



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 82 OF 2018

WILSON OKUMU KABURU

(suing on his behalf and as the Leg.

of the estate of PETER WERE.....PLAINTIFF

= VERSUS =

JOSEPH WANJALA ODUBA.....DEFENDANT

R U L I N G

1. This ruling is a Preliminary Objection premised on paragraph five (5) of the defence filed here on 10/4/2019 and a notice to raise it filed on 30/4/2019. The substance of the objection is as follows: The Plaintiff's suit, which is focussed on land parcel No. BUNYALA/BULEMIA/188, was determined vide PMCC No. 98/2009, Busia. The order issued in that case has not been set aside and is therefore still in force. This matter is therefore said to be *RES-JUDICATA* and thus runs counter to Section 7 of the Civil Procedure Act (cap 21).

2. At paragraph 5 of the defence, the Defendant expressed his intention to raise the issue as a preliminary point. He followed that up by filing a Notice of Preliminary Objection on 30/4/2019. The issue in dispute relates to ownership.

3. The Objection was canvassed by way of written submissions. The Defendant's submissions were filed on 1/7/2019. It was submitted, *inter alia*, that the matter had been handled earlier at Bunyala land Dispute's Tribunal and the decision of the tribunal was adopted by the court here in Busia in case No. PMCC No. 98/09. That decision was said to be still in force as it was not challenged. The Defendant then urged the court to hold that the matter herein is *RES-JUDICATA*.

4. The Plaintiff's submissions were filed on 24/7/2019. The objection was opposed. The Plaintiff submitted that for one to raise the issue of *RES-JUDICATA*, all issues should be clearly discernible from the court records yet that is not the position here. It was pointed out that the tribunal proceedings mentioned by the Defendant were not part of the court record when the Preliminary Objection was intimated to be raised. It was said to be irregular to raise a preliminary point of law and then seek to argue it through written submissions and annex documentary evidence to the submissions.

5. Further, the Plaintiff submitted that in a Preliminary Objection, only points of law should be raised and if some facts need to be ascertained, a Preliminary Objection should not be raised. The Plaintiff said his claim is based on a customary trust, which was never raised or handled at the Land Disputes Tribunal. And the Land Tribunal itself was said to have been incompetent to decide on the issue of ownership. This court was therefore urged to dismiss the objection with costs.

6. I have had a look into the pleadings. I have considered the objection and rival submissions from both sides. The Defendant gave the rationale used to raise the issue of *Res-Judicata* and even cited the cases of **R Vs NATIONAL ENVIRONMENTAL TRIBUNAL EXPARTE ORBIT CHEMICAL INDUSTRIES LIMITED & Another [2013] eKLR, NYANZA GARAGE Vs ATTORNEY GENERAL, HCC No. 450/1993, Kampala, and JOHN FLORENCE MARITIME SERVICES LIMITED Vs CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 others [2015] eKLR** to support his arguments. He further referred this court to its own decision in **PETER OMUSE Vs DORCAS ODUNGA OGOYE; ELC NO. 110/2016, BUSIA.**

7. The rationale is correct as raised. But the Defendant failed to contextualise this court's position in Omuse's case (*supra*). The issue in that case was not raised through a Preliminary Objection. It was raised through a formal application which was duly canvassed by both sides leading to a ruling. In that case too, the Plaintiff had admitted that the issues he was raising were the same issues handled earlier at the Land Disputes Tribunal. The approach in Omuse's case (*supra*) was therefore different and there had been admission.

8. In this matter itself, nothing is admitted and the issue is raised as a Preliminary Objection. The Defendant fails to appreciate the context in which a Preliminary Objection should be raised. In **MUIRURI Vs KIMEMIA (2002) 2KLR 677**, the court held that a Preliminary Objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption all facts pleaded by the other side are correct. A preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. This same position emerged in the case of **SIRMA Vs KIPRONO [2005] IKLR 197**. It had been expressed much earlier in the locus classicus case of **MUKISA BISCUIT CO. LTD Vs WEST END DISTRIBUTORS LTD [1969] EA 696**.

9. The Defendant in this matter misses the point. He has not admitted the crucial facts raised by the Plaintiff and the truth of the issue raised needs to be established through evidence. Yet, knowing this, he proceeded to raise a Preliminary Objection. The Defendant further did something else that is not acceptable. He was trying to attach evidence to his submissions. That is what this court would treat as ignorable evidence. The court is entitled to ignore it, and does indeed ignore it, because of the manner in which it was availed. All procedure was ignored and the Plaintiff's side correctly pointed this out. Due regard should always be had to procedure.

10. The Defendant needed to bid his time and raise the issue when all the evidence is in and when the relevant facts have been established. It was wrong for him to raise the issue as a Preliminary Objection yet all the circumstances are clearly against that kind of approach. He should have waited for trial of the action.

11. It is in light of all this that the Objection is found to lack merits. It is hereby dismissed with costs to the Plaintiff.

Dated, signed and delivered at Busia this 11th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Present

Counsel for the Plaintiff: Absent

Counsel for the Defendant: Present

CA: Nelson Odame