



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 77 OF 2019**

**PHYLLIS MAKOKHA SUNDIA**

(suing as the Legal Representative of **LUCAS SUNDIA MUGA**).....**PLAINTIFF/RESPONDENT**

**= VERSUS =**

**FRANCIS TOBIAS OKELLO**.....**DEFENDANT/APPLICANT**

**R U L I N G**

1. The application for determination is dated the 25<sup>th</sup> of February, 2020 and brought under the provisions of order 2 rule 15 (e) & (d) of the Civil Procedure Rules. It seeks for orders THAT:

**a. This Suit be struck out;**

**b. The costs of this application be provided for.**

2. The Application was supported by the affidavit of FRANCIS TOBIAS AKELLO sworn on 25<sup>th</sup> February, 2020 and on the following grounds;

*(a) That, there have been three (3) high court cases between the Applicant and the son of the Respondent touching on the same subject matter, namely the ownership of land parcel number SAMIA/LUANDA-MUDOMA/1369;*

*(b) That the said three (3) cases have been finalized and one of them is pending hearing in the Court of Appeal;*

*(c) That in the three (3) cases the Applicant herein has been a successfully party and has been awarded costs;*

*(d) That this suit is therefore res judicata.*

3. The Applicant deposed that he has had a long running battle with the Plaintiff's family over the suit land with the case starting at the Funyula Land Disputes Tribunal. That the Plaintiff's son Gabriel Onyanchi lost the case before the Tribunal and the appeal before the Provincial Land Disputes Tribunal as well as the Judicial Review application no 24 of 2009. The Applicant went on to state that the Respondent's son was made to withdraw ELC case no. 20 of 2013 because of the pendency of the judicial review application. The Applicant further deposed that he filed ELCC No 44 of 2015 seeking the eviction of the Plaintiff's family from the suit land and obtained judgement on 20<sup>th</sup> February 2019. A copy of this judgement was annexed to the affidavit in support of the motion. That in all these cases, Gabriel was suing in his capacity as representing the estate of Lucas Sundia Muga-deceased.

4. The Respondent filed her replying affidavit on the 22<sup>nd</sup> of July, 2020 in opposition to the application deposing THAT:

*(a) It is not true that the Defendant has had a long running battle with my family but only my son who does not represent my family;*

*(b) I only became aware of the land dispute claim before Funyula Land Disputes Tribunal when I wanted to file succession in respect of my late husband's land parcel SAMIA/LUANDA-MUDOMA/1369 which he jointly held with the late ODUMA MUGA and OKOCHI MUGA as per annexed copy of certificate of official search.*

*(c) My lawyer advices me, which advice I verily believe to be true that the issues raised herein have not been determined before this Court;*

(d) I am neither a party of the alleged determined BUSIA ELC No. 44 of 2015 nor KISUMU CA No. 96 of 2014;

(e) I am seeking justice on behalf of the estate of my late deceased husband which estate has not been succeeded and never been sued; and

(f) This Suit is well before this Court for determination and I pray for my day in Court.

5. Parties agreed to canvass the application by way of written submissions and the Applicant filed his submissions on the 25<sup>th</sup> of November, 2020. He submitted that the dispute is over land ownership of the Suit Land was initially triggered by the Respondent's son, **Gabriel Onyanchi Sundia**, and illegally registering it in his name. That the matter has been litigated on severally. The Applicant further submitted that **Gabriel Onyanchi Sundia** was sued as the legal representative of the estate **Lucas Sundia Muga** who is the husband to the Respondent and the Respondent cannot claim to be representing the estate of **Lucas Sundia Muga**.

6. That Respondent did not file any submissions to the application.

7. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act, Cap 21 which provides that:

**“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”**

8. The test in determining whether a matter is *res judicata* was summarized in **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others (2010) eKLR**, as follows:

- (i) The matter in issue is identical in both suits;
- (ii) The parties in the suit are the same;
- (iii) Sameness of the title/claim;
- (iv) Concurrence of jurisdiction; and
- (v) Finality of the previous decision.

9. From the evidence on record it is apparent that the Plaintiff/Respondent in this case is the mother to Gabriel Onyanchi who is the legal representative of the estate of Lucas Sundia Muga as per the letters of administration issued on the 12<sup>th</sup> of October, 2010 vide Busia Succession Cause 119 of 2010. Gabriel was sued as the administrator of the deceased estate for eviction orders from the Suit Land in ELC No. 44 of 2015. The said Gabriel Onyanchi has also appealed against said decision in Court of Appeal Civil Appeal No. 96 of 2019.

10. Although the Respondent has sworn that Gabriel Onyanchi was not acting on her behalf, it is clear by the letters of administration confirm otherwise. There is no affidavit sworn by the said Gabriel Onyanchi to support the Respondent's claim that he does not represent the family in the case no 44 of 2015 and or in the pending appeal before the Court of Appeal. Further, the Plaintiff/Respondent pleaded both in her plaint and the replying affidavit that she brought the present suit on behalf of the estate of Lucas Sundia Muga-deceased. The deceased was one of the registered owners of the suit land as shown in the searched dated 11<sup>th</sup> August 2016 annexed by the Respondent. Therefore, Gabriel Onyanchi (Respondent's son) could only sue or be sued on behalf of the estate of Lucas Sundia Muga-deceased. On account that the former suit was on behalf of the deceased estate just like the present one, the parties and the subject matter of the former & current Suit remains the same.

11. The previous matter, ELC 44 of 2015 was handled by a court of competent jurisdiction. The claim of the land ownership of the Suit Land has been determined on merits to conclusion in Busia ELC No. 44 of 2015. If there are any new issues (which has not been stated), the same ought to have been brought in the former suit but bring them up in a fresh suit.

12. I am therefore satisfied that the application has satisfied the principles of *res judicata*. The same is allowed with the result that this suit is struck out with costs of the suit and the application awarded to the Defendant/Applicant.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 28TH DAY OF APRIL, 2021.**

**A. OMOLLO**

**JUDGE**