



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAORK

ELC CAUSE NO. 86 OF 2017

**WALTER SALONIK YENKO (Suing as the legal representative of the
Estate of Mpoke Ene Yenko).....PLAINTIFF**

VERSUS

PATITA OLE NTOKOIWUAN.....1ST DEFENDANT

LAND REGISTRAR NAROK.....2ND DEFENDANT

HON.ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Before me is a Notice of Motion dated 21st May, 2020 and a Notice of Preliminary Objection dated 2nd July, 2020. The Notice of Motion dated 21st May, 2020 is seeking the following prayers: -

1. Spent.
2. That this Honourable court be pleased to grant leave to the firm of M/S J Maritim and Co. Advocates to come on record on behalf of the 1st Defendant/Applicant and the Notice of Appointment of Advocates filed herewith be deemed as properly filed and served.
3. That pending the hearing and determination of this application inter-partes, this Honourable court be pleased to issue an order to restrain the Plaintiff/Respondent, by himself, his agents, servants or any person claiming under him, from charging alienating, transferring, subdividing, disposing off by way of sale or in any way interfering with the 1st Defendant's/Applicant's use and occupation of P/No. Narok Cis/Mara-Olposmoru/293.
4. That this court be pleased to set aside all the ex-parte proceedings giving rise to the judgement of 23rd January 2019, the judgment delivered on 23rd January 2019 the ensuing decree and all consequential Orders.
5. That the status of ownership in regards to P/No Narok Cis/Mara Olposmoru/293 do revert back to as before the Judgment was delivered on the 23rd January, 2019. (the Lands Registrar be served with a copy of the order).
6. That the costs of this Application be borne by the Plaintiff.

The Application is Supported by the Affidavit of the 1st Applicant/Defendant sworn on 21st May, 2019 in which he avers that no proper service was effected on him and the other Defendants and as such he prays for the Orders as stated above.

The Respondent/Plaintiff did not file a Replying Affidavit, instead, he filed a Notice of Preliminary Objection on the grounds that:-

1. That the said application is misconceived, an abuse of the court process, frivolous and a waste of judicial time and the same be dismissed with costs to the Plaintiff; and
2. That the application is sub-judice or Res judicata.

I have analysed the Notice of Motion Application, Notice of Preliminary Objection and Submissions filed by both parties. First and foremost, I will deal with the Notice of Preliminary Objection. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** in which the court stated, ‘So far as I’m 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’.

This court must now consider whether the issues raised in the Notice of Preliminary Objection are matters of fact or law. **Order 2 Rule 15 of the Civil Procedure Rules** provides as follows:-

‘(1) At any stage of the proceedings the court may order to be struck or amended any pleading on the ground that:-

(a) It discloses no reasonable cause of action or defence in law;

(b) It is scandalous, frivolous and vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court and may Order the suit be stayed or dismissed or Judgment be entered accordingly as the case may be.

In **Dawkins vs Prince Edward of Save Weimber (1976) 1 QBD 499**, the court held that:- ‘A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be wasting the court’s time; or (v) when it is not capable of reasoned argument’. I do note that the 1st Applicant/Defendant did not file grounds of opposition to the Notice of Preliminary Objection. Having analyzed the Notice of Motion dated 21st May, 2020, and having perused Notice of Motion application dated 17th May, 2019. I find that the latter application is a copy paste of the previous application. This court dismissed the same for lack of merit. No new evidence or substance has been introduced in the latter application. The issue of service of process was well articulated in the Judgment dated 23rd January, 2019. Having stated the above, I do find that the Application dated 21st May, 2020 is frivolous and an abuse of the court process.

The other objection is whether the application is *sub judice* and or res judicata. **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).The purpose of this section is to bar the prosecution of parallel matters in courts of similar jurisdiction. In this case, sub judice does not apply for the reason that there are no pending matters filed in this case in any courts of similar jurisdiction. The principles of *res judicata* are well set in a plethora of cases which I cannot exhaust at this point. **Section 7 of the Civil Procedure Act on Res judicata** provides that “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 (emphasis mine)**, 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.(emphasis mine)**

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.”

As stated earlier, the issues raised in this application had previously been raised word for word in the Notice of Motion Application dated 17th May, 2019. The same was dismissed for lack of merit. In the instant application, there is no new evidence introduced and or material to warrant grant of prayers sought. The upshot of the foregoing is that the Notice of Motion dated 21st May, 2020 lacks merit and the same is dismissed with costs to the Plaintiff. The Notice of Preliminary Objection dated 2nd July, 2020 is sustained.

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