



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. CASE NO. E025 OF 2021**

**PETER OUMA MBAJA (suing as the administrator of the estate of the late**

**LAZARO OPIYO MASEKO a.k.a OKOTH MASEKO.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**ALFRED OYOKO OLUNJE.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE LAND REGISTRAR, KISUMU COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application herein is dated 24/8/2021. The applicant seeks that the suit be struck out. The application is based on grounds that the 1<sup>st</sup> defendant herein filed a suit Kisumu Elc Case No. 51 Of 215, Formerly Winam Srm Cc No. 107 Of 2008 against the Plaintiff in this instant suit seeking an Order of Permanent Injunction in respect to the land parcel herein KISUMU/KASULE/3270. On 7<sup>th</sup> February 2018 Hon. Justice S.M. Kibunja entered Judgment in favour of the 1<sup>st</sup> defendant herein and granted an order of Permanent Injunction restraining the plaintiff either of themselves agents, employees, and/or servant from trespassing onto the 1<sup>st</sup> defendant's land parcel designated as KISUMU/KASULE/3270 or in any other way interfering with the 1<sup>st</sup> defendant's quiet use and occupation of the said land" and a decree issued thereto on 5<sup>th</sup> September 2018.

Subsequently, the plaintiff herein being dissatisfied with the judgment by Justice S.M. Kibunja in KISUMU ELC CASE NO. 51 OF 2015, preferred an Appeal in the Court of Appeal in KISUMU CIVIL APPEAL NO. 148 OF 2018 which they later on abandoned after their Application for stay pending hearing and determination.

Thereafter, the 1<sup>st</sup> Defendant filed an application dated 25<sup>th</sup> August 2020 seeking orders of eviction of the plaintiff from land parcel KISUMU/KASULE/3270 and which is still pending hearing and determination.

Furthermore, the plaintiff's plaint dated 18/03/2021 is just a duplicate of his Statement of defence and Witness Statements dated 28/8/2105 which were filed in KISUMU ELC CASE NO. 51 OF 2015 hence, the filing of this instant suit is an abuse of court process as the same issues being raised by the plaintiff in this instant suit were litigated and determined before court of competent jurisdiction, as such any contrary decision in this matter may embarrass this Honourable court.

In the circumstances, the plaintiff's suit and the orders or prayers sought therein are a monumental procedural and legal nullity, abuse of the Court process, vexatious, mischievous, and a proper candidate for dismissal and or striking out with costs.

The application is supported by the affidavit of Maurice C. Ouma who states that the 1<sup>st</sup> defendant herein filed a suit Kisumu ELC Case No. 51 Of 2015, Formerly Winam SRM CC No. 107 Of 2008 against the Plaintiff in this instant suit seeking an Order of Permanent Injunction in respect to the land parcel herein KISUMU/KASULE/3270.

That on 7<sup>th</sup> February 2018 Hon. Justice S. M. Kibunja entered judgment in favour of the 1<sup>st</sup> defendant and granted an order of Permanent Injunction restraining the plaintiff either of themselves agents, employees, and/or servant from trespassing onto the 1<sup>st</sup> defendant's land parcel designated as KISUMU/KASULE/3270 or in any other way interfering with the 1<sup>st</sup> defendant's quiet use and occupation of the said land and a decree issued thereto on 5<sup>th</sup> September 2018.

The Plaintiff herein being dissatisfied with the judgment by Justice S.M. Kibunja in KISUMU ELC CASE NO. 51 OF 2015, preferred an Appeal in the Court of appeal in KISUMU CIVIL APPEAL NO. 148 OF 2018 and which they abandoned after their Application dated

22/07/2019 for stay pending appeal was dismissed by the Court of appeal on 29<sup>th</sup> January 2021.

The 1<sup>st</sup> Defendant thereafter filed an application dated 25<sup>th</sup> August 2020 seeking orders of eviction of the plaintiff from land parcel KISUMU/KASULE/3270 and which is still pending hearing and determination before the Court.

The defendant states that the plaintiff's plaint dated 18/03/2021 is just a duplicate of his Statement of Defence and Witness Statements dated 28/8/2015 which were filed in KISUMU ELC CASE NO. 51 FO 2015, hence, the filing of this instant suit is an abuse of court process as the same issues being raised by the plaintiff in this instant suit were litigated and determined before a court of competent jurisdiction, as such any contrary decision in this matter may embarrass this Honorable Court.

