



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 2 OF 2015

JOHN WALOBWA RAJULA.....PLAINTIFF/RESPONDENT

VERSUS

DEMITILA OYOYO.....1ST DEFENDANT/APPLICANT

EMMANUEL ODUOR NANJIRA.....2ND DEFENDANT/APPLICANT

R U L I N G

1. The Applicants moved the Court under the provisions of sections 3A and 7 of the Civil Procedure Act on the 27th of January, 2021 seeking for orders THAT:

- a) This Suit be dismissed or struck out with costs for being res judicata, an abuse of the court process, misconceived and incompetent;**
- b) The Plaintiff be declared a vexatious litigant; and**
- c) The costs of this application be provided for.**

2. The application was supported by the affidavit of EMMANUEL ODUOR NANJIRA dated 18th February, 2021 and on the following grounds;

a. That, the subject matter and parties herein are the same in the following cases which are concluded rendering the present case res judicata and or an abuse of the court;

i) Busia CMC LD No. 23 of 2002;

ii) Busia HCC No. 5 of 2005;

iii) Busia CMCC No. 284 of 2007;

iv) Busia HC ELC No. 36 of 2014 (formerly HCC 26 of 2008);

v) Busia CMC No. 275 of 2008.

b. The plaintiff was restrained from interfering with the 2nd Defendant's use of land parcel LR No. Marachi/Elukhari/3052 and convicted of contempt of court;

c. This suit is yet another of the several suits commenced by the Plaintiff in a clear abuse of the court process and showing the Respondent has become a vexatious litigant;'

d. The Court lacks jurisdiction to grant the reliefs sought.

3. The Respondent filed his replying affidavit to the application on the 10th of March, 2021 stating that the cases mentioned by the Applicants cannot be based on to term the current suit res judicata as they do not involve the same parties and the same subject matter. He

deposed further that the Applicants bringing this application after six years of filing suit is a delaying tactic on the Defendant's part; and that this being a land matter, it should not be concluded as this stage but should go for full hearing.

4. Parties agreed to canvass the application by way of written submissions with the Applicants filing their submissions on the 18th of March, 2021. They submitted that the dispute and parties in the present case are the same as those in Busia CMC Land case No. 23 OF 2002, HCC No. 5 of 2005, CMC CC 284 of 2007, ELC Case no. 36 of 2014 and CMCC 275 of 2008 which cases were heard and determined on merit. That the Plaintiff has not denied the existence and conclusion of the aforesaid cases and that the matters raised in the replying affidavit are irrelevant and do not raise any valid ground.

5. The Respondent filed his submissions on the 1st April, 2021 submitting that the parties in all the cases the Defendants have mentioned are totally different from his claim in this present suit. That the prayers for determination in this suit are distinct and separate from the prayers in the suits mentioned by the Applicants hence the matter cannot be res judicata.

6. 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”

7. The Applicants have asked this Court to strike out this suit with costs on account of being res judicata the cases whose numbers are provided in paragraph 2 hereinabove. The test in determining whether a matter is *res judicata* is reiterated in the case of **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. The summaries of the causes in action in the previous cases which are of relevance to the present application which as submitted by the Applicants claim involved the same parties and the same subject matter is given below:

a. *Busia ELCC Case no 36 of 2014 (formerly HCCC No. 26 of 2008) Emmanuel Oduor Nanjira vs. John Walobwa Rajula*

The suit property in this case was Marachi/Elukhari/3053 and vide a consent adopted as judgement of the Court it was ordered that a permanent injunction was issued against the Defendant, restraining his family, agents, servants or any other person from encroaching onto or interfering with the Plaintiff's peaceful use and occupation of the suit land.

b. *Busia CMCC No. 284 of 2007 John Walobwa Rajula vs. Demitila Oyoyo & Another*

The suit property in this case was Marachi/Elukhari/1334 with prayers seeking to stop the subdivision undertaken by the Defendant. After hearing on merits, the trial Court held that the Plaintiff was improperly before the court as the orders sought had been overtaken even before the filing of the suit. The plaintiff's case was thus dismissed.

c. *Busia SRM Land Dispute No. 23 of 2002 Demitila Oyoyo vs. John Walobwa Rajula*

The suit property in this case was Marachi/Elukhari/1334. In its judgement, the Court proceeded to enforce the elders award which is now being challenged by the present suit.

d. *Busia SPM Civil case No. 327 of 1991 Demitila Oyoyo and 4 others vs. John Walobwa Rajula*

The suit property in this case was Marachi/Elukhari/1334 where the Plaintiff had sued the Defendant for subdivision of the suit parcel. The Court held that the Defendant was the registered owner of the disputed land. That the Plaintiffs had not shown they have any rights to the said land and suit was dismissed with costs.

9. From the aforementioned cases and the pleadings on record, it is evident that the title Marachi/Elukhari/3053 is a resulting subdivision of Marachi/Elukhari/1334. It is also apparent that there have been several cases in respect of the suit property between the same parties from the year 1991 to the latest case being filed in the year 2008. The Respondent brought this case in the 2015 after the conclusion of the ELC Case No. 36 of 2014 (formerly case no 26 of 2008). The plaintiff (now 2nd defendant in this suit) had sued the present plaintiff for an order restraining him from interfering with parcel no Elukhari/3053. The suit was determined by a consent entered between the parties allowing the claim before the Court.

10. In the case number CMCC No 284 of 2007, the plaintiff sued the present first defendant praying for orders stopping the subdivision of Elukhari/1334. The court after hearing the parties and based on the evidence adduced found that the process sought to be stopped had long been completed even before that suit was filed. At page 2 of the judgement, the trial court observed that the current plaintiff admitted during cross-examination that the award from Butula Land Disputes Tribunal was executed by the surveyor demarcating the land. The Respondent herein admitted that searches revealed the subdivision process was concluded and the new numbers were issued on 15th April 2005.

11. So that when the two suit (ELCC NO 36 OF 2014 & 284 OF 2007) were proceeding, the Respondent was aware of the outcome in Butula Land Disputes Tribunal award which was adopted as an order of the Court and subsequently executed. He had the option to raise nullity of the Tribunal's award either as a counter-claim in case no 36 of 2014 or include it as one his claims in case no 284 of 2007. Explanation No. 1 & 4 of section 7 states thus:-

“1. The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.”

“4. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

12. In my view, the subject matter of the present suit has been handled to conclusion in both ELC No. 36 of 2014 and CMCC 284 OF 2007 by courts of competent jurisdiction. It does not matter that the Plaintiff did not plead the nullity or otherwise of the award which caused his land to be subdivided and apportioned apart thereof to the 1st defendant. Unless he prefers an appeal against the said decisions or have the decrees varied or set aside, the law bars him from bringing a new suit with the same parties in respect of the same subject matter.

13. It is my considered opinion and I so hold that the application has satisfied the principles of res judicata. The same is allowed in terms of prayer 1 & 3 with the result that this suit is struck out with costs of the suit and the application awarded to the Defendants/Applicants. However, I decline to declare the Plaintiff/Respondent as a vexatious litigant because some of the previous cases were commenced by either of the defendants.

Dated, signed & delivered at BUSIA this 20th day of September, 2021.

A. OMOLLO

JUDGE