



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 31 OF 2012**

**BUSIA DAIRY FARMERS CO-OPRATIVE SOCIETY...APPLICANT**

**VERSUS**

**JAMES NDIRANGU NG'ANG'A.....DEFENDANT**

**BENSON NG'ANG'A NDIRANGU.....INTERESTED PARTY**

**R U L I N G**

1. The application under consideration is a Notice of Motion dated 11/9/2017 filed here on the same date. It is brought under Order 1 Rule 8, 3, and 9 of Civil Procedure Rules. The Applicant – **BUSIA DAIRY CO-OPERTIVE SOCIETY** – is supposed to be the 2<sup>nd</sup> Plaintiff in the suit and is infact indicated as such in various documents filed. The application is against the two Respondents – **JAMES NDIRANGU NG'ANG'A** and **BENSON NG'ANG'A NDIRANGU** – who are Defendant and Interested Party respectively in the suit.

2. The Applicant is seeking the following prayers:

Prayer 1: That this honourable court be pleased to grant leave to the Applicant/2<sup>nd</sup> Plaintiff to file his plaint and verifying affidavit.

Prayer 2: That the attached draft plaint and the verifying affidavit be deemed to be filed and to be the plaint for the 2<sup>nd</sup> Plaintiff herein together with the verifying affidavit.

Prayer 3: That this court does make orders that this case proceeds from where it had stalled following the subsequent ruling of the court dated 26/7/2017.

3. The grounds advanced in support state, *interalia*, that the Applicant/2<sup>nd</sup> Plaintiff has all along participated in the proceedings, having been granted leave to join the suit on 9//7/2014. The 1<sup>st</sup> Plaintiff then withdrew the suit and the 2<sup>nd</sup> Plaintiffs relief is still pending for determination. The Plaintiffs case is already closed and the Applicant wants the Defendants case to proceed. The Applicants position is that although the case was originally filed by the 1<sup>st</sup> Plaintiff – The Attorney General – it is actually the Applicant who would benefit from the reliefs sought.

4. The 1<sup>st</sup> Respondent – **JAMES NG'ANG'A NDIRANGU** – opposed the application in two ways viz:

**1. Notice of Preliminary Objection dated 15/9/2017 and filed on 18/9/2017.**

**2. Grounds of opposition dated 15/9/2017 and filed on 18/9/2017.**

IN both responses filed, the jurisdiction of the court is faulted as the issues raised have been handled by other courts. The issues are therefore said to be *RES-JUDICATA*. More specifically, the 1<sup>st</sup> Respondent is said to have had a suit with Applicant in BUSIA PRINCIPAL MAGISTRATES COURT NO. 229 of 2007 where ownership of the subject matter – BUSIA/MUNICIPALITY/20 was determined in favour of the 1<sup>st</sup> Respondent. The Applicant even went on appeal in that matter and the appeal was dismissed.

5. Then this suit was filed by the 1<sup>st</sup> Plaintiff – The Attorney General – and the Applicant was allowed to join the suit as Second Plaintiff. The Applicant failed to join the suit as 2<sup>nd</sup> Plaintiff. The Applicants endeavor now is said to be an abuse of the court process.

6. The 2<sup>nd</sup> Respondent also responded in a similar fashion as the 1<sup>st</sup> Respondent. He filed a Preliminary Objection on 12/9/2017 and on the same date he also filed grounds of opposition.

7. According to the 2<sup>nd</sup> Respondent, the application is incompetent and is also *RES-JUDICATA*. The suit on which the application is premised is said to have ceased to exist as it was withdrawn by the 1<sup>st</sup> Plaintiff – The Attorney General.

8. On 18/9/2017, it was agreed that the application and the responses filed be canvassed by way of written submissions. In that regard, the Applicant's submissions were filed on 11/10/2017. The Applicant submitted, *inter alia*, that the matter is not *res-judicata* as the issues raised in it have never been tried and conclusively determined. Concerning the averment by the 1<sup>st</sup> Respondent that the court allowed the Applicants inclusion in the case but the Applicant failed to do so, the Applicant submitted that the door should not be shut on it. It should, it submitted, be allowed to proceed with its case regardless of its weaknesses. The court was urged to use its inherent powers and allow the Applicant's application. Also pointed out was that the court that is said have determined the previous suit had no jurisdiction to do so.

9. The 1<sup>st</sup> Respondent's submissions were filed on 20/9/2017. According to 1<sup>st</sup> Respondent, the matter is *RES-JUDICATA* as it was already adjudged upon in BUSIA PRINCIPAL MAGISTRATE'S COURT No. 229 of 2007 and in a subsequent appeal arising therefrom in HCCA No. 227 of 2008. And because the matter is *RES JUDICATA*, this court is also said to have no jurisdiction to entertain it. It was pointed out too that the Plaintiff had earlier been allowed to join the case that was withdrawn but failed to do so.

