



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 94 OF 2015**

**JAMES NGANGA MURIUKI**

**(Suing as Chairman of Dricos Self Help Group).....1<sup>ST</sup> PLAINTIFF**

**DRICOS SELF HELP GROUP.....2<sup>ND</sup> PLAINTIFF**

**= VERSUS =**

**HAROLD LUNGAHO NAVODERA.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, BUSIA COUNTY.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND SURVEYOR, BUSIA COUNTY....3<sup>RD</sup> DEFENDANT**

**= AND =**

**JAMES NAKHULO ORODI.....THIRD PARTY**

**R U L I N G**

1. The matter before the Court for determination is Notice of Preliminary Objection by Third Party – **JAMES NAKHULO ORODI** - dated 21<sup>st</sup> September 2016 and filed on even date to the effect that this Court lacks jurisdiction to entertain the suit against the Third Party or grant the reliefs sought by the 1<sup>st</sup> Defendant against himself; and that the suit is *Res-judicata* against the Third Party pursuant to the judgments dated 30<sup>th</sup> August 2012 by Hon. B. A Ojoo in **Lower Court Civil Case No. 406 of 2008 James Ng’ang’a Muriuki & Dricos Self Help Group Vs James Nakhulo Orodi** and Hon. S.M KIBUNJA in **High Court Civil Appeal No. 56 of 2012, James Ng’ang’a Muriuki & Dricos Self Help Group Vs James Nakhulo Orodi**. The Third Party also filed Grounds of Opposition on 14<sup>th</sup> November 2016 in objection to his joinder to the suit whose grounds are identical to those in the Preliminary Objection.

2. The Preliminary Objection was canvassed by way of written submissions. The Plaintiff’s submissions as well as the Defendants were filed on 10<sup>th</sup> December 2018. Interestingly, the Third Party’s Counsel elected not to file submissions in support of his own Preliminary Objection.

3. The Plaintiffs admitted that they had instituted the aforementioned lower court suit against the Third Party as a Defendant concerning the same suit property. They however sought different reliefs from the current case being injunctive orders restraining the then Defendant from interfering with the 2<sup>nd</sup> Plaintiff’s peaceful and quiet occupation of the property known as **LR NO. BUKHAYO/BUGENGI/5198** (hereinafter referred to as the “suit property”). In this case they seek orders compelling the Defendants, - **HAROLD LUNGAHO NAVODERA – THE LAND REGISTRAR BUSIA COUNTY** - and the - **DISTRICT LAND SURVEYOR BUSIA COUNTY** - to physically pinpoint the suit property and effectually cancel and revoke the **Title Deed No. BUKHAYO/BUGENGI/8231** which they deem to be an irregular and illegal subdivision of the mother title the original **No. BUKHAYO/BUGENGI/5163**.

4. The Plaintiffs further contend that the parties in both **Lower Court Civil Case No. 406 of 2008 James Ng’ang’a Muriuki & Dricos Self Help Group Vs James Nakhulo Orodi** and **High Court Civil Appeal no. 56 of 2012, James Ng’ang’a Muriuki & Dricos Self Help Group Vs James Nakhulo Orodi** are different from the ones in the current suit which has been instituted against **HAROLD LUNGAHI NAVODERA, LAND REGISTRAR BUSIA COUNTY** and **DISTRICT LAND SURVEYOR, BUSIA COUNTY**. The Plaintiffs have submitted that they **do not seek any relief from the Third Party**.

5. The 1<sup>st</sup> Defendant's submissions are largely in tandem with the Plaintiffs'. He admits that there were previous suits between the Plaintiff and the Third Party determined by competent courts. He however contends that the said suits were not between the same parties as the current suit nor were they between parties under who they claim, litigating under the same title as prescribed by Section 7 of the Civil Procedure Act. Further, the subject matter in the former suits is distinct from that in the current proceedings with regard to the prayers sought as detailed by the Plaintiff.

6. The 1<sup>st</sup> Defendant further argues that the claim against the Third Party is one of contribution or indemnity should the former be held liable in the main suit which cause of action only accrues once judgment has been entered against the Defendant. The Defendant and Third Party therefore stand in relation to each other as if the Defendant was a Plaintiff and the Third Party was a Defendant. The case between the two should not therefore prejudice the Plaintiff. The 1<sup>st</sup> Defendant has quoted the cases of **Pontifex Vs Ford (1884) 12 QBD 151**, **Commissioner for Transport Vs F. Boero and Co. EA Ltd (1954) 27KLR** and **Jessie Mwangi Gachango Vs Attorney General and Others (1981) eKLR** to buttress this argument. The 1<sup>st</sup> Defendant contends that the Third Party's objection is inapplicable to his case as there has never been any litigation on indemnity and/or contribution between himself and the Third Party.

7. The submissions filed are generally sound. But there was even no need to file them in my view. In this matter the preliminary objection was to be prosecuted either through oral hearing in court or by filing written submissions. Both the Plaintiff and the 1<sup>st</sup> Defendant filed written submissions. The Third Party chose not to file submissions. What this means is that the Third Party chose not to prosecute his preliminary objection. It is obvious that what is not prosecuted cannot be said to be proved.

8. The notice of preliminary objection was simply that: A NOTICE. Without being prosecuted, it can never amount to proof. It is often said that choices have consequences. The choice of not filing submissions and/or not arguing the objection orally in court was fatal to the preliminary objection. Without much ado therefore, the preliminary objection is hereby dismissed.

**Dated, signed and delivered at Busia this 12<sup>th</sup> day of June, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: Present

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

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

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

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

Third Party: Absent

Counsel for the Plaintiffs: Absent

Counsel for the Defendants: Absent

Court Assistant: Nelson Odame