REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 165 OF 2012

CHRISTOPHER K. KOECH.....PLAINTIFF/APPLICANT

-VERSUS-

ELISHA K. ROTICH.....DEFENDANT/RESPONDENT

RULING

Application

1. The applicant moved the court through Notice of Motion dated **26th May, 2021** brought under **Article 159(2)(d) of the Constitution of Kenya, 2010, Order 8 Rule 3 and 5 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya)** and sought the following orders:-

> ***a) [Spent].***
>
> ***b) THAT this Honourable Court be pleased to grant leave to the plaintiff/applicant to amend his plaint dated 28th March, 2012 as per the annexed draft amended plaint.***
>
> ***c) THAT this Honourable Court be pleased to make all such further orders and or directions as it may deem fit.***
>
> ***d) THAT costs of this application be provided for.***

2. The application is supported by an affidavit dated **26/5/2021** sworn by Christopher K. Koech, the plaintiff in which he deposed that he filed the instant suit sometime in **2012** and that at the time of filing the suit there was a pending **Judicial Review No. 27 Of 2011** later renamed **JR No. 21 of 2018** instituted by the defendant/respondent; that judgment in the judicial review was delivered on **11/3/2021** dismissing the said application and given the developments that came up at the hearing of the judicial review application, he now wishes to enjoin the Land Registrar and the Attorney General in this suit to shed light on the existence of two titles over the same property.

3. He went on to depose that the notice of intention to sue the Attorney General (AG) on behalf of the Land Registrar was received by the Attorney General's office on **18th March, 2021** hence the **30** days period upon the AG has been complied with and that no prejudice will be occasioned to the defendants if the application is allowed.

Response

4. The defendant/respondent in opposing the application filed his sworn replying affidavit dated **25th June, 2021** where he deposed that he is the registered proprietor of land parcel **No. Nakuru/Sururu/203** which he was allocated by the government of Kenya in **1997**; that the plaintiff lodged a claim in **2006** before the **Mauche Land Disputes Tribunal** and never served him with papers and that the matters in relation to this cause have already been substantially determined by Hon Ohungo J in his ruling in respect to **JR No. 27 of 2011.**

5. He further deposed that the application herein is irregular to the extent that since no appeal has been preferred as against the decision the suit herein is *res judicata*. He finally stated that the application is an abuse of the court process and if allowed it will unjustly enrich the plaintiff/applicant owing to the fact that the suit land belongs to the respondent. He urges the court to dismiss the instant application.

Submission

6. The plaintiff/applicant filed his submissions dated **9th July, 2021** on the same day while the defendant/respondent filed his submission

dated **22nd September, 2021** on the same day.

Determination

7. Upon perusal of the pleadings and submissions by the parties, two main issues for determination stand out, one, whether the suit is ***res judicata*** and two, whether the instant application has merit. Considering its jurisdictional implication, it is pertinent to first deal with the question of whether the application is *res judicata*.

8. **Section 7** of the **Civil Procedure Act** states 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.'***

9. The Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** held as follows.

> ***"… for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> ***(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." [Emphasis mine]***

10. Further, the mandate of a judicial review court was reiterated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another [2002] eKLR** as follows:

> ***"… judicial review is concerned with the decision -making process, not with the merits of the decision itself. … The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."***

11. In the instant case, the respondent avers that the suit is ***res judicata*** as the same was heard by the Mauche Land Dispute Tribunal and that the court has already made a determination in **ELC JR 21 of 2018**. The applicant on the other hand contends that the judgment in **ELC JR 21 of 2018** was not final as it only dealt with the jurisdiction of Mauche Lands Tribunal. He states that it did not delve into the issue of title which can only be brought to the right forum such as this court.

12. I am in agreement with the applicant that indeed the judgement of the **ELC JR 21 of 2018** only dealt with one issue: whether the tribunal acted in excess of its jurisdiction.

13. Despite the judicial review proceedings having similar almost parties as the suit, it is clear that the Judge in arriving at the determination thereof did not in the judicial review hear and determine the case on merit as to who is the rightful owner of the suit property. The decision in the **Independent Electoral & Boundaries Commission** Court Of Appeal judgment clearly indicates that all the identified elements must be satisfied to warrant a suit to be declared *res judicata* and in the instant case, not all the conditions have been established to exist.

14. Also, the present application essentially seeks to amend the plaint so as to enjoin parties to the suit for it to be heard and determined on merit and therefore it is my opinion that the instant application is not *res judicata*.

15. The second issue for determination is whether the application has merit. **Section 100** of the **Civil Procedure Act** gives parties the general power to amend their plaint. In the case of **Suleiman v Karasha]1989] eKLR** the Court of Appeal held that:

> ***"Under the Civil Procedure Rules, the parties can amend their pleading with the leave of the court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just."***

16. The applicant in the instant case seeks to amend his plaint so as to enjoin the Land Registrar and the Attorney General as defendants in the suit. The respondent on the other hand contends that the applicant has failed to convince the court the need for enjoining the said parties; that the application has been presented at a late stage and that the amendment is likely to cause an injustice to him as it will delay the speedy conclusion of the matter and it is hence an abuse of the court process.

17. An application for joinder of a plaintiff or defendant as an additional party to a suit is discretionary in nature. **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** provides as follows:

> ***"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."***

18. It is my opinion that when a proposed party's presence is necessary to enable the court effectually and completely adjudicate upon and settle all the questions then the amendment should be allowed. In the instant case, the suit property **Nakuru/Sururu/203** has two titles each held by both the applicant and respondent both issued by the Land Registrar and apparently on the same date. Despite the delay in making the application, I believe it would only be prudent to allow the said amendment so that the court can understand how the same land parcel came to be issued to both parties and the only way to establish that is by having the Land Registrar enjoined. This is also necessary as the presence of the said defendants in the case would legally affect the interests of either the applicant or respondent on the suit property.

19. In conclusion, I find that in order to fully and finally determine the issue in controversy between the applicant and respondent, it will be necessary to have all proposed parties enjoined to this suit as this will not only prevent a multiplicity of suits and duplication of efforts, but also enable the court determine the suit in its entirety and settle all common issues of fact and law which arise between all the parties.

20. In view of the foregoing, it is this court's opinion that the instant application has merit. Consequently, the application **26th May, 2021** is allowed. The amended plaint shall be filed and served alongside the relevant summons **within 14 days** of this order. The costs of the application shall be in the cause.

21. This suit shall be mentioned on **30/11/2021** for the issuance of a hearing date for the main suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF OCTOBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.