



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 472 OF 2016

DIANA LEE LASOI (AS ADMINISTRATOR & HEIR OF THE ESTATE OF

SOLOMON KIPKORIR ARAP LASOI).....1ST PLAINTIFF

LEA CHERONO SHABANGI.....2ND PLAINTIFF

VERSUS

JOHN KIPTOO CHERUIYOT.....1ST DEFENDANT

PETER K. CHERUIYOT.....2ND DEFENDANT

COLLINS K. CHEPKWONY.....3RD DEFENDANT

JANE CHEPKORIR BARBARET.....4TH DEFENDANT

CAREN CHEPKURUI MUTAL.....5TH DEFENDANT

CAROLINE CHEBET.....6TH DEFENDANT

SAMWEL KIPNGETICH KITUR BETT.....7TH DEFENDANT

THE COUNTY LANDS REGISTRAR NAKURU COUNTY.....8TH DEFENDANT

CONSOLIDATED WITH

ELCC No. 54 OF 2020

CAROLINE CHEBET.....PLAINTIFF

VERSUS

DIANA LEE LASOI.....1ST DEFENDANT

LEA CHERONO SHABANGI.....2ND DEFENDANT

LEONARD KIPNGETICH CHELULE.....3RD DEFENDANT

RULING

1. Pursuant to this court's ruling delivered on 26th June 2019, Nakuru **CM ELC No. 106 of 2018** was withdrawn from Chief Magistrate's Court at Nakuru, transferred to this court and consolidated with ELCC No. 472 of 2016 which was pending before this court. Following the transfer, Nakuru **CM ELC No. 106 of 2018** has since been allocated a new number in this court: ELCC No. 54 of 2020.

2. This ruling is in respect of two applications in the consolidated matters: Notice of Motion dated 3rd September 2018, filed by the plaintiffs in ELCC No. 472 of 2016 and Notice of Motion dated 24th May 2018, filed by the plaintiff in ELCC No. 54 of 2020.

3. The following orders are sought in Notice of Motion dated 3rd September 2018:

1. *The instant application be certified urgent, service be dispensed with in the first instance and be heard exparte.*
2. *There be a temporary injunction barring the 4th, 5th, 6th and 7th Defendants by themselves, their agents, or servants from entering, dealing with, or encroaching an trespassing or in any way interfering with the plaintiffs quiet possession of the property known as Land Title Number Nakuru/Olenguruone/Cheptuech/269 pending the hearing and determination of this application, and the O.C.S, Olenguruone Police Station do supervise the compliance of this order.*
3. *There be a temporary injunction barring the 4th, 5th, 6th and 7th Defendants from encroaching the property known as Land Title Number Nakuru/Olenguruone/Cheptuech/269 pending the hearing of this suit.*
4. *There be a certified copy of the green card of the suit property Land Title Number Nakuru/Olenguruone/Cheptuech/269 to be produced at the hearing of this Application by the 8th Defendant, The County Lands Registrar.*
5. *There be an order of inhibition against any tempering of the record held by the 8th Defendant as pertains the suit property Land Title Number Nakuru/Olenguruone/Cheptuech/269.*
6. *Costs incidental to and arising from this application be borne by the Defendants.*

4. On the other hand, Notice of Motion dated 24th May 2018 seeks the following orders:

1. *THAT the Motion be certified as extremely urgent and service be dispensed with in the first instance.*
2. *THAT this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendants by themselves, their agents, their servants or employees from entering into, dealing with, interfering with, digging or in any other manner howsoever from entering or dealing with the Plaintiff's parcel of land known as NAKURU/OLENGURUONE/CHEPTUECH/269 pending the hearing and determination of this Application inter-partes. (This order to be served on the Defendants with the help of the O.C.S, Olenguruone Police Station and chief, Cheptuech location, who will ensure compliance.*
3. *THAT pending the hearing and determination of the main case on merits, an injunction be issued restraining the Defendants by themselves, their servants, agents and or their employees from entering into, dealing with or in any way interfering in whatsoever manner with the Plaintiff's parcel of land No. NAKURU/OLENGURUONE/CHEPTUECH/269.*
4. *THAT costs of this Motion be borne by the Defendants.*

5. Notice of Motion dated 3rd September 2018 is supported by an affidavit sworn by Diana Lee Lasoi who deposed that she is the administrator and heir of the estate of Solomon Kipkorir Arap Lasoi (deceased) and that the deceased was the registered proprietor of the parcel of land known as Nakuru/Olenguruone/Cheptuech/269. She annexed a copy of the first page a Land Certificate dated 13th July 1978 showing registered owner of the property as Solomon Kipkorir Arap Lasoi. She stated that the 4th, 5th, 6th and 7th defendants in ELCC No. 472 of 2016 have encroached on the property claiming to have a title over it. She added that their title is a forgery since she has never transferred the property to them and since there has been a general government caveat on the registration section known as Nakuru/Olenguruone/Cheptuech yet the defendants claim to have obtained title on 7th November 2016.

