



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KILGORIS LAW COURT**

**ELC NUMBER 9 OF 2021**

SAIPEI NAREIYO LEMAYIAN.....1<sup>ST</sup> PLAINTIFF/APPLICANT

NENGOE ENE MAINGUSI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

**-VERSUS-**

OLOIRIEN GROUP RANCH.....1<sup>ST</sup> DEFENDANT/RESPONDENT

JAMES TEMEI.....2<sup>ND</sup> DEFENDANT/RESPONDENT

JULIUS KAIPAI KAYIONI.....3<sup>RD</sup> DEFENDANT/RESPONDENT

JOSHUA TEMEI SAITOTI.....4<sup>TH</sup> DEFENDANT/RESPONDENT

SHADRACK LETEIPA TIKAN.....5<sup>TH</sup> DEFENDANT/RESPONDENT

OLOIRIEN LAND CARE LIMITED.....6<sup>TH</sup> DEFENDANT/RESPONDENT

SAMWEL LEKISHON SONORWA.....7<sup>TH</sup> DEFENDANT/RESPONDENT

PUTAA OLE TOGOM.....8<sup>TH</sup> DEFENDANT/RESPONDENT

HON.ATTORNEY GENERAL.....9<sup>TH</sup> DEFENDANT

LAND REGISTRAR TRANS-MARA SUB-COUNTY.....10<sup>TH</sup> DEFENDANT

SURVEYOR TRANS-MARA SUB-COUNTY.....11<sup>TH</sup> DEFENDANT

LAND ADJUDICATION OFFICER

TRANS-MARA SUB-COUNTY.....12<sup>TH</sup> DEFENDANT

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's herein filed a Complaint dated 25<sup>th</sup> November 2020 against the 1<sup>st</sup> to the 12<sup>th</sup> Defendant on the 7<sup>th</sup> of December 2020 (hereinafter referred to as "the Complaint").

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the widows and representatives of the estate of Lemayian Naliki Ole Maigusie (Deceased) who is the registered owner of the property known as Land Reference Number TRANS-MARA/OLOIRIEN/24 (hereinafter referred to as "the suit property").

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' allegations are that initially, the Late Lemayian Naliki Ole Maigusie (Deceased) suit property was measuring 160 Hectares which was accordingly provided for in the Title Deed issued on the 27<sup>th</sup> April 2004 pursuant to Registry Map Sheet No. 144/4.

Upon the demise of the Late Lemaiyan Naliki Ole Maiguse(Deceased), the survivors and/or beneficiaries of the estate commenced the succession process and consequently the transmission of the title from the name of the Late Lemaiyan Naliki Ole Maiguse(deceased) into their names.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff state that upon surrendering the original Title Deed of the suit property in the name of the Late Lemaiyan Naliki Ole Maiguse (Deceased) measuring approximately 160 Hectares for Transmission, the new Title Deed to the suit property re-issued is now approximately 123.77 Hectares and not the original 160 Hectares.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's cause of action is that the purported resurveying of the suit property and creation of new parcels of land namely TRANS-MARA /OLOIRIEN/1307,1309,1310,1311,1312,1314 AND 1315 was unlawful, illegal and without color of right, justification, authority and consent of either the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff or the Land Control Board and thereby anullity and illegal abinitio.

Upon service of the Plaint dated 25<sup>th</sup> November 2020, the 1<sup>st</sup> to the 8<sup>th</sup> Defendants filed a Defence dated 21<sup>st</sup> January 2021.

In the 1<sup>st</sup> to 8<sup>th</sup> Defendant's Defence dated 21<sup>st</sup> January 2021, Paragraph 6 contained therefore confirms that indeed the suit property known as TRANS-MARA/OLOIRIEN/24 belonged to the Late Lemaiyan Naliki Ole Maiguse (Deceased) and was at the time of his demise measuring approximately 160 Hectares.

The 1<sup>st</sup> to 8<sup>th</sup> Defendant further allege in the same paragraph 6 of the Defence dated and filed on the 21<sup>st</sup> January 2021 that the suit property known as TRANS-MARA/OLOIRIEN/24 had an error on record which showed the acreage to be 160 Hectares.

