



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 19 OF 2018**

**JULIUS AMBUNDA..... PLAINTIFF**

**VERSUS**

**ERICK MALOBA**

**MARTIN INYANGALA**

**FREDRICK AMBUNDA.....DEFENDANTS**

**RULING**

The application is dated 18<sup>th</sup> October 2018 and is brought under Sections 6,7 and 3A of the Civil Procedure Act for orders that:-

1. This suit be struck out with costs for lack of locus standi on the part of the plaintiff and for being Res judicata, Subjudice, time or statute-barred, incompetent, untenable and an abuse of the due process of court.
2. Costs of this application be borne by the plaintiff/respondent.

It is based on following grounds that the plaintiff/respondent instituted a similar suit against the defendants/applicants vide Kakamega ELC No. 68 of 2017 (O.S) over the same cause of action as the claim herein and this suit is thus a non-starter, duplex, res judicata, incurably defective, bad in law, irregular and a waste of precious judicious time. The plaintiff's claim herein, being a succession issue was adjudicated upon and finally heard and determined vide Mumias District Magistrate's Succession Cause No. 30 of 1977 which distributed the estate of the deceased Ambunda Amukhuma which distribution or verdict the plaintiff appealed against, under the old procedure, but failed, vide Kakamega Resident Magistrate's Court Appeal No. 43 of 1977 and Kisumu HCCA No. 4 of 1980 and this being a land court and not a succession court is devoid of jurisdiction to delve into the succession matter herein or set aside, quash or overturn the decisions of the succession courts made in 1977, 1979 and 1980 respectively or order a fresh succession cause and the plaintiff's suit is really an appeal against the verdicts in the succession courts disguised as a land case. The certificate of confirmation of grant was registered on land title No. E/Wanga/Lubinu/379 and adopted at the Kakamega Lands Office on 18/10/1977 thereafter new titles were created whose cancellation the plaintiff/respondent seeks vide this suit which has been filed over 40 years thereafter without leave of the court and this suit is full of mischief, disingenuous, oppressive, otiose, irregular, vexatious and improperly before court.

The plaintiff/respondent submitted that, this suit is for the cancellation of titles and the succession court cannot do the same. He also never instructed Kiveu Advocate to file any suit on his behalf hence this suit is now before the proper court.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

*"..... 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"*

In the same case, Sir Charles Newbold said:

*"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".*

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”*

Section 7.

*“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.”*

This court has taken the liberty to peruse the pleadings Kakamega ELC No. 68 of 2017 (originating summons) and indeed find that the parties are the same and subject matter is the same. There is also Mumias District Magistrate’s Succession Cause No. 30 of 1977 which distributed the estate of the deceased Ambunda Amukhuma and where the subject matter and parties were also the same. This suit filed later in 2018 is an abuse of the court process. I find that this matter is res judicata and sub judice. For these reasons I find the preliminary objection has merit and I uphold the same. This suit is struck out with costs to the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> MAY 2019.**

**N.A. MATHEKA**

**JUDGE**