be struck out with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON THIS 8TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

In presence of:-

NO APPEARANCE FOR THE APPLICANT

NO APPEARANCE FOR THE RESPONDENTS

TOM MAURICE – COURT ASSISTANT