The 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants have not entered Appearance or filed any Defences to this suit and am not sure even if they have been duly served thereof.

#### **PRELIMINARY OBJECTION DATED 21<sup>ST</sup> JANUARY 2021.**

On the date of filing the Defence dated 21<sup>st</sup> January 2021, the 1<sup>st</sup> to the 8<sup>th</sup> Defendants/Applicants herein filed a Preliminary Objection.

The gist of the Preliminary Objection dated 21<sup>st</sup> January 2021 is that this suit is Sub-Judice against the 1<sup>st</sup> Defendant as there is another suit namely ELC 500 of 2017 between Saipai Nareyo Lemaiyan & 2 Others –Versus- Land Registrar Kilgoris ( 10<sup>th</sup> Defendant in this present suit ) & Oloirien Group Ranch ( 1<sup>st</sup> Defendant in this present suit ).

Similarly, this present suit has been filed in contravention of Section 6 of the Civil Procedure Act and therefore this Honourable court lacks jurisdiction to grant the prayers in the Plaint as the same are Res Judicata in view of the ruling delivered by the Court in regards to the Joinder of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants.

The relief sought by the 1<sup>st</sup> to the 8<sup>th</sup> Defendants is that this suit be struck out forthwith.

#### **ANALYSIS OF THE FACTS AND THE LAW.**

As earlier indicated hereinabove, this ruling is purely on the issues raised in the Preliminary Objection dated 21<sup>st</sup> January 2021 which in the view of the Court are as follows:-

- a) Whether or not this suit is Sub-Judice against the 1<sup>st</sup> and 10<sup>th</sup> Defendant in this present suit.
- b) Whether or not this suit is Res-Judicata against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants.
- c) Whether or not this Suit should be dismissed by virtue of the finding on the Preliminary Objection dated 21<sup>st</sup> January 2021.

#### **ISSUE NUMBER A.**

The Principles that guide the Courts in making determinations on issues regarding Sub-Judice were clearly provided for by the *Supreme Court of Kenya in the case of Kenya National Commission on Human Rights –Versus- The Attorney General ;Independent Electoral & Boundaries Commission & 16<sup>th</sup> Others (Interested Parties)* wherein as correctly captured in the Plaintiff's Submission stated as follows:-

**“A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter;that one suit was instituted before the other;that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”**

The first principle in evaluating if a matter is Res Sub-Judice is to establish whether or not there is more than one suit over the same subject matter.

In this particular matter, the 1<sup>st</sup> to 8<sup>th</sup> Defendants/Applicants have averred the existence of another suit namely NAROK ELC CASE NUMBER 500 OF 2017 BETWEEN SAIPEI LEMAYIAN NAREYO & ANOTHER-VERSUS- THE LAND REGISTRAR KILGORIS &

ANOTHER.

The 1<sup>st</sup> to 8<sup>th</sup> Defendants contention is that the above mentioned suit relates to the same parties and subject matter as in this present suit.

Nevertheless, the 1<sup>st</sup> to the 8<sup>th</sup> Defendant failed to confirm and/or prove to the Court whether or not this suit is ongoing.

According to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents submissions dated 23<sup>rd</sup> July 2021, there is submission that the entire suit was withdrawn on the 22<sup>nd</sup> March 2021 pursuant to a Notice of Withdrawal filed in court on the 23<sup>rd</sup> of February 2021.

This submission by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs'/Respondents Counsel has not been challenged by the 1<sup>st</sup> to 8<sup>th</sup> Defendants/Applicants Counsel.

The Honourable Court has also had an opportunity to look at the directions of 22<sup>nd</sup> March 2021 as regards NAROK ELC CASE NUMBER 500 OF 2017 BETWEEN SAIPEI LEMAYIAN NAREYO & ANOTHER –VERSUS LAND REGISTRAR KILGORIS & ANOTHER before my brother Honourable Justice Mohamed N.Kullov and note that the following Orders were made therein;-

1. That since a notice of withdrawal dated 23<sup>rd</sup> February 2021 was filed by Counsel for the Plaintiffs , this matter is marked as withdrawn.
2. The Defendants may appropriately move the court to pursue the issue of the payments of costs.

