



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 10 OF 2017

MICHAEL ORINYO ALUSI.....PLAINTIFF

= VERSUS =

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. This ruling is on a Preliminary Objection first intimated in the Defendant's defence filed on 12/4/2017 and dated the same. Contemporaneously with the defence was also filed a notice of even date seeking to raise or actualise the objection. In simple terms the objection is to the effect that this suit is fatally defective and a non-starter for being *res-judicata* the proceedings in Busia HCCC No. 30 of 2007, as well as the ruling by this court delivered on 31/8/2016 relating to the Plaintiff's application dated 1/7/2015.

2. The notice is one to which the Plaintiff – **MICHAEL ORINYO ALUSI** – seems to have responded vide a “**supplementary Affidavit**” filed on 15/11/2018 and a “**Replying Affidavit**” filed on 6/2/2019. Preliminary Objections are not ordinarily responded to that way but the Plaintiff is unrepresented and this court feels impelled to tolerate the procedural unsoundness of his response. Both responses by the Plaintiff largely contain his view on the antecedents surrounding his suit herein.

3. The Plaintiff has sued the Defendant – **NATIONAL BANK OF KENYA LTD** – because of a charge in the Defendant's favour placed on land parcel No. SOUTH TESO/AMUKURA/428. He wants the charge treated or declared as null and void and desires that the Defendant be compelled to write off a financial facility related to the charge and release the title to the Plaintiff. The Plaintiff would also wish to be paid costs of the suit and/or be granted any other relief the court may deem fit to grant.

4. It is useful in this matter to give some background. The Plaintiff and two others claimed land parcel No. LR. SOUTH TESO/AMUKURA/428 as adverse possessors in HCC No. 30/2007, BUSIA. The suit was against one JOBSON SALLANO MULANDA who was, and still is, the registered owner of the land. Jobson didn't defend the suit and the court found for the Plaintiffs. The Plaintiffs faced difficulties getting the land registered in their names because Jobson had obtained a loan from the Defendant and offered the land as security. The Defendant has the title in its custody. In order to release it to facilitate the process of Plaintiff's registration as owners, the Defendant required full payment of all the monies owed to it in relation to the loan.

5. The Plaintiff is opposed to such payment. His first opposition was through an application – an amended Notice of Motion – filed in the same suit and which this court dismissed vide the ruling mentioned in the notice of preliminary objection. The dismissal took place on 31/8/2016.

6. After the dismissal the Plaintiff filed this suit seeking, *inter alia*, to have the same charge treated and/or declared null and void. It is the Defendant's position that the suit is *RES JUDICATA* in view of the earlier suit mentioned herein and the ruling of this court that dismissed the Plaintiff's application.

7. The Plaintiff's application that was dismissed by this court had the following prayers, among others,

Prayer (a): That the charge registered on 13/5/1982 against the title to land parcel No. SOUTH TESO/AMUKURA/428 be discharged and/or removed to facilitate the execution of the judgment issued herein earlier in favour of the Applicants.

Prayer (b): That M/S National Bank of Kenya Limited be ordered to pursue the person of JOBSON SALANO MULANDA separately to enforce settlement of any existing loan.

Prayer (bb): In the alternative, the 1st Respondent be ordered to pay 2nd Respondent the sum of Kshs.165,000 with or without interest or any other justifiable sum to facilitate removal of the existing charge on parcel No. SOUTH TESO/AMUKURA/428 and in

default of payment the Applicants or 2nd Respondent be at liberty to take out execution against the 1st Respondent to enforce payment.

8. In the present suit, the same party now as Plaintiff has made the following prayer relating to the same charge:

An agreement made between the Defendant and a charge issued on 13/5/1982 be made null and void and the Hon. Court compel the Defendant write off a facility in their custody and release land parcel No. SOUTH TESO/AMUKURA/428 by diverse (?) (I think he means adverse possession) to the Plaintiff.

I need to mention that this prayer lacks grammatical clarity but it's clear that the Plaintiff is seeking to get the charge on the land out of his way so that he can become the registered owner of parcel No. 428. The prayers in the application that the court ruled on in the earlier suit were seeking the same thing.

9. The Preliminary Objection herein was canvassed by way of written submissions. The Plaintiff filed his submissions on 14/6/2019. He gave a history of the matter and then talked of addressing the evidence and analysis. I honestly do not know what evidence the Plaintiff is analysing since this case has not yet been heard. The Defendant's submissions were filed on 29/5/2019. He gave some background and then submitted that the matter is *RES-JUDICATA*. He made the point that what was sought and rejected in the ruling that this court delivered in the Plaintiff's application in the earlier decided suit is precisely what he is seeking in this suit.

10. I have carefully considered what each side has presented for consideration. I agree with the Defendant. The Plaintiff is trying some ingenuity that does not seem to serve him well. His claim to the land is through adverse possession. The court has already found that he is an adverse possessor. I am sure that when he filed his suit for adverse possession, the charge on the land was already in the land register. Due diligence on his part would have led him to take action against the Defendant. I find the matter herein being *res-judicata* in two senses. The first one is as explained by the Defendant. And the first one means that the Plaintiff is trying to achieve in this suit what he lost in the application that this court ruled on earlier. The second one is that the Plaintiff did not have to file a separate suit against the Defendant. He should have enjoined the Defendant in his earlier suit because the charge being challenged was already manifest on the title he was relying on to make a claim of adverse possession. It is clear therefore that the matter is *RES-JUDICATA* in all senses of the word. His suit herein is belated and completely *RES-JUDICATA*. It is a non-starter.

11. I also need to state that this is a matter that the court can consider for *sua sponte* dismissal as mandated by Order 2 rule 15 of Civil Procedure Rules, 2010, which enjoins, *inter alia*, that a suit can be struck out or dismissed where it discloses no reasonable cause of action or is scandalous, frivolous, and vexatious or is otherwise an abuse of the court process.

12. I say this because as pointed out earlier, the Plaintiff in this matter is an adverse possessor. The law is clear: Adverse possession against a paper title holder extinguishes only the paper title of the registered owner and not the interests of any third party to which the title has been subordinated. The Defendant herein is such third party and it is clear that its well-nigh impossible for the Plaintiff to defeat the Defendant's interests. It is in light of this that it becomes clear that the Plaintiff does not have a reasonable cause of action against the Defendant. But I will not dismiss it for this reason as I am already in agreement with the Defendant on the issue of *RES-JUDICATA*. I therefore find merit in the Defendant's objection and hereby dismiss the Plaintiff's suit with costs.

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

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Present

Defendant: Absent

Counsel for the Plaintiff: Absent

Counsel for the Defendant: Absent

CA: Nelson Odame