



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. E005 OF 2020

THE MARURA PEASANT COMMUNITY -*Suing through*

PETER KIRERA (*CHAIRPERSON*).....1ST APPLICANT

IBRAHIM LESIAN (*DEPUTY CHAIRPERSON*).....2ND APPLICANT

FESTUS MBOGO (*SECRETARY*).....3RD APPLICANT

PAULINE LENANTARE (*TREASURER*).....4TH APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT

THE NATIONAL ENVIRONMENT &

MANAGEMENT AUTHORITY.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

A. INTRODUCTION

1. By a plaint dated 17th December, 2020 the Plaintiffs sought the following reliefs against the Defendants:

(a) A declaration that the Plaintiffs are beneficial owners with an equitable interest in the Land referred to as Marura.

(b) A permanent injunction restraining the Defendants, their agents and/or assigns from evicting, or threatening to evict the Plaintiffs from the subject land.

(c) Costs of the suit.

(d) Interest.

(e) Any other relief that the court may deem fit to grant.

2. The Plaintiffs pleaded that they were the beneficial owners of all that portion of land known as Marura (*the suit property*) which they claimed was their community land. The Plaintiffs described the suit property as the land lying along the River Ngare Narok and River Pessi which they claimed to have occupied and farmed on since the colonial days. They further pleaded that the suit property stretched across Salama Ward, Kisiriri, Mutara, Rumuruti, Secondary, Island and Thome areas.

3. The Plaintiffs contended that the Respondents had been threatening them with eviction from the suit property since 2018 and that at some point the County Commissioner – Laikipia, had evicted some members of their community from Kisiriri. They contended that there was no other suit pending in court over the suit property save ELC No. 25 of 2020 in which the Defendants herein were not parties.

B. THE PLAINTIFFS' APPLICATION

4. Simultaneously with the filing of the suit the Plaintiffs filed a notice of motion dated 17th December, 2020 seeking a temporary injunction restraining the Defendants from evicting them or interfering with their quiet occupation and use of the suit property pending the hearing and determination of the suit.

5. The application was based upon the same grounds and matters set out in the plaint dated 17th December, 2020. It was supported by an affidavit sworn by the 1st Applicant, Peter Kirera on 17th December, 2020. The Plaintiffs contended that they had an equitable interest over the suit property because their forefathers had occupied and settled thereon since the colonial period when they were working for the white settlers. It was their case that the Defendants' threats to evict them were unlawful since they had no alternative land to move to. They contended that if they were evicted and their homes destroyed during the pendency of the suit they shall suffer irreparable loss and damage. Consequently, they urged the court to grant them the interim orders sought.

C. THE DEFENDANTS' RESPONSE

6. There is no indication on record of the 1st and 3rd Defendants having filed a response to the application. However, the 2nd Defendant filed a notice of preliminary objection dated 5th February, 2021 contending that the suit was *res judicata* on account of previous litigation over the matter in *Nanyuki CMCC No. 47 of 2018 – Kisiriri Community v Harry George Jennings and 2 Others and Nyeri ELCA No. 25 of 2020 – Kisiriri Community v Harry George Jennings and 2 Others*. It was contended that the issues raised in the instant suit were adjudicated upon and determined in those previous proceedings.

D. DIRECTIONS ON SUBMISSIONS

7. When the said application was listed for hearing on 23rd February, 2021 it was directed that the 2nd Defendant's notice of preliminary objection dated 5th February, 2021 shall be heard first. It was further directed that the preliminary objection be canvassed through written submissions. The parties were given timelines within which to file and exchange their written submissions. The record shows that the 2nd Defendant filed its submissions on 16th April, 2021 whereas the Plaintiffs filed theirs on or about 20th April, 2021.

E. THE ISSUES FOR DETERMINATION

8. The only issue for determination is whether or not the Plaintiffs' suit is *res judicata* within the meaning of **Section 7 of the Civil Procedure Act (Cap. 21)** as contended in the 2nd Defendant's notice of preliminary objection dated 5th February, 2021.

