



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. NO. 35 OF 2020

WILLIAM WANYAMA NDEGE.....PLAINTIFF

= VERSUS =

LEONORA NERIMA KARANI

PATRICK KARANI.....DEFENDANTS

RULING

1. The Defendant raised a preliminary objection that the suit is res judicata having been determined in Kisumu Civil Appeal No. 142 of 2007 in the Court of Appeal and therefore this Court does not have jurisdiction and the suit should be struck out with costs.

2. Both parties agreed to dispense with the hearing of the preliminary objection through written submissions. The defendant filed their submissions on 16th March 2021 and submitted that the plaintiff herein had sued the 1st defendant herein in Busia High Court Civil Case No. 40 of 1997(O.S) where she claimed 0.3 Ha of land comprised in title No. BUNYALA/BUKOMA/1433 which her late husband had purchased from Stephen Bwire. The plaintiff also purchased a portion comprised in the said land. The plaintiff thereafter transferred the whole land to himself knowing it was wrong as he is a neighbour to the defendants and knew that the 1st defendant husband had purchased a portion of the same land.

3. The 1st defendant appealed to the Court of Appeal in Civil Appeal No. 142 of 2007 at Kisumu. The Court of Appeal rendered its judgment on 28/11/2012 and the 1st defendant's originating summons was allowed which finding confirmed that the 1st defendant was entitled to 0.3 ha of land out of LR. No. BUNYALA/BUKOMA/1433. The plaintiff purported to comply with the judgment by subdividing the land and allocating the 1st defendant 0.26 ha. The defendants submit that the prayers the plaintiff is seeking in this suit is to try and upset or reverse the judgment of the Court of Appeal. He submitted that the court lacks the jurisdiction to make a finding that the defendants are entitled to 0.29ha and not 0.3 ha. He further submitted that if it is the execution process that has brought the issue herein, the best forum is to go back to Busia High Court Civil Case No. 40 of 1997(O.S) and move the court appropriately if he has any cause.

4. The plaintiff filed their submissions on 22nd March 2021 and submitted that their suit is for trespass and an order of permanent injunction against the defendant in relation to LR. No. BUNYALA/BUKOMA/2135 and that at the time of filing this suit land parcel no. BUNYALA/BUKOMA/1433 no longer existed. He admitted that the defendant was indeed awarded 0.3ha on appeal through an adverse possession claim. The plaintiff submitted that the defendants' trespass occurred when the case was pending before the Court of Appeal. The plaintiff prayed that the preliminary objection be dismissed with costs for the following reasons;

a) A preliminary objection that relies on the doctrine of res judicata cannot be properly and exhaustively addressed without adducing evidence in support thereof.

b) The plaintiff is complaining of trespass on his land parcel No. BUNYALA/BUKOMA/2135. The trespass complained of came about due to the deliberate mischief of the defendants who now seek to benefit from their own nuisance of trespass and chaos of building within the plaintiff's portion without waiting for the Court of Appeal to deliver its verdict.

5. The plaintiff further submitted that the preliminary objection cannot provide the defendants with adequate answers to their allegations of fraud and collusion especially when the County Surveyor who impartially did his work and even halted the progress to see if a settlement can be reached, has not yet been called to testify in Court to confirm or disprove the alleged fraud or collusion. They cited the following decisions; **Eunice Karimi Kibunja V. Mwirigi M'ringera Kibunja (1996) eKLR, Busia ELC No. 82 of 2018 Wilson Okumu Kaburu V. Joseph Wanjala Oduba.**

6. The issue before this court is whether the preliminary objection is merited. In the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. The test in determining whether a matter is *res judicata* is set out in section 7 of the Civil Procedure Act and restated in case law *inter alia*; **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.*

8. From a perusal of the pleadings filed by the parties, it is clear that the plaintiff's case is for an order of demolition and an order of permanent injunction against the defendants. The plaintiff has pleaded that a structure belonging to the defendants falls within his parcel of land BUNYALA/BUKOMA/2135 which came about as a result of the execution of the decision in Court of Appeal in Civil Appeal No. 142 of 2007. The defendants are adamant that the present suit is *res judicata* and if the plaintiff wanted to properly address the execution process, the proper forum was the High Court Civil Case No. 40 of 1997(O.S.). I have perused the Court of Appeal judgment and it is clear that the parties are the same with the exception of the 2nd defendant.

9. Although the cause of action in High Court Civil Case No. 40 of 1997(O.S) was adverse possession on a portion of parcel No. BUNYALA/BUKOMA/1433. The cause of action in the current suit was occasioned by the execution of the judgement in the former suit which execution created the subdivision of L.R. 1433 into the two new numbers. The plaintiff's attempt to distinguish it as a new cause of action must fail. Section 34 (1) & (2) of the Civil Procedure Act provides thus:-

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.”

10. Given the pleadings as filed and the provisions of the law, in my opinion and I so hold, that the present case is *res judicata* the issues High Court Civil Case No. 40 of 1997(O.S.) and the subsequent appeal Civil Appeal No. 142 of 2007. The issues in the present suit can be dealt with appropriately in the former suit. The preliminary objection is allowed with the result that the plaintiff's suit is struck out with costs to the defendants.

DATED, SIGNED & DELIVERED AT BUSIA THIS 15TH DAY OF JULY, 2021.

A. OMOLLO

JUDGE