



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELC CASE NO.109 OF 2016

GEORGE OCHIENG NYAKOTA.....PLAINTIFF/APPLICANT

VERSUS

CHARLES ONYANGO

JACOB OITU NYAKOTA.....DEFENDANTS/RESPONDENT

RULING

1. This is a ruling on a Preliminary Objection premised on a notice dated 21/11/2016 filed here on the same date. The notice raised two issues viz:

i. This suit is **RES-JUDICATA** Land dispute No.62 of 2006.

ii. That no Appeal or Judicial review was ever filed.

2. The Objection was canvassed by way of written submissions. The two defendants – **CHARLES ONYANGO** and **JACOB OITU NYAKOTA** – filed their submissions on 1/11/2017. These two are the ones raising the Objection. The Plaintiff – **GEORGE OCHIENG NYAKOTA** – filed his submissions on 13/2/2018.

3. According to the defendants, they had a case over the issue of ownership of Land parcels **BUKHAYO/BUGENGI/4488** and **4489** before Busia Land Dispute Tribunal at Matayos. The case was between them and the Plaintiff. They won and, as it was the law then, the decision of the tribunal was adopted as the decision of the Court at Busia in land Dispute No.62 of 2006. It appears clear that the Plaintiff herein even went on appeal at Kakamega. He lost the appeal. He has now come to Court vide this case to agitate the same issue of ownership. That is why the issue of **RES-JUDICATA** is raised.

4. The Plaintiff opposed the Objection mainly on the ground that it is based on facts that require to be ascertained. According to him, the Objection as raised is incompetent and it would be prejudicial to the applicant to allow or uphold it.

5. I have considered the Objection as filed and the rival submissions. The second limb of the Objection was that no appeal or judicial review was filed by the Plaintiff relating to previous proceedings between the parties. In the submissions filed, neither the defendants nor the plaintiff addressed this limb. I think the right thing to do is to deem it abandoned. And I hereby treat it as such.

6. The issue for consideration then is that of **RES JUDICATA**. The defendants have premised it on the fact of there having been previous proceedings between them and the plaintiff. The relevant proceedings were availed. The plaintiff even appealed and proceedings relating to his appeal were availed. The decisions in the previous proceedings were in favour of the defendants in this case. And it is clear that the issue considered in those proceedings related to ownership. It is the same ownership that the plaintiff is raising in the suit herein.

7. I have looked at pleadings in this case. The plaintiff has filed it as an entirely new dispute. It is not manifest at all that there was past dispute over the same issue. Here, one reads some measure of dishonesty on the part of the plaintiff. He should have disclosed the existence of previous proceedings. He was duty-bound to do so. He also makes it look as if the defendants became owners of Land parcel No.**BUKHAYO/BUGENGI/4489** illegally. Infact, according to him, the defendants became owners “without any colour of right”. According to him too, the defendant’s “illegally caused to be transferred and did transfer Land parcel No.**BUKHAYO/BUGENGI/4489** into their names jointly.”

8. What was availed by the defendants makes the plaintiff’s averments hollow and misleading. The defendant’s became owners through a legal process to which the plaintiff himself was a party. The order vesting ownership of the land in the defendant was infact made here in Court at Busia. That order still stands and this suit itself is not challenging or seeking removal of that order.

9. The defendant is therefore labouring under a serious misdirection or misapprehension of law and fact to think that he can successfully re-litigate the issue of ownership without first doing something about the legal process that gave ownership to the defendant in the first place. That process is still legal and/or lawful unless or until it is successfully challenged. The issue of **RES-JUDICATA** applies because what the plaintiff is seeking here is precisely what he was denied through a past legal process. I am in general agreement with the submissions of the defendant including the general observations on **RES JUDICATA** by Gikonyo J in **NANCY MWANGI T/A WORTHLIN MARKETERS Vs AIRTEL NETWORKS (K) LTD & 2 OTHERS. HCC No.275/2014, MILIMANI – NAIROBI**. This decision was availed by the defendant is a back-up to their submissions.

10. I don't agree with the plaintiff in his submissions. In my view, there are no facts to be ascertained. And the issue of **RES-JUDICATA** is one of law, not facts. Reference to facts while expounding on the issue does not make it an issue of fact. It sometimes becomes impossible to avoid facts while explaining the law. In fact we always say: **EX FACTO JUS ORITUR** (the law arises out of the fact).

11. The upshot is that I find the Preliminary Objection herein well merited and I hereby uphold it. This suit is dismissed with costs to the defendant's.

Dated, Signed and Delivered at Busia this 24th Day of April, 2018

IN THE PRESENCE OF:

PLAINTIFF

DEFENDANT.....

COUNSEL OF PLAINTIFF

COUNSEL OF DEFENDANT.....

A.K. KANIARU

J U D G E