



**REPUBLIC OF KENYA**

**IN THE ENVORNMENT AND LAND COURT**

**AT NAROK**

**ELC NO. 5 OF 2019**

**JOHN ALLAN ONCHIRI MASESE.....PLAINTIFF**

**VERSUS**

**REUBEN KIPNGETICH MABIL.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTARR NAROK COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Defendants have by a Notice of Preliminary Objection dated 12<sup>th</sup> June, 2019 on points of law contended that the suit herein is res judicata and that the same was filed contrary to the provisions of section 7 of the Civil Procedure Act and hence the same is bad in law and ought to be dismissed.

It is the Defendant's contention that on 20<sup>th</sup> November, 2017 the court through Misc. Land Case No. 11 of 2007 issued a decree in relation to land parcel Cis Mara/Ilmotiok/463, 464 and 465 in which the decree was for the confirmation of an award by the land disputes tribunal case No. 6 of 2006 which award was confirmed as the Judgement of the court and various orders were made thereof by the court.

Subsequent to the aforesaid award the plaintiff thus moved to the High Court vide Judicial Review Application No. 10 of 2009 seeking to quash the contents of a letter which sought to implement the decision on the award in which the Judicial Review was also dismissed and on the 8<sup>th</sup> February, 2019 the Plaintiff filed the instant suit seeking an order of injunction against the Defendant from trespassing on land parcel Cis Mara/Ilmotiok/464 and a further order for the determination of the boundaries between the Plaintiff's parcel of land and that of the Defendant.

The Plaintiff in opposing the Preliminary Objection contends that the instant suit relates to the tortious act of trespass by the 1<sup>st</sup> Defendant in which he illegally entered on the Plaintiff's parcel of land and that the proceedings alluded to in the Preliminary Objection involved the land parcels Cis Mara/Ilmotiok/463,464 and 465 and dealt with the common boundaries between the aforesaid parcels of land.

In his submissions the 1<sup>st</sup> Defendant stated that the dispute in the matter has been litigated upon before the land dispute's tribunal which was competent to hear the matter and the same was thus conclusively determined.

The Plaintiff to water the above in his submissions stated that the matter before the court now has not been heard and finally decided by the court as the tribunal never established and that it did not have any jurisdiction to deal with boundaries.

I have read the Notice of Preliminary Objection that is before me and the submissions by the parties and the issue for determination before me is whether the instant suit is barred by dint of the provisions of section 7 of the Civil Procedure Act and thus the same is res judicata and therefore sustainable. In the case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED -VERSUS- WESTEND DISTRIBUTORS LIMITED (1969)EA 696** the principles of what amounts to Preliminary Objection has been settled and it was held that a "preliminary objection consists of points of law which has never pleaded or which arises by clear implications out of pleadings and if argued as a preliminary objection may dispose the suit. The test that is inferred from the above case is that a preliminary objection should ordinarily consist of pure points of law and not a hybrid point involving both points of law and of facts. In the instant matter the preliminary objection before me is based on the provision of section 7 of the Civil Procedure Act and it is in my view that the defendant has met the threshold to raise the objections.

On whether the matter before me is res judicata section 7 of the Civil Procedure Act 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. The provisions of section 7 outlines when a matter can thus be deemed as res judicata and it must be determined. The matter in issue is identical in both suits, the parties are the same and a determination of the issues was made.

I have read the pleadings before me and I find that the Plaintiff seeks an order of injunction against the defendant in respect of Land Parcel Cis Mara/Ilmotiok/464. I have also read the decree that was issued by the Principal Magistrate Court Narok pursuant to the award made by the Land Disputes Tribunal and I find it relates to Land Parcel Cis Mara/Ilmotiok/465. I have also further looked at Judicial Review Application No. 10 of 2009 and I find that the parties were the same as in the instant suit and that the suit relates to land parcel Cis Mara/Ilmotiok/465.

From the above it is clear that the parties had litigated before the land dispute tribunal, the High Court in Nakuru and now before me are the same parties and all the suits related to the same parcel of land and I thus find that the matter before me is res judicata and I consequently allow the preliminary objection dated 12<sup>th</sup> June, 2019 and dismiss the suit with costs to the defendants.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **17<sup>TH</sup>** day of **DECEMBER, 2019**

**Mohammed Kullow**

**Judge**

**17/12/19**

In the presence of:-

CA:Chuma/Kimiriny

1<sup>st</sup> Defendant

Felix Rateno (grandchild of the plaintiff)

**Mohammed Kullow**

**Judge**

**17/12/19**