10. The 2<sup>nd</sup> Respondent's submissions were filed on 20/9/2017 just like those of 1<sup>st</sup> Respondent. And like 1<sup>st</sup> Respondent's submissions, the issues raised touch on *RES JUDICATA* and failing to join the suit within the time allowed by court.

11. I have considered the application, the responses made, and the rival submissions. I have had a look too into the matter generally. The responses by the Respondents are premised broadly on the issues of *RES JUDICATA* and failure to join the suit as ordered by the court. From the issue of *RES JUDICATA* also arises the issues of jurisdiction.

12. I think I should deal with the issue of *RES JUDICATA* and/or the attendant issue of jurisdiction only if I decide that the proposed draft plaint is acceptable to the court. I say so because, the request made in the application is for leave to file the plaint. A court of law normally becomes properly seized of a matter if and when it is filed. When a matter is properly filed, a party can then draw the court's attention to the fact that the matter is *RES JUDICATA* and therefore ought not to be entertained.

13. In this matter, the Respondents are raising the issue of *RES JUDICATA* concerning a plaint that is yet to be accepted. And now I come to the question: should leave be granted to file the plaint? In answer to this question I will have regard to all the other prayers made in the application.

14. The starting point is appreciation of the fact that due regard should always be had to procedure. What the law frowns upon is undue regard to procedural technicalities; it does not advocate throwing procedure out of the window. In this matter, the Applicant was granted leave to become a party to the suit. He was given a period within which to file or amend the pleadings. The Applicant never did that. It should be borne in mind that to become a party in a suit, one should properly be enjoined or included as such. In this particular case, the Applicant was permitted to become a party. To become such party, the necessary steps needed to be taken to be enjoined or included.

15. The suit remained as it was filed by the Plaintiff (Attorney General) who later withdrew it. At the time of withdrawal, the Applicant herein was not a party in the true sense of the word. Even as the Applicant testified, it did so merely as a witness, not as a party. And the Applicant seems to realise this position because that is the only logical reason one can gather for seeking to file another plaint that includes only itself as a Plaintiff. If the Applicant had complied with the court directive to ensure inclusion in the suit, this application would not be necessary. In my view, the whole suit was withdrawn without the Applicant being a party. That being the case, it logically follows that the Applicant cannot seek to become a party in a withdrawn suit in which he was never a party.

16. It is important also to try and appreciate the scenario that would arise if the Applicant's application is allowed. Ordinarily, a suit normally starts with the filing of a plaint. After the filing of a plaint, the other pre-trial procedural requirements follow. The hearing of the matter comes at the tail-end of the process. In this matter, the Applicant wants the plaint to be accepted. After that, the Applicant wants the hearing that had taken place on the basis of the withdrawn suit to be accepted as part of his case too. Here, one foresees a procedural aberration. For how can a hearing be said to have taken place before the filing of a suit, or plaint if you like?

17. The plaint is one pleading. It is normally followed by other pleadings. All the pleadings together provide the framework upon which hearing has to be conducted. How then can hearing come before pleading? In this matter, the Applicant messed itself up. It has no one to blame but itself. It rode on someone else's suit wrongly assuming all along that it was a party. The stark reality of the omission to become included in the suit only dawned on the Applicant when the Attorney General, who was Plaintiff, decided to withdraw the matter. It dawned on the Applicant that it had no legal legs to stand on. It is partly for this reason that the Applicant opposed the withdrawal. And when that did not work, there is now this clearly belated and misplaced application.

18. To allow this application is to ignore fundamental imperatives of procedure. It is to glorify laxity or incompetence at the expense of procedural justice. As pointed out earlier, the Applicant never became a party to the suit. When the suit was withdrawn, it ended at that point. If the Applicant has a suit that can stand on its merits, it should not shy away from filing it. The suit herein ended when it was withdrawn. The Plaintiff is seeking to revive it by belatedly filing a plaint. That cannot work. It is abuse of procedure to allow it. It would be abuse of procedure too to accept a hearing that took place before the proposed plaint was filed.

19. It is for all these reasons that I refuse to allow the Applicant's application.

20. I had said earlier that I would deal with the issue of *RES JUDICATA* if I accept the Applicant's proposed plaint. As is clear now, I am not accepting the application. I am rejecting it. I do not deem it necessary to deal with *RES JUDICATA* now. I hasten to add however that that issue is not closed. It can still be raised for consideration by the court if the Applicant files another suit that attracts its consideration. The Applicant's application herein is now hereby dismissed with costs.

**Dated, signed and delivered at Busia this 24<sup>th</sup> day of January, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: .....

Defendants: .....

Counsel of Applicant: .....

Counsel of Defendants: .....