



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 156 OF 2017(OS)

JOHN BARASA MATIFARI.....PLAINTIFF

VERSUS

SIMON WANJALA MABONGA.....DEFENDANT

R U L I N G

This is in respect to the defendant's Preliminary Objection dated 18th July 2018 raising the following issued:-

- 1. That the application is sub- judice viz BUNGOMA CMCC NO 5 OF 2005 SIMON MABINGA .V. JOHN BARASA MATIFARI.**
- 2. That the application and suit are an abuse of the Court process.**
- 3. That this Honourable Court lacks jurisdiction to entertain this suit in the circumstances.**

The defendant therefore seeks the striking at out of this suit. The application being referred to as sub – judice is the plaintiff's Notice of Motion dated 11th May 2018 seeking the following orders:-

- a: Spent**
- b: Spent**
- c: That this Honourable Court do orders for the withdrawal and transfer of BUNGOMA CMCC NO 5 OF 2005 to this Court for consolidation with this suit and final determination.**
- d: That costs do abide the outcome of the main suit.**

The Preliminary Objection has been canvassed by way of written submissions which have been filed both by **MR OCHARO ADVOCATE** for the defendant and **MR SICHANGI ADVOCATE** for the plaintiff.

I have considered the Preliminary Objection and the submissions by Counsel.

Before I delve into the substantive Preliminary Objection, it is important that I set out facts which are not really in dispute.

The defendant herein (**SIMON WANJALA MABONGA**) was the plaintiff in **BUNGOMA CMCC NO 5 OF 2005** where he had sued the plaintiff herein (**JOHN BARASA MATAFALI**) seeking Judgment in the following terms:-

- 1. An order compelling the defendant to deliver to him all that parcel of land known as EAST BUKUSU/SOUTH NALONDO/2802.**
- 2. A permanent injunction.**
- 3. Costs of the suit.**

The basis of the claim was that the plaintiff had purchased the said suit land from one **TITILA MAYUU MULUONI** on or about 21st February 1995. That suit was heard to completion and by a Judgment delivered on 25th July 2018, **HON. S. O. MOGUTE** (Principal Magistrate) entered Judgment for the plaintiff therein (now the defendant). An appeal by the defendant therein (now the plaintiff) was dismissed by **MUKUNYA J** on 10th January 2018 for want of prosecution. Meanwhile, the plaintiff filed this Originating Summons on 4th December 2017 seeking against the defendant the main order that he is entitled by adverse possession to land measuring 9 acres comprised in parcels **NO EAST BUKUSU/SOUTH NALONDO/2802, 2861 and 2863** being sub – divisions of parcel **NO EAST BUKUSU/SOUTH NALONDO/98**. The Originating Summons is contested and the defendant filed a replying affidavit dated 28th February 2018. For purposes of this ruling, I need not go into the details of the Originating Summons or replying affidavit. Those will be considered at the appropriate time.

What must now be clear from the above summary is that the plaintiff's Notice of Motion dated 11th May 2018 and which provoked the Preliminary Objection dated 18th July 2018 has been over-taken by events. There is therefore no application that can be described as being sub – judice or an abuse of the Court process. Judgment having already been delivered in **BUNGOMA CMCC NO 5 OF 2005**, that suit cannot be stayed or transferred to this Court for consolidation with this suit since it no longer exists at least not for purposes of trial or consolidation. And since the plaintiff's Notice of Motion dated 11th May 2018 is the foundation upon which the defendant's Preliminary Objection dated 18th July 2018 is based, the said Preliminary Objection has no basis upon which it can be considered. It can only be struck out and in any event, the plaintiff's Notice of Motion dated 11th May 2018 was itself over-taken by events because Judgment in **BUNGOMA CMCC NO 5 OF 2005** was delivered on 25th July 2018.

The defendant has also raised the issues of lack of jurisdiction by this Court to determine this dispute and that the same is also an abuse of the process of the Court. The principle of res – judicata has been raised and **MR OCHARO** has rightly cited **section 7 of the Civil Procedure Act** and the relevant case law. However, res – judicata cannot be invoked in this suit because in **BUNGOMA CMCC NO 5 OF 2005**, the issue of adverse possession, which has been pleaded in this suit, was not pleaded and could not have been determined in that case because the subordinate Court would not have had jurisdiction to determine a claim for adverse possession. It is of course true that the filing of multiple suits or application over issues that have been previously determined amount to an abuse of the Court process because it is meant to irritate, harass and annoy the other party. But that does not mean that a party cannot file another suit to determine an issue which was not determined, and could not have been determined, by the previous litigation. I must add however that if the previous suit involving the parties herein had been heard and determined by the High Court, then a plea of res – judicata and abuse of the Court process could have been well founded because the plaintiff herein would have been expected to file a counter – claim seeking the suit land by virtue of adverse possession. That was not possible in **BUNGOMA CMCC NO 5 OF 2005**.

The up – shot of the above is that the defendant's Preliminary objection dated 18th July 2018 is devoid of merit. It is dismissed with costs.

Boaz N. Olao.

J U D G E

9th October 2019.

Ruling dated, delivered and signed in Open Court at Bungoma this 9th day of October 2019.

Mr. Waswa for Mr. Sichangi for plaintiff present

Plaintiff present

Defendant absent

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

9th October 2019.