In the circumstances, the defendant contends that the Plaintiff's suit and the orders or prayers sought therein are a monumental procedural and legal nullity, abuse of the Court process, vexatious, mischievous, and a proper candidate for dismissal and or striking out with costs. He sums that this suit is frivolous, vexatious and an abuse of the court process hence it ought to be struck out with costs to the 1<sup>st</sup> Defendant/applicant. According to the 1<sup>st</sup> defendant, it is in the interest of justice and fairness that the 1<sup>st</sup> Defendant's application be allowed as prayed.

Peter Ouma Mbaja filed a replying affidavit stating that him and the deceased herein were never parties in the said Kisumu ELC No. 2015 (formally Winam SRMCC No. 107 of 2008) that the 1<sup>st</sup> Defendant/Applicant makes reference to. That according to the annexed pleadings in ELC No. 2015 (formally Winam SRMCC No. 107 of 2008), the suit involved Alfred Oyoko Olunje – vs Bonface Mbaja Opiyo and Thomas Maseko and not the plaintiffs herein.

That the pleadings in ELC No. 2015 (formally Winam SRMCC No. 107 of 2008) involved an order of permanent injunction to restrain Bonface Mbaja Opiyo and Thomas Maseko from the suit property while in this current suit the estate of the deceased is seeking to nullify the 1<sup>st</sup> Defendant's title and have the same reverted back to the estate of the deceased as it was fraudulently acquired. Hence, the causes of action are different in both cases.

That this case is not res-judicata as being claimed by the 1<sup>st</sup> Defendant. That the matter in this suit is not directly and substantially the same issue in ELC No. 2015 (formally Winam SRMCC No. 107 of 2008). That the titles the parties are litigating in this suit is not the same title the parties in ELC No. 2015 (formally Winam SRMCC No. 107 of 2008) litigated on as they were completely different parties.

That in ELC No. 2015 (formally Winam SRMCC No. 107 of 2008) parties therein were litigating on an injunction with respect to land parcel Kisumu/Kasule/3270 while in this suit the parcel is Kisumu/Kasule/1512. That the deceased was the registered owner of land parcel Kisumu/Kasule/1512 as evidenced from the list of documents supplied with the pleadings.

That the deceased passed on without selling or transferring his land parcel to anyone. His remains were interred in the same land parcel Kisumu/Kasule/1512. That the survivors and beneficiaries of the deceased are still residing on the same parcel.

That the estate of the deceased herein instituted this suit when they learnt that the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant had unlawfully and fraudulently transferred the ownership of the suit property from the name of the deceased herein to that of the 1<sup>st</sup> defendant. That the 1<sup>st</sup> Defendant later secretly subdivided the property Kisumu/Kasule/1512 into two portions being Kisumu/Kasule/3270 and Kisumu/Kasule/3271.

The plaintiffs contend that the 1<sup>st</sup> Respondent does not reside in any of the parcels and they are surprised how he managed to transfer the land to his name then sub divide accordingly. That he is still holding the original title deed to Kisumu/Kasule/1512. The 1<sup>st</sup> Respondent never undertook succession of the deceased plaintiff to entitle him transfer the land to his name.

The process the Respondents undertook to transfer the property to the name of the 1<sup>st</sup> Respondent was fraudulent. The 1<sup>st</sup> Defendant/Applicant is now trying to steal a march from the estate of the deceased with this application.

The doctrine of *res judicata* is set out in *Section 7* of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

A close reading of *Section 7* of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

I have considered the application, supporting affidavit, replying affidavit and do find that the parties in the two suits are not the same. In this case, the plaintiff is Peter Ouma Mbaja suing as an administrator of the estate of the late Lazaro Opiyo Masako whilst in the previous suit the plaintiff was Alfred Oyuko Olunje and the defendant was Bonface Mbaja Opiyo and Thomas Maseko Opiyo. The plaintiff herein was not a party in the previous suit.

The issues in this suit are not similar to issues in the previous suit as in the previous suit the issues gravitated on trespass whilst in this suit, the issues gravitate on fraud and illegality. I do find the 1<sup>st</sup> Defendant's application without merit and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17<sup>th</sup> DAY OF FEBRUARY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*