



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**HCC NO. 23 OF 2004**

**FRANCIS OSIKE MASABA.....APPLICANT NOT A PARTY**

**NICKSON MAKOKHA MASABA.....DECEASED**

**SEMEYO NYONGESA MASABA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY KHAKHUBU WEDODO.....DEFENDANT**

**R U L I N G**

1. By an application dated 21/8/2017 filed here on the same date, **FRANCIS OSIKE MASABA**, opposes the inclusion of his name in a Notice to Show Cause said to relate to intended or imminent sale of land parcel No. L.R. BUKHAYO/KISOKO/349 to realise some costs and interests amounting to Kshs.155,760. The application is against **HENRY KHAKHUBI WEDODO**. Henry was the Defendant in this suit filed against him by two parties – **DICKSON MAKOKHA MASABA** and **SEMEYO NYONGESA MASABA**.

2. It is clear that Henry had this suit terminated in his favour vide a ruling dated 15/5/2013. The ruling itself was on an application filed by Henry dated 23/3/2010. In the ruling, costs were awarded to Henry.

3. It is necessary to clarify that the suit was between **DICKSON MAKOKHA MASABA** and **SEMEYO NYONGESA MASABA** as Plaintiffs while **HENRY KHAKHUBI WEDODO** was the Defendant. But a decree drawn after the suit was terminated includes **FRANCIS OSIKE MASABA** as a party. In this application itself, **FRANCIS** describes himself as “**NOT A PARTY**”, meaning he is not a party in the suit. In his application, **FRANCIS** has three prayers namely:

Prayer (a): Spent

Prayer (b): That it pleases the honourable court to dismiss the N.T.S.C why L.R. BUKHAYO/KISOKO/349 should not be attached to answer the decree.

Prayer (c): That costs be provided for.

4. The Respondents opposed the application vide grounds of opposition dated 12/2/2018 filed here on the same date. To the Respondents, the application is ineptly drawn and hence incompetent. The order sought was said to be incapable of being granted through an application and this court itself was said to be *functus officio*. Further, Francis was said to lack *Locus Standi* to bring the application.

5. The application was canvassed by way of written submissions. The submissions of **FRANCIS** were filed on 29/10/2018. Francis submitted, *inter alia*, that he was not a party to the suit; that no application was made to enjoin him as a party; that he was not summoned for taxation of costs; and that he was not involved in the ruling that terminated the suit.

6. The submissions of the Respondent were filed on 2/11/2018. Francis was faulted for not following procedure in raising his objection. The court was asked to dismiss his application.

7. I have considered the application, the response made, rival submissions, and the history and antecedents attending the entire suit. Francis was not a party to the suit. He correctly observes that he was not even a party in the ruling that terminated the suit. But the decree that was

drawn subsequent to termination of the suit included him as a party. No application was ever made to make him a party. No leave of court was sought to enjoin him as a party to the suit. His inclusion seems to have come from the blues.

8. The Respondents fault Francis for not following procedure laid down for objecting to attachment. Francis is layman. It is clear that before even settling for prosecution of this application, he had other previous attempts to raise the same issue. It is clear he was fumbling and did not have much knowledge as to what procedure to follow. All he seems to have been sure of is that he was aggrieved and needed court's help.

9. In contrast, the Respondents are represented. One would presume that they would follow procedure. But they enjoined Francis as a party in a very unprocedural manner. It lies ill in their mouths to accuse Francis of not following procedure while they themselves were the first to act in utter disregard of procedural requirements.

10. I expected the Respondents to amplify or substantiate the grounds of opposition they raised in response to the application. They didn't do that and as things stand, it is not clear what they mean when they allege that the application is ineptly drawn or that the court is *functus officio* or even that Francis has no *Locus Standi*. Their submissions should have come clear on that. The Respondents however chose to focus on other things.

11. The Respondents wronged Francis. They had no good basis for doing so. The application of Francis is therefore meritorious. I allow the application in terms of prayer (b). I also award costs to Francis.

**Dated, signed and delivered at Busia this 5<sup>th</sup> day of February, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant Not a Party: Present

2<sup>nd</sup> Plaintiff: Absent

Respondents: Absent

Counsel for Plaintiff: Absent

Counsel for Respondents: Absent

Court Assistant: Nelson Odame