F. ANALYSIS AND DETERMINATION

9. The 2nd Defendant submitted that whereas the parties in the previous and instant suits may be different, the Plaintiffs in the instant suit were litigating under the same title as the Plaintiffs in the previous suits. It was submitted that the subject matter of litigation in *Nanyuki CMCC No. 47 of 2018* was L.R. No. 5197 and L.R. No. 2426 which was described as "Jennings Farm" which fell within River Ngare Narok and River Pessi. It was further submitted that the inclusion of new parties and additional properties in the instant suit did not change the character of the action since the Plaintiffs had an opportunity to litigate their entire claim in the previous proceedings. The court was consequently urged to uphold the preliminary objection and strike out the suit.

10. The Plaintiffs, on the other hand, disputed that the instant suit was *res judicata*. It was contended that first, there was no judgment in *Nyeri ELCA 25 of 2020* since the appeal was still pending hearing and determination. Second, that the cause of action and the parties in the previous proceedings were different from those of the instant suit. It was further contended that whereas the subject matter of the previous suit was located in Kisiriri, the instant suit concerned land in six (6) different locations which were not even adjacent to Jennings Farm. The Plaintiffs relied upon the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] EKL**R and submitted that all the legal elements of *res judicata* stipulated under **Section 7 of the Civil Procedure Act** had not been satisfied. Accordingly, the court was urged to overrule the preliminary objection and allow the pending application to be heard on merit.

11. The doctrine of *res judicata* is encapsulated in **Section 7 of the Civil Procedure Act (Cap. 21)** 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.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit

shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

12. In the case of **Independent Electoral Boundaries Commission v Maina Kiai and 5 Others** (*supra*) which was cited by the Plaintiffs, the elements of *res judicata* were summarized as follows:

(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.*

13. In the said case the court held that all those elements of *res judicata* must be satisfied in a given case for the plea to succeed and that it is not sufficient if only some of them are satisfied. The court stated *inter alia*, that:

“Thus, 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; ...”

14. There is *prima facie* evidence on record to show that the parties in the instant suit are all different from the parties in the previous proceedings. There is no evidence to show that the current Plaintiffs are acting as proxies of the Plaintiffs in the previous proceedings. There is no indication that the subject matter of the previous suit is the same subject matter in the instant suit. The mere fact that the suit properties in both suits could be located somewhere between River Ngare Narok and Pessi River does not necessarily mean that there are no other properties between those two rivers other than the property which was the subject of the previous suit, that is, “Jennings Farm”.

15. The court is of the opinion that some factual evidence would be required to identify the suit properties involved in the previous suit as well as the instant suit. The instant suit vaguely describes the suit properties as falling within Salama Ward, Mutara, Rumuruti, Secondary, Island, Kisiriri and Thome areas which were all said to fall between the two rivers. It is not even clear whether or not “Jennings Farm” is the only property in Kisiriri area. The court is thus not satisfied that the subject matter in the previous suit is the same subject matter in the instant suit on the basis of the material on record so far.

16. The court is thus far from satisfied that the 2nd Defendant has demonstrated all the elements of *res judicata* as required by law. The court has further noted that Nyeri ELCA No. 25 of 2020 cannot form the basis for a plea of *res judicata* since the said appeal is yet to be heard and determined. Nevertheless, for reasons already given, the court finds and holds that the proceedings in Nanyuki CMCC No. 47 of 2018 cannot form the basis for a plea of *res judicata* in the instant suit. Accordingly, the court is inclined to overrule the 2nd Defendant’s notice of preliminary objection.

G. CONCLUSION AND DISPOSAL

17. The upshot of the foregoing is that the court finds no merit in the 2nd Defendant’s notice of preliminary objection. Accordingly, the 2nd Defendant’s notice of preliminary objection dated 5th February, 2021 is hereby overruled with costs in the cause.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF JUNE 2021.

In the presence of:

Mr. Mukhama for the Plaintiffs

Mr. E. K. Gitonga for the 2nd Defendant

No appearance for the 1st Defendant

No appearance for the 3rd Defendant

Court assistant – Wario

.....

Y. M. ANGIMA

ELC JUDGE