



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

MISC CIVIL APPL NO. 5 OF 2020

KAMKEI LENJIRR.....APPLICANT

VERSUS

KIPILA NAKOLA.....RESPONDENT

RULING

Before me is a Notice of Motion Application dated 3rd July, 2020 in which he is seeking the following prayers:-

1.Spent

2.Spent

3. Spent

4. That pending the hearing and determination of Narok ELC High Court Constitutional Petition Number 4 of 2018 (Saruni Ole Loonkushu & Others versus Naroosura Group Ranch and Others), the Honourable court be pleased to stay of proceedings of Narok CMCC ELC Number 192 of 2018 (Kipila Nakola versus Kamakei Lenjirr).

5. That pending hearing and determination of Narok ELC HC Constitutional Pending Number 4 of 2018 (Saruni Ole Loonkushu & Others versus Naroosura Goup Ranch & Others), the Honourable court be pleased to grant stay of ex-parte Orders issued on the 14th December, 2018, in Narok CMCC ELC Number 192 off 2018 (Kipila Nakola versus Kamakei Lenjirr).

6. That pending the hearing and determination of Narok ELC HC Constitutional Petition Number 4 of 2018 (Saruni Ole Loonkushu & Others), The Honourable court be pleased to stay the consequent orders of the ruling delivered on the 14th January, 2020

7. In the alternative, that this Honourable court be please to transfer Narok CMCC ELC Number 192 of 2018 (Kipila Nakola versus Kamakei Lenjirr) to this court, for hearing and determination and costs of the Application.

Applicant's Case

The Application is supported by the Affidavit of the Applicant sworn on 3rd July, 2020. It is the Applicant's case that the Respondent filed a Complaint on 4th December, 2018 way after the demarcation process and issuance of title in the irrigation section was challenged in Narok ELC HC Constitutional Petition Number 4 of 2018. That the parcels of land Narok Cis/Mara-Naroosura/1087 and 1088 are amongst the subject parcels in contention in Petition Number 4 of 2018 in which he relies on the grounds contained therein. That an order of status quo was thereafter issued on 3rd May, 2018.

Respondent's Case

The Application is opposed by the Respondent through a Replying Affidavit dated 17th July, 2020. He avers that the application before this court is an abuse of the court process for the following reasons:-

That the dispute in CMCC ELC 192 of 2018 is one of trespass whereas the ELC Constitutional Petition 4 of 2018 is contesting the demarcation process of a ranch land. He also avers that the suit property in CMCC ELC 192 of 2018 is not anywhere mentioned in the High Court Constitutional Petition Number 4 of 2018.

The Respondent avers also that none of the parties in CMCC ELC 192 of 2018 is a party to the ELC Constitutional Petition 4 of 2018.

Issues for determination.

At this stage, the issues for determination is whether the Applicant herein is entitled to the prayers 3-7 and also costs.

Analysis

I have analysed the Application, the Replying Affidavit, copies of annexures and the Submissions filed by both parties.

I do note in paragraph 24 of the Constitutional Petition Number 4 addresses the parcels of land in dispute due to trespass and misalienation as Naroosura/Cis Mara/6 and Naroosura/Cis Mara.

The Applicant contends that the matters raised in CMCC ELC 192 of 2018 are similar to that raised in this ELC Petition.

Section 6 of the Civil Procedure Act Cap 21, provides that 'no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of the claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed'.(emphasis mine)

This section is a bar to prosecution of parallel matters in courts of similar jurisdiction. The Applicant herein has not demonstrated the correlation between the two matters either in terms of the subject matter, prayers and relief sought. The Applicant herein has not availed before this court a copy of the pleadings of the Main Suit in ELC 192 of 2018 to enable this court make an analysis as to the dispute or contention and the prayers sought therein.

This court is therefore not in a position to determine whether the prayers as prayed in CMCC ELC 192 of 2018 are similar to the prayers and relief sought in this Petition.

I do also note that the parties in CMCC ELC 192 of 2018 are not parties in the Constitutional Petition number 4 of 2018 and neither are their parcels of land mentioned therein.

Section 18 of the Civil Procedure Act provides as follows:-

(1). On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it and thereafter-

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or-

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order or transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

Section 9 (a) (i) of the Magistrates Act provides as follows:-

a. In the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to-

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

It is the applicant's Submission that since Narok ELC HC Constitutional Petition Number 4 of 2018 was filed prior to Narok CMCC ELC 192 of 2018, then Narok CMCC ELC 192 of 2018 should be stayed or transferred to this court for hearing and determination. In my view, for a party to succeed to have a matter transferred to this court, it must satisfy the provisions of section 6 as stated above. The Applicant in this case has failed to do. The Magistrates court is also well clothed with jurisdiction to hear and determine matters relating to boundaries as is the Respondent's contention. Therefore, I do not see any sufficient reason why Narok CMCC ELC No. 192 of 2018 should be transferred to this court.

The Applicant had also sought stay of Narok CMCC ELC 192 of 2018 pending hearing and determination of ELC Constitutional Petition No. 4 of 2018. In the case of *Kenya Wildlife Service versus James Mutembei [2019] eKLR*, my brother, Justice Gikonyo observed that 'stay of proceedings is a grave judicial action which interferes with the right of a litigant to conduct his litigation. It impinges on right of access to

justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent. I need not buttress any further this point as it is well put. The Applicant has not demonstrated any loss or damage that would be occasioned if Narok CMCC ELC no. 192 of 2018 proceeds for hearing and determination.

Based on the above, I find that the Applicant's Notice of Motion dated 3rd July, 2020 is without merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 28TH DAY JULY, 2021

MOHAMED N. KULLOW

JUDGE

28/7/2021

In the presence of:-

CA:Chuma

N/A for the parties and advocates