



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 130 OF 2015 (O.S)

ROSE JUMA OGOLA..... 1ST PLAINTIFF

BONVENTURE OCHIENG OGOLA.....2ND PLAINTIFF

LAWRENCE MURUKA MBUYA.....3rd PLAINTIFF

= VERSUS =

PAUSTINA ANYANGO.....1ST DEFENDANT

VICTORINA APONDI KWANG'OTO..... 2ND DEFENDANT

R U L I N G

1. For determination is the application dated 15th July 2020 brought by the defendants/applicants. The application is premised on the provisions of article 159(2)(a) of the Constitution; sections 1A, 1B, 3A, 7 and 8 of the Civil Procedure Act and Order 2 rules (9) and (15) and Order 51 of the Civil Procedure Rules. The Applicants prays for Orders:

1) Spent

2) That this suit be dismissed for being an abuse of Court process and or *Res judicata*.

3) That cost of this application and the main suit be borne by the plaintiff/respondent.

2. The application is supported by the affidavits sworn by both the defendants and the following grounds;

a) *This case is Res judicata in light of the:*

(i) *Butula Land Dispute Tribunal claim No. 017/07/2011 concluded on or about 17th October 2011.*

(ii) *Busia CMC Land Dispute Case No. 145 of 2011 concluded on or about 19th January 2012; and*

(iii) *Busia High Court Misc. Application No. 197 of 2012 concluded on 14th May 2013; and its orders as to cost dated 17th June 2013.*

(iv) *Environment and Lands Court; ELC No. 48 of 2013 before Justice A. K. Kaniaru conclude on 29th of September 2015 and its orders as to cost and decree dated 29th September 2016.*

b) *This suit is frivolous and vexatious*

c) *This suit is bad in law, amounts to an abuse of Court process and a mere waste of time.*

3. The application is opposed by the plaintiffs'/Respondents' grounds of opposition and replying affidavit both dated 17th September 2020. The grounds pleaded *inter alia*;

(i) *That the issue of adverse possession of which the suit herein was brought have not been heard and decided by any competent court to determine it and the issue of res-judicata does not arise against the suit.*

(ii) That the matter before the tribunal was heard without the respondents'/plaintiffs' knowledge and it concerned who should inherit the estate of OKHUYA NAMUTECHA thus cannot be *res-judicata* to the claim under adverse possession.

(iii) That Busia HC ELC No. 48 of 2013 was not heard and decided having been withdrawn and cannot be *res-judicata* to this suit.

(iv) That the tribunal decision and its adoption cannot be legally used to deny other beneficiaries their shares from the deceased's estate unless so determined by succession court.

(v) That the application by the applicants/defendants dated 15/7/2020 is frivolous and vexatious and ought to be dismissed with costs.

4. The parties argued the application by filing of written submissions. The applicants in their submissions addressed the following issues;

(i) Whether the preliminary objection is based on points of law.

(ii) Whether the suit is bad in law, vexatious and an abuse of court process.

(iii) Whether this suit is *res judicata*.

(iv) Whether the adverse possession claim was litigated in the former suit.

(v) Whether the applicants herein are entitled to costs of this application and this suit.

5. The respondents on their part submitted on the three sub heads of;

(a) Jurisdiction.

(b) *Res-judicata*.

(c) Administrator of the suit land.

6. I have read and considered the pleadings and submissions filed. On my part, I chose to determine the application strictly on the orders sought on the face of it i.e;

(a) Whether or not this suit is *res judicata*.

(b) Whether or not this suit is vexatious and or an abuse of the court process.

7. The principle of *res-judicata* is laid out in section 7 of the Civil Procedure Act. For a suit to be declared *res-judicata*, the following must be proved;

(i) The former suit must have been decided.

(ii) The competence of a court which decides the former suit must be determined irrespective of any provision as to right of appeal.

(iii) The former suit must have been alleged by one party and denied or admitted expressly or impliedly by the other party.

(iv) Any matter which might and ought to have made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in the former suit.

(v) The parties litigating must be the same.

8. The applicants relied on the following former suits which according to them makes the present case *res-judicata*;

(a) Butala Land Disputes Tribunal claim No. 0177/2011 between: Faustina Anyango Vs Arnold Ogola & Lawrence Muruka.

(b) Busia HCC Case No. 48 of 2013; Okola Namuteche & Lawrence Muruka Vs Faustina Anyango and Victorina Apondi.

(c) Busia CMC Land Dispute Case No. 145 of 2011 Faustina Anyango & Ano Vs Arnold Ogola.

