



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT BUSIA.

MISC. APP. NO. 161 OF 2014.

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE FOR CERTIORARI

AND

IN THE MATTER OF LAND DISPUTE NO. 70 OF 2007

AND

AND IN THE MATTER OF L.R SAMIA/BUKHANGALA 'A'/498

AND

IN THE MATTER OF THE DECISION OF FUNYULA LAND DISPUTE TRIBUNAL

CASE NO. 08 OF 2007

GODWIN OUMA MAKUBEPLAINTIFF

VERSUS

MOSES DIRU AMBASA1ST RESPONDENT.

COUNTY LAND REGISTRAR BUSIA.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING.

BACKGROUND

1. **GODWIN OUMA MAKUBE**, hereinafter referred to as the Applicant, filed the Chamber summons application dated 17th December, 2014 against the three named Respondents. The application is indicated to be brought under Order 53 Rules 1 and 2 of the Civil Procedure Rules among others. The Applicant seeks for leave to file a substantive application for certiorari and Mandamus Orders relating to the subdivision of his land into Samia/Bukangala/ 'A' 818 and 819. The Applicant also pray for leave to operate as stay in Busia Land Disputes case No. 70 of 2007.
2. That though the application was indicated to be *ex parte*, the 1st Respondent instructed counsel who filed memorandum of appearance and notice of preliminary objection, both dated 19th January, 2015.

3. The Applicant also instructed counsel, who filed notice of appointment dated 28th January, 2015.

PRELIMINARY OBJECTION.

4. The counsel for the 1st Respondent issued the notice to raise a preliminary objection dated 19th January, 2015. The preliminary objection is based on the ground that the application is an abuse of the due process of the law. When application dated 17th December, 2014 came up for hearing on 29th January, 2015, counsel for the Applicant and 1st Respondent agreed that the preliminary objection be heard first. The matter was therefore rescheduled to 16th February, 2015. On that day, counsel holding brief for the Applicant's counsel applied for adjournment and the matter was set down for hearing of the preliminary objection on 9th March, 2015.

5. That on 9th March, 2015, the Applicant and his counsel did not attend court. The counsel for the 1st Respondent was allowed to prosecute his preliminary objection. The counsel submitted that the application is an abuse of the court process in view of the court's decision in Busia H.C. Misc. Application No. 108 of 2014 in which the Applicant had sought similar prayers and was dismissed. I have carefully considered the counsel's brief submission and the applicable provisions of the law and find as follows;

FINDINGS.

6. That though the Applicant indicate in the supporting affidavit sworn on 17th December, 2014 at paragraph 2 that there was no land sale agreement between the 1st Respondent and himself, the statement of facts of the same date at paragraph 3 states otherwise. In that paragraph, the Applicant concedes to entering into an agreement to sell 1.5 hectares of land parcel Samia/Bukangala 'A'/498 to the Respondent.

7. That the certificate of official search annexed to the supporting affidavit sworn by the applicant on 17th December, 2014 indicates that the register for Samia/Bukangala 'A'/498 was closed on 16th September, 2013 after it was subdivided into parcels 818 and 819.

8. That there is nothing in the file to connect the subdivision of parcel Samia/Bukangala 'A'/498 with Busia Land Disputes case No. 70 of 2007. The proceedings and award of Busia Land Disputes land case No. 70 of 2007 were not availed in these proceedings and the court is unable to know its subject matter. The land Disputes Tribunal proceedings and award were also not availed.

9. That the Applicant has not disclosed the date of the award and or orders of Busia Land Disputes Case number 70 of 2007. The court is therefore unable to confirm whether indeed the Applicant participated in those proceedings, the parties in the matter, the subject matter and the orders made thereof.

10. That Order 53 Rule 2 of the Civil Procedure Rules, which is in similar terms with Section 9 (3) of the Law Reform Act, requires application for leave to be filed within six months of the making of the order or award sought to be called to court and quashed. If the subdivision of land parcel Samia/Bukangala 'A'/498 was pursuant to orders issued in Busia Land Disputes case number 70 of 2007 in which the undisclosed Land Disputes Tribunal award was filed and adopted, then this application was filed outside the six months window. As held in the Court of Appeal decisions in *Kimanzi Mbou -vs- David Mutwa* No. 233 of 1996 and *Wilson Osolo -vs- John Ojiambo & Another eKLR* the application herein is time barred and should be dismissed.

11. That this court has already pronounced itself on this matter in Busia H.C. Misc. Application No. 108 of 2014 **GOWIN OUMA MAKUBE -VS- MOSES DIRU AMABASA** through its ruling delivered in the presence of both parties on 13th November, 2014. The filing of this application in a new file without disclosing the existence of the previous application and orders of

13th November, 2014 made thereof, was an abuse of the courts process.

12. That Section 7 of the Civil Procedure Act sets out the law on the doctrine resjudicata. The fact that the court has already pronounced itself on this matter makes this application res judicata and the fact that two new Respondents have been added does not alter that fact. The Court of Appeal decision in *Uhuru Highway Development Limited –vs- Central Bank of Kenya & 2 others* Civil Appeal No. 26 of 1996 is relevant in this matter where it stated;

“ There is no one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature that is the say, there must be an end to applications for similar nature: that is to say further, wider principles of res judicata apply to applications within a suit.”

13. That for reasons set out in 10 to 12 above, I find the issues raised for determination in this application had been conclusively decided in this court’s ruling of **13th November, 2014 in Busia H.C. Misc. Application number, 108 of 2015** which was between the Applicant and 1st Respondent herein. The application is therefore res judicata and hence an abuse of the courts process and the 1st Respondent’s counsel’s preliminary objection is upheld. The application dated 17thDecember, 2014 is struck out and dismissed with costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 23RD DAY OF APRIL, 2015.

IN THE PRESENCE OF ABSENT.....APPLICANT

PRESENT 1ST RESPONDENT

MR. MAKOKHA FOR MR. IPAPU FOR 1STRESPONDENT..COUNSEL.

JUDGE.