6. Notice of Motion dated 24th May 2018 is supported by an affidavit sworn by Caroline Chebet, the plaintiff in ELCC No. 54 of 2020. She deposed that she is the proprietor of the parcel of land known as Nakuru/Olenguruone/Cheptuech/269. She annexed a copy of a title deed dated 7th November 2016 showing registered owners of the property as Jane Chepkorir Barbaret, Caren Chepkurui Mutai, Caroline Chebet and Samwel Kipngetch Kitur Bett. She further stated that the defendants in ELCC No. 54 of 2020 entered the property without any right and started ploughing it.

7. The applications were canvassed through written submissions. I have duly considered the applications, the affidavits and the submissions. Among others, the 2nd to 7th defendants in ELCC No. 472 of 2016 have argued that Notice of Motion dated 3rd September 2018 is *res judicata* in view of the ruling delivered by the court on 19th June 2018.

8. I will deal with the issue of *res judicata* first since it goes to the court's jurisdiction. **Section 7** of the **Civil Procedure Act** provides 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. Thus, for a plea of *res judicata* to succeed, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**. Pursuant to **Section 2** of the **Civil Procedure Act**, "suit" is defined to mean all civil proceedings commenced in any manner prescribed, thereby including applications.

10. The record herein shows that through Notice of Motion dated 3rd November 2016, the plaintiffs in ELCC No. 472 of 2016 sought an injunction against the 1st to 3rd defendants who were then the only defendants in the matter. The plaint was later amended on 7th June 2018 to join the 4th to 8th defendants. The court delivered a ruling on 19th June 2018 in which an injunction was granted restraining the 1st to 3rd defendants from advertising or selling the property known as Nakuru/Olenguruone/Cheptuech/269 pending hearing and determination of the suit. Since the plaintiffs contend that the defendants obtained title on 7th November 2016, the allegations against the 4th, 5th, 6th and 7th Defendants ought to have been raised in Notice of Motion dated 3rd November 2016 or as soon as the plaint was amended on 7th June 2018 and before delivery of the ruling on 19th June 2018. I therefore agree with the plaintiff in ELCC No. 54 of 2020 that prayer 3 of Notice of Motion dated 3rd September 2018 is *res judicata*. I strike out the said prayer. The other prayers are however not *res judicata*. Similarly, the whole of Notice of Motion dated 24th May 2018 is *res judicata* in view of the ruling of 19th June 2018. I equally strike out the said application.

11. The record herein further shows that on 12th September 2018 my brother Munyao J. granted prayers 2, 4 and 5 of Notice of Motion dated 3rd September 2018. The orders granting prayers 4 and 5 were final orders which have not been set aside. Consequently, prayers 4 and 5 of Notice of Motion dated 3rd September 2018 are spent, just like prayers 1 and 2 thereof.

12. Considering that both sides of the litigation claim the suit property, there is need to preserve the property pending the hearing and determination of the consolidated suits. That end is in fact achieved by the order of inhibition granted on 12th September 2018 by Munyao J.

13. In conclusion, I make the following orders:

a) I strike out prayer 3 of Notice of Motion dated 3rd September 2018 for being *res judicata*.

b) I strike out Notice of Motion dated 24th May 2018 for being *res judicata*.

c) Prayers 4 and 5 of Notice of Motion dated 3rd September 2018 are spent in view of the orders made on 12th September 2018.

d) Since both sides of the litigation have had some measure of success, I make no order as to costs.

Dated, signed and delivered at Nakuru this 17th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Chelule for the plaintiffs in ELCC No. 472 of 2016 and for the defendants in ELCC No. 54 of 2020

No appearance for the 1st defendant in ELCC No. 472 of 2016

Mr Karanja Mbugua for the 2nd to 7th defendants in ELCC No. 472 of 2016 and for the plaintiff in ELCC No. 54 of 2020

No appearance for the 8th defendant in ELCC No. 472 of 2016

Court Assistants: B. Jelimo & J. Lotkomoi



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