



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CIVIL CASE NO. 74 OF 2018

JUSTUS ATSIENO ODHIAMBO.....PLAINTIFF

VERSUS

PETER ONYANGO ACHIENG.....DEFENDANT

R U L I N G

1. Before me for determination is a Preliminary Objection dated 28th November, 2018 filed by Peter Onyango Achieng, the defendant herein seeking for orders that the plaintiff's plaint be struck out with costs on the following grounds;

i) That the matter is res-judicata having been canvassed in previous proceedings namely Judicial Review No. 5 of 2015 at Busia between the same parties over the same piece of land.

ii) That the plaintiff lacks locus standi to file this matter.

2. On 4th November, 2019 when the matter came up for hearing, following an application by the defendant/applicant, the Court directed that the Preliminary Objection be dispensed with first. The defendant abandoned the second ground after he acknowledged having been served with of Letters of Administration Intestate.

Defendant/Applicant's Argument

3. The defendant/applicant submitted that the plaintiff/respondent in the present suit is the son of the plaintiff in Judicial Review No. 5 of 2015 and that the suit land is MARACHI/ESIKOMA/1199 registered in the name of the defendant/applicant on 28/08/1982 and hived off from MARACHI/ESIKOMA/606 which belonged to the Late Odhiambo Diameri.

4. The applicant further contends that the plaint admits the existence of a case before the Land Dispute Tribunal which led to the Judicial Review No. 4 of 2015 and that the issues raised in the plaint are similar to what was raised in the Judicial Review proceedings.

Plaintiff/Respondent's Case

5. The Plaintiff/Respondent in objecting to the Preliminary Objection submitted that for the suit to be struck out for being *res judicata*, the parties must be the same, the subject matter must be the same and that the previous case must have been before a competent court.

6. The Plaintiff further submitted that the Court in Judicial Review No. 4 of 2015 held that the Lands Dispute Tribunal lacked jurisdiction to determine issues of ownership and as a consequence, the case before the Lands Dispute Tribunal was a nullity and as such the Preliminary Objection ought to fail.

Analysis/Determination

7. The principles for a valid preliminary objection was laid down in the case of *Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) EA 696*, Law JA stated;

“A preliminary objection 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

8. Therefore, for a preliminary objection to succeed it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct and lastly it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Essentially, a preliminary objection should, if successful, dispose off the suit in its entirety.

9. The defendant has asked this court to struck out this suit with costs as the same was *res judicata*. The court has perused the court file and also considered the oral submissions made by the counsels for the respective parties in support of and against the preliminary objection. From the record, it is not in dispute that there exists a judgment in Judicial Review No. 4 of 2015 filed by Peter Onyango Achieng, the defendant herein, challenging the decision of the Butula Land Dispute Tribunal to award part of Land Parcel No. MARACHI/ESIKOMA/1199 to Rose Adipo.

10. From the judgment, the Ex parte applicant had sought to challenge the decision of the tribunal on three grounds. First, that the tribunal acted *ultra vires* its powers by ordering subdivision and cancellation of title to registered land. The Tribunal was faulted for accepting proceedings instituted by a person who was not privy to the contract between the seller and the ex parte applicant. Lastly that the matter was time barred. Neither the respondent nor the interested party filed their response or filed their submission despite being alive to the proceedings. The application was found to be merited and was allowed. In its judgment the Court held;

“11. I am generally in agreement with the ex parte applicant on his stand concerning the applicable law except on the issue of the Statute of Limitations. To begin with, the tribunal had no power to award land to the interested party. As aptly pointed out in the submissions, its jurisdiction derived from section 3(1) of the now repealed Land Disputes Tribunals Act which stated as follows:

Section 3(1)

Subject to this Act, all cases of Civil nature involving a dispute as to-

- a) the division of, or the determination of boundaries to land, including land held in common.**
- b) a claim to occupy or work land; or**
- c) trespass to land shall be heard and determined by a tribunal established under Section 4.**

A plain reading of this provision shows that the tribunal had no mandate to delve into issues of ownership. Its sojourn into that domain therefore was an exercise in futility.

12. It is also true that the interested party was litigating over land owned by her own late husband. She needed to show that she had acquired the legal capacity to represent her husband’s estate. The decided authorities make it clear that she could not do so without acquiring the necessary legal documents. That is trite law. I dont need to belabor this point too much....”

11. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act, Cap 21 which provides that:

“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”

The test in determining whether a matter is *res judicata* as stated was summarized in *Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others (2010) eKLR*, as follows:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

12. Looking at the circumstances of the present suit, i find that the properties in dispute are the same and so are the parties. In the dispute before the High Court and the Tribunal, Rose Adipo was litigating in her capacity as the wife of her late husband (Odiambo Diemeri Musundi) while in the present suit, the plaintiff is the son of Rose Adipo and therefore estopped from litigating under Section 7 of the Civil Procedure Act. However, the decision of the court in Judicial Review No. 4 of 2015, was to the effect that the suit before the Tribunal was a nullity. This is because the Tribunal did not have the jurisdiction to hear and determine issues relating to land ownership and secondly, the complainants were not properly before the Tribunal as they lacked the *locus standi*. This in my view did not determine the issue of ownership in finality and or on merits. The High Court, although of a concurrent jurisdiction, merely maintained the *status quo* before the complainants moved to the Tribunal.

13. The upshot of the foregoing is that the claim of land ownership between the parties in the present suit has not been determined on merit neither in Busia Judicial Review No. 4 of 2015 nor in the Land Dispute Tribunal and therefore the present case is not res judicata. Consequently, the defendant's Preliminary Objection dated 28th November, 2019 is not merited and is hereby disallowed. Costs shall be in the cause.

Dated, signed and delivered at BUSIA this 11th day of December, 2019.

A. OMOLLO

JUDGE