This Honourable Court having verified and confirmed the above directions, it is the finding of this court that the proceedings known as the NAROK ELC CASE NUMBER 500 OF 2017 BETWEEN SAIPEI LEMAYIAN NAREYO & ANOTHER –VERSUS LAND REGISTRAR KILGORIS & ANOTHER were withdrawn and the file closed save for the issue of costs.

In other words, this suit is the only matter in a court of law and therefore can not be res-subjudice.

Prayer number (a) on the Preliminary Objection dated 21<sup>st</sup> January 2021 is dismissed with costs.

#### **ISSUE NUMBER B.**

Whether or not this suit is Res-Judicata against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants.

The doctrine of Res Judicata is provided for in law under Section 7 of the Civil Procedure Act (2010) which reads as follows;-

**“No Court shall try any suit or issue in which the matter directly and substantively 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.”**

On the interpretation of this Section, the Court of Appeal in the Case of **The Independent Electoral and Boundaries Commission-Versus – Maina Kiai & 5 Others, Nairobi CA Civil Appeal No.5 of 2017 (2017) eKLR**, the Court held as follows; -

**“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;**

- a) The suit or issue was directly and substantively in issue in the former suit.**
- b) That the 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 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 which the issue was raised.”**

As earlier captured, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff’s attempt to enjoin the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> in the proceedings namely NAROK ELC CASE NUMBER 500 OF 2017 BETWEEN SAIPEI LEMAYIAN NAREYO & ANOTHER –VERSUS- LAND REGISTRAR KILGORIS & ANOTHER before the hearing of the main suit was done did not succeed.

Technically speaking therefore, the parties that were in the previous proceedings namely NAROK ELC CASE NUMBER 500 OF 2017 BETWEEN SAIPEI LEMAYIAN NAREYO & ANOTHER –VERSUS- LAND REGISTRAR KILGORIS & ANOTHER were the 1<sup>st</sup> Defendant/ Applicant and 10<sup>th</sup> Defendant.

The 2<sup>nd</sup> , 3<sup>rd</sup> ,4<sup>th</sup> ,5<sup>th</sup> ,6<sup>th</sup> ,7<sup>th</sup> ,8<sup>th</sup> ,9<sup>th</sup> , 11<sup>th</sup> and 12<sup>th</sup> Defendants are not in any proceedings with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein.

Similarly, the Application for injunction which did not succeed had not adjudicated on the merits of the various ownership issues including cross accusation of fraud, error on the record and/or misrepresentation regarding the suit property known as TRANS-MARA/OLOIRIEN/24.

In other words, the issue of ownership of the property known as TRANS-MARA/OLOIRIEN/24 has not been heard and determined by any court of competent jurisdiction.

Consequently, this Honourable Court holds that the proceedings against 2<sup>nd</sup> , 3<sup>rd</sup> ,4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> ,7<sup>th</sup> and 8<sup>th</sup> are not Res-Judicata and this Court has jurisdiction to hear and determine the issues against the 1<sup>st</sup> to the 8<sup>th</sup> Defendant.

Ground Number (b) of the Preliminary Objection dated 21<sup>st</sup> January 2021 is hereby dismissed with costs.

**ISSUE NUMBER C**

Whether or not this Suit should be dismissed by virtue of the finding on the Preliminary Objection dated 21<sup>st</sup> January 2021.

This Honourable court having found that there is no other pending suit on the same subject matter by the same parties in any Court of similar competent jurisdiction, the Honourable Court dismisses the entire Preliminary Objection dated 21<sup>st</sup> January 2021 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Respondents thereof.

**DELIVERED IN KILGORIS ELC COURT ON THE 30TH DAY OF SEPTEMBER, 2021.**

**HON.EMMANUEL.M.WASHE**

**JUDGE**