



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

APPEAL NO. 35 OF 2019

HANIB AYUB SULEIMAN.....APPELLANT

VERSUS

MARY LANKAS.....RESPONDENT

RULING

The Appellant applicant had by a Notice of Motion dated 18th December, 2019 sought for orders of stay of execution or orders made by the Chief Magistrate's court granting the respondents 4 acres of the Appellants land comprising of land parcel Cis Mar/Oleleshwa/544 and 545 and an order restraining the respondents from entering and remaining, trespassing or dealing with the suit land and the orders of the court be enforced by the OCS Narok Police Station.

The application was supported by the affidavit of the appellant in which he deponed that certain people came to the suit land and demarcated 4 acres of his land alleging that they had a court order and since then there is an appeal pending. It is paramount that the status quo be maintained so that the subject land is preserved.

When the application came for hearing the respondents raised a preliminary objection on points of law to the effect that the application offends the provisions of section 7,1A,3A of the Civil Procedure Act and that the Application is an abuse of the process of the court since the court has already pronounced itself on the matter and that the instant application amounts to forum shopping.

In his submissions the respondents contended that pursuant to the provisions of section 7 of the Civil Procedure the matters that are raised in the instant application are matters that were heard by court since the issues raised and the parties are the same and therefore the issue is res judicata since the court had already pronounced itself in Narok ELC No. 484 of 2017 and had directed that the respondents herein was at liberty to choose how she wanted to execute the decree she had obtained for the delivery of the 4 acres of land.

The appellant in his submission contends that the preliminary objection as framed by the respondents is not clear on whether the preliminary objection is against the application dated 18/12/19 or the appeal itself and thus the same does not show whether it is a pure point of law. He further states that the instant application is in regard to the ruling delivered on 17/12/19 and that the same was made without delay and if the order sought are not granted the appellant will suffer substantial loss as the respondent had begun sub dividing the suit land.

On whether the application and the instant appeal are res judicata, the appellant contends that the instant appeal and application do not fall within the rules applicable under section 7 of the civil procedure rules. He states that the issues raised in the instant application and appeal are different and have never been adjudicated by this court and he invited the court to look at the Narok ELC Appeal No. 484 of 2017 and Narok ELC Appeal No. 35 of 2019.

I have read the application before me the memorandum of appeal and the rival submissions filed by the parties. Since the respondent had raised a preliminary objection I will not at this stage make any findings or merits on the notice of motion dated 18/12/19 but on the respondents Preliminary Objection dated 10/2/2020 the aforesaid preliminary objection is basically founded on whether the instant appeal and the accompanying application are defective and void pursuant to the provisions of section 7 of the Civil procedure Act even though the respondents had quoted the provisions of section 1A and of the Civil Procedure Act, with parties having submitted on the contentions thereon.

What constitutes a preliminary objection on point of law is now well settled in **Mukhisa Biscuits limited-versus-Westend Distributors (1969)EA 696**. Same must consist of pure points of law which whether pleaded or not may dispose off a suit. In the instant preliminary objection, the respondent contends that the issues raised by the parties in the instant matter is what was raised in Narok ELC case No. 484 of 2017 and therefore the appeal and the application therein offend the provisions of section 7 of the Civil Procedure Act and thus the same is Res Judicata.

Section 7 of the Civil Procedure provides:-

...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.

The respondent states that the parties in the instant appeal are the same and the issues raised are one and hence since the court made a determination and a finding, the appeal offends the provision of section 7 and thus an abuse of the process of the court.

The respondent in opposition says, the instant appeal and the application are different from what the court had determined in Narok ELC No. 484 of 2017 and relates to a ruling delivered by the Chief Magistrate court on 17/12/19 seeking a stay of execution emanating from a ruling delivered on the said date and therefore different from what the court had determined in Narok ELC No. 484 of 2017 and thus does not fall within the ambit of section 7 of the Civil Procedure Act.

I have considered the preliminary objection and both the rulings that both parties wish the court to rely on to determine if the instant application offends the provisions of section 7 of the Civil Procedure Acts Section 7 of the Civil Procedure Act contemplates a scenario where the issues in contemplation have substantially been adopted by court and any other court barred from hearing and adjudicating upon what has already been determined.

In the instant matter the Appeal arises from a Ruling delivered on 17/12/19 by the Chief Magistrate Narok, the finding in the Narok ELC No. 484 of 2017 was in respect of a ruling delivered by the Senior Resident Magistrate court in Civil Application No. 8 of 2007 in which this

court had made a determination that the appeal lacked merit and consequently dismissed the said appeal. The facts raised in Narok ELC No. 484 of 2017 was in relation to the manner and mode of execution of a decree.

The instant appeal was filed on 19/12/19 challenging the ruling of the Chief Magistrate Court. I have not had the benefit to have the entire record of appeal and I may not be able to conclusively determine what the issues are since the appellant had not even annexed a copy of the ruling to the application and in the absence of the record of appeal at this preliminary stage I find the preliminary objection raised is premature and I find that the preliminary objection lacks merit and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED in OPEN COURT at NAROK on this 5th day of MAY, 2020.

Mohammed Kullow
Judge
5/5/2020

In the presence of:

CA:Chuma

Mr Tanyasis for the respondent

N/A for the appellant

Mohammed Kullow
Judge
5/5/2020