



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 33 OF 2017**

**VINCENT EMAYI OKASIAKA (suing on his behalf as the Leg Rep**

**JOSEPH OBOSE OKUME.....APPLICANT**

**VERSUS**

**JOSEPH MANYURU.....1<sup>ST</sup> RESPONDENT**

**PETER MANYURU IWUONI.....2<sup>ND</sup> RESPONDENT**

**MOSES OKWARE OPARI MANYURU.....3<sup>RD</sup> RESPONDENT**

**JOSEPH MUSANGO AYUYA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before me now for determination is dated 22/6/2017 and was filed here on 5/10/2017. It is a Notice of Motion brought under Section 3A of the Civil Procedure Act (cap 21), Order 8 rule 3 and 5 of the Civil Procedure rules, and all other enabling provisions of law. The Applicant – **VINCENT EMAYI OKASIAKA** – is the Plaintiff in the suit he filed here on 4/6/2009 vide a plaint dated 30/5/2009. The Respondents – **JOSEPH MANYURU IWUONI, PETER MANYURU IWUONI, MOSES OKWARE OPARI MANYURU** and **JOSEPH MUSANGO AYUYA** – are the Defendants in the same suit.

2. In this application the Applicant is seeking the following prayers:

Prayer (a): That leave be granted to the Applicant to amend the plaint and enjoin **BENEDICTOR MAMBILI MUHATIA** and **VINCENT ODUOR WARINGA** as Defendants in this case as shown in the annexed draft amended plaint.

Prayer (b): That an order of inhibition be entered on the registers of land parcel Nos **SOUTH TESO/AMUKURA/3175** and **SOUTH TESO/ANGOROMO/3176** to prevent any further dealings pending the hearing and conclusion of the case herein.

Prayer (c): That the costs of application be provided for.

3. The Applicant averred that the amendment sought is necessary for fair determination of all issues; that there shall be no prejudice to the opposite side if leave is granted; and that there has been deliberate effort by the Respondents to transfer the suit parcels of land to complicate and pre-empt the case herein. The aim of the amendment is to bring new Defendants on board and to add more prayers in the plaint.

4. The application was opposed vide a replying affidavit dated 12/1/2018 and filed on 6/2/2018. The Respondents averred, *inter alia*, that the suit herein is *RES-JUDICTA* as the parties have had another litigation of similar nature in Bungoma HCC No. 11 of 2008 where eviction was ordered against the Plaintiff and his family. The Plaintiff even appealed at Kisumu vide Civil Appeal No. 15 of 2010 but he lost the appeal. The Respondents pleaded justification to transfer the land as they pleased, having won the case at Bungoma against the Plaintiff. The court was asked to dismiss the application.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 6/3/2018. He reiterated that the aim of the amendment is to **"bring the new land owners on board so that they do not plead innocence and allege having been condemned unheard in the event their titles are cancelled as prayed in the plaint"**.

6. As regards the order of inhibition sought, the Applicant submitted that the parcels of land have been transferred during the pendency of this suit. The order of inhibition is meant to prevent mischief by the parties. The order of inhibition was said to cause no prejudice to the Respondents now sued as they are not even registered owners now, the owners being the parties now sought to be enjoined. The court was urged to allow the application.

7. The Respondents submissions were also filed on 6/3/2018 just like those of the Applicant. According to the Respondents, the matter is *RES-JUDICATA* as stated in their response to the application. The Respondents submitted that the Applicant tried to challenge the outcome of the case at Bungoma and failed. He is now said to have tried to re-invent himself by calling himself another name and purporting to bring the suit on behalf of another. This, Respondents submitted, does not change the position that there has been previous litigation in which the Applicant was the loser.

8. I have had a look at the suit as filed. I have also considered the application by the Applicant, the response by the Respondents, and the rival submissions. The response by the Respondents is largely based on the issue of *RES-JUDICATA*. And the point made is that parties had litigated over the same land in the past and the Applicant herein had lost. In my view, it is inappropriate to raise the issue of *RES JUDICATA* in response to the application. It is clear that the issue relates to the suit. The Respondents are simply saying that there was a suit at Bungoma which was similar to this one and was determined in their favour.

9. When this suit was filed, the Respondents, as Defendants, filed a defence in which they pleaded, *inter alia*, that this suit is *RES JUDICATA*. They intimated that they would bring a preliminary objection to that effect. The defence was not filed yesterday; It was filed way back in year 2009. So many years down the line, the objection has never been raised. It is now being raised as a response to this application. I say it is inappropriately raised because even if I were to address it conclusively, the end result would affect the application, not the suit. The suit would still be left standing because the issue at hand is whether to dismiss or allow the application, not the suit. I therefore refuse to consider the issue of *RES JUDICATA*. It is not a fitting response to the application. It is an issue that has the potential to determine the suit in Limine. I consider that the issue can be fully addressed later if and/or when appropriately raised.

10. I now come to the issue of amendment. The court has a wide discretion to allow amendments in order to determine the real question in dispute and to do substantial justice. The amendment can be done at any stage but within reasonable time. The circumstances under which amendments can be sought are wide and varied and each case should depend on its own facts. In this particular case, it is clear that the disputed parcels of land were transferred to the parties intended to be brought on board when this suit was still pending in court. The necessity of enjoining the new owners is therefore obvious. Any judgment issued or delivered without inclusion of the new parties would not be an effective judgment.

11. Any such judgment is likely to spawn or give rise to other suits. The court should aim to avoid multiplicity of proceedings and all amendments necessary to avoid such multiplicity should be allowed. I would therefore allow amendment in this matter.

12. Then there is the issue of inhibition. Among the annexures availed in this application are copies of the land register showing the various dealings and/or transactions that have taken place. Both copies of the registers for parcels numbers 3175 and 3176 show that one of the Defendants – JOSEPH MUSANGI AYUYA – placed restrictions on 22/6/2015. Nothing shows that the restrictions have been removed. And it is clear that the restrictions were placed after the parties now sought to be enjoined became the new owners of the parcels of land.

13. I would have agreed with the Applicant if the two parcels of land had no restrictions. Without restrictions, the parcels of land would be in danger of being dealt in a manner that may confuse or obfuscate issues. But now there are on record orders of restriction. The inhibition order being sought would precisely serve the same purpose that the orders of restriction now in force are serving. In the circumstances therefore, I find it presumptuous and superfluous to issue an order of inhibition. I would therefore decline to issue it.

14. The upshot, in light of the foregoing, it that the application herein is only partially successful. I grant the prayer of amendment as sought but I decline to grant an order of inhibition. Costs of the application to be in the cause.

**Dated, signed and delivered at Busia this 20<sup>th</sup> day of February, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Absent

1<sup>st</sup> Respondent: Absent

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

3<sup>rd</sup> Respondent: Absent

4<sup>th</sup> Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondents: Absent

Court Assistant: Nelson Odame