(d) High Court Misc. Appl. No. 197 of 2012; Arnold Ogola & Ano Vs Faustin Anyango & Another.

9. From the annexures, the proceedings before the Land Disputes Tribunal were commenced by the defendants herein against Arnold Ogola and the current 3rd plaintiff. Can the proceedings before the tribunal be responded to by way of denial or admission? Secondly did the

Tribunal have jurisdiction to litigate on a claim for adverse possession so that the current claim ought to have been raised before the Tribunal?

10. Proceedings before the Land Disputes Tribunal did not invoke application of the provisions of the Civil Procedure Act and Rules. Therefore, the denial or admission was sort of informal. The law provides that a claim for adverse possession was to be brought to the High Court by way of an Originating Summons. Consequently, even if the parties litigating is the same and the subject matter is the same, the current cause of action was incapable of being litigated before the Land Disputes Tribunal.

11. In Busia CMC Land Case No. 145 of 2011 it was merely to adopt the award issued in Butula Land Disputes Tribunal Case No. 017/7/2011. There was no trial of any issues or any issues on merits. Similarly, in the High Court Misc. Application No. 197 of 2012 was an application which did not proceed by way of hearing and determining any issues in dispute that is related to the current dispute. The following is an extract of the order made in that file;

“Having perused the Notice of Motion dated 21/11/2012 for orders to transfer the Busia CMC Land Case No. 145 of 2011 to this court and on perusing the lower courts file which is herein attached I find that the case commenced through the award received from the Butula Land Dispute Tribunal. The Applicants obtained a stay to file appeal but there is no appeal filed herein. There is also no application for Judicial Review orders filed in this matter. Even if the applicants obtains the orders to transfer the lower court file there is nothing in that file to be canvassed before this court. The applicant ought to move this court by either an appeal or Judicial Review application. As such the application is struck out with no orders to costs.”

12. The final suit the Applicants rely on is Busia ELC Case No. 48 of 2013 between the same parties. The Applicants submitted that this suit was withdrawn after being litigated for many years. The prayers in that suit were set out in the decree annexed by the applicant to be for “orders of declaration that the decision made by the Tribunal is null and void”. This particular suit was withdrawn on application of the plaintiffs’ counsel on 29th May 2015. Order 25(1) of the Civil Procedure Rules allows the plaintiff to withdraw the suit at any time before setting it down for hearing and that such withdrawal/discontinuance is not a defence to any subsequent action.

13. Thus any withdrawal of a suit does not bar any party from filing a fresh suit. Order 25 makes it self-explanatory that a withdrawn suit cannot make a fresh suit res-judicata. In light of the analysis of the status of each of the suits relied on by the defendants/applicants none of them can render the current suit *res-judicata*. I find this line of objection as lacking in merit.

14. The second issue is whether this suit is vexatious and/or an abuse of the court process. The applicants relied on the Court of Appeal Case of *Kivanga Estates Ltd Vs National Bank of Kenya Ltd (2017) eKLR* where the Court observed thus at page 3 of the judgement;

“At the beginning of this judgment we have set out what guides courts in an application for striking out of pleadings. We rehash them here one more time. Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former’s discretionary power to strike out the pleading”.

15. As already stated herein above, the claim before the Tribunal which was subsequently adopted by Magistrate’s court was instituted by the defendants/applicants. The 3rd plaintiff and Arnold in an attempt to challenge that award filed Misc. Application No. 197 of 2012. Thus the first 3 suits were not at instance of the current plaintiffs. The only suit they filed is No. ELC 48 of 2013 which was withdrawn and costs were awarded to the defendants/applicants. The said costs were taxed to Kshs.67,289/= (*annex PAV-6C*). The facts of the case relied on by the applicants are thus distinguishable to the present suit. The Plaintiffs/Respondents are in my view not forum shopping as is submitted by the Applicants.

16. Under explanation 2 of section 7 “**competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court**”. This infers that even if the Respondents did not appeal the decision of the Tribunal is not a bar to this court to determine whether or not the Tribunal was competent to handle a claim for adverse possession which indeed it lacked jurisdiction making the provisions of section 7 & 8 of the Land Disputes Tribunal Act inapplicable to this dispute.

17. In conclusion, it is my considered opinion and I so hold that the application dated 15/7/2020 was brought in bad faith and intended to delay the hearing which had begun. The same is without merit and is hereby dismissed with costs to the Plaintiffs/Respondents.

Dated, signed & delivered at BUSIA this 9th day of Dec., 2020.

A. OMOLLO

JUDGE