



REPUBLIC OF KENYA



**Makule v Makokha; Adundo (Applicant) (Environment & Land Case
2 of 2017) [2023] KEELC 17071 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 2 OF 2017**

BN OLAO, J

APRIL 26, 2023

BETWEEN

SALOME NABWIRE MAKULE PLAINTIFF

AND

TERESA MAKOKHA DEFENDANT

AND

STANSLAUS WABWIRE ADUNDO APPLICANT

RULING

1. On May 13, 2019, the Court (Kaniaru J) dismissed the Plaintiff's suit in which she sought the cancellation of the title to the land parcel NO Bukhayo/nasewa/267 on the ground that the Defendant had obtained it fraudulently.
2. I now have for my determination, the application by Stanslaus Nabwire Adundo (the Applicant) seeking orders that:
 1. This Honourable Court be pleased to substitute the name of the deceased Plaintiff Salome Nabwire Makule With The Name Of Stanslaus Wabwire Adundo.
 2. That the dismissal order herein made on the May 13, 2019 be set aside.
 3. That this case be reinstated for hearing and be heard on merit.
 4. Costs of the application be in the cause.
3. The application is premised on the provisions of Order 27 Rule 3(10), Order 17 Rule 6(2) of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*. It is based on the grounds set out therein and is supported by the Applicant's affidavit also dated December 9, 2022.



4. The gist of the application is that the Applicant is the legal representative of the Plaintiff who died on April 26, 2017 while this suit was still pending. That the Applicant obtained the Grant of Letters of Administration in respect to the Estate of the deceased on July 16, 2020 following a delay for which he asks this Court to excuse him.
5. That on May 13, 2019 when this suit was dismissed, it was actually coming up for ascertaining the progress made towards substituting the deceased Plaintiff. That on that day, the then counsel for the deceased Plaintiff had no information to give the Court and the Estate was still planning on the appropriate person to represent it. Because of the delay in getting a legal representative, the Court should have given them more time to do so. It is therefore in the interest of justice that the application be allowed and the order made by Kaniaru J dismissing the suit be set aside and the same be reinstated and heard on the merit.
6. Annexed to the application are the following documents:
 1. A copy of the death certificate of the deceased plaintiff showing the date of death as April 26, 2017.
 2. A copy of the court proceedings of May 13, 2019.
 3. Limited Grant of Letter of Administration issued to the Applicant on July 16, 2020 limited for purposes of substituting the deceased Plaintiff in this suit.
7. The application is opposed and Teresa Makokha (the Defendant) filed a replying affidavit dated February 9, 2023 in which she has deposed, *inter alia*, that in 1977, she purchased the land parcel No Bukhayo/nasewa/267 from one Julius Wabwire Mirikwa at a consideration of Kshs.4,000 and took possession. That in 1992, the deceased Plaintiff filed against her Busia SRM CC NO 28 of 1992 seeking cancellation of her title. That the suit was heard and dismissed on February 17, 1999. That this suit is seeking similar prayers as in Busia SRM CC NO 28 of 1992 and is therefore res-judicata. That the deceased died on April 26, 2017 and no step was taken to substitute her. That the Defendant has been vexed with this litigation since 1992 and is now over 80 years. This suit should therefore be dismissed with costs.
8. The application has been canvassed by way of written submissions. These have been filed by Ms Achala Instructed By The Firm Of Abalo & Company Advocates For The Applicant And By Mr Otanga Instructed By The Firm Of Bogonko, Otanga & Company Advocates for the defendant.
9. I have considered the application, the rival affidavits as well as the submissions by counsel.
10. In paragraphs 6, 7 and 8 of her replying affidavit, the Defendant has deposed as follows:
 6. "That in or about 1992, the Plaintiff herein together with the Applicant herein filed Busia SRM CC NO 28 of 1999 against me seeking cancellation of the title deed what had been issued to me."
 7. "That suit was heard and on February 17, 1999, it was dismissed with costs."
 8. "That the present suit is seeking similar prayers as in Busia SRM CC NO 28 of 1992 hence it is *res-judicata*."
11. Other than that bare assertion that this suit is res-judicata, the Defendant did not avail the pleadings and/or judgment in Busia SRM CC NO 28 of 1992 to prove that this suit is *res-judicata*. However, a plea of res-judicata is a serious one which can bring proceeding to an end. And since such a plea goes to the jurisdiction of the Court and the case being cited was heard in this Court, I decided that it was necessary for the Court to peruse the said file. I therefore directed that the Court Administrator



avails the file in respect to Busia SRM CC NO 28 of 1992 and it was subsequently retrieved from the Archives at Kakamega Court. I was informed that due to shortage of space at the Busia Court, some of the files are stored at Kakamega. Upon perusal of the file, I confirmed that the said suit had been instituted by Salome Nabwire (the deceased Plaintiff herein) and Stanslaus Wabwire (the Applicant) as the 1st and 2nd Plaintiffs respectively) seeking the cancellation of the Defendant's title to the land parcel No Bukhayo/nasewa/267 (the suit land). After hearing the parties, the trial magistrate S. N. Riechi Srm (as he then was) dismissed the claim by the deceased Plaintiff and the Applicant herein vide a judgment delivered on September 17, 1999. It is not clear if an appeal was preferred against the judgment and with what results.

12. The result therefore is that this suit is caught up with the provisions of Section 7 of the [Civil Procedure Act](#) which states:
 7. "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."
13. It is not in dispute that the court presided over by Hon S N Riechi Senior Resident Magistrate (as he then was) was competent to hear and determine the dispute in busia SRM CC NO 28 of 1992. Indeed the Applicant did not file any supplementary affidavit to rebut the plea of res-judicata.
14. The up-shot of all the above is that the plea of *res-judicata* is well founded and is up-held. This suit is struck out with costs to the defendant.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 26TH DAY OF APRIL 2023 BY WAY OF ELECTRONIC MAIL

BOAZ N. OLAO

JUDGE

26TH APRIL 2023

