



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 110 OF 2016

PETER OMUSE OJUMAA.....PLAINTIFF

VERSUS

DORCAS ODUNGA OGOYE.....1ST DEFENDANT

JULIA ALUOCH.....2ND DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion dated 5/2/2018 and filed on 9/2/2018. The 1st defendant – **DORCAS ODUNGA OGOYE** – filed it against the plaintiff – **PETER OMUSE OJUMAA** – who has instituted this case against her and another defendant – **JULIA ALUOCH**. The application is brought under Section 7 of the Civil Procedure Act (Cap 21) and Order 2 Rule 15 (1) (d) of Civil Procedure Rules. The following prayers are sought.

Prayer (a) The plaint herein be struck out and the suit dismissed with costs to 1st defendant.

Prayer (b) Costs be in the cause.

2. In the suit, the plaintiff is simply claiming land from the two defendants. He pleaded, *inter alia*, that his late father – **OJUMA MUSUNGU MOKA** – owned land Parcel No. **BUKHAYO/MUNDIKA/1816** measuring 1.89Ha. That land was later subdivided into five portions – **BUKHAYO/MUNDIKA/2168, 2169, 2170, 2172 and 2173**. Of these portions, the plaintiff was allegedly to own parcel No.2169 but didn't because the defendants late mother – **MARGARET OGOYE ORORO** – illegally caused a transfer to herself and thereafter subdivided the land into parcels Nos **BUKHAYO/MUNDIKA/7041 and 7942**. The two defendants herein are administrators of the estate of the late **MARGARET OGOYE ORORO**.

3. The defendant filed a defence and pleaded, *inter alia*, that the suit is bad in law, misconceived and/or for res-judicata as the dispute regarding it was heard and determined between the deceased parents of the parties before **BUSIA LAND DISPUTES TRIBUNAL** in the year 2004, with the award of the tribunal being adopted by Court in BUSIA PMCC Land case No.14 of 2004 on 26/4/2005. The premise of this application is precisely based on this pleading.

4. It is stated in the affidavit supporting the application that the tribunal made a finding that the plaintiff's late father had sold the land to the defendants late mother. The plaintiff himself participated in the tribunal proceedings. He is therefore aware of the decision that was made but he never filed an appeal and/or sought a review of the decision. Instead of doing so, he has now come to Court via this suit raising the same issues that were before the tribunal. That is why the suit is said to be bad in law, misconceived, res-judicata and/or an abuse of the Court process.

5. The plaintiff filed a replying affidavit stating, *inter alia*, that his suit has merit and high chances of success. He also reiterated that the land in dispute was illegally and irregularly transferred to defendant's late mother.

6. The application was argued orally in Court on 14/5/2018. Omondi for the 1st defendant largely re-stated and emphasized what the application contained. The plaintiff also made reference to what his replying affidavit had adverted to. He stated further that he had raised the same issues before the tribunal but the tribunal never listened to him.

7. I have had a look at the suit as filed and I have considered the application, response made to it, and the rival arguments. It is common ground that the matter was before the tribunal. The plaintiff infact says he raised the same issues he is now raising before the tribunal but the

tribunal didn't listen to him.

8. For guidance and persuasion, Omondi for the 1st defendant availed two authorities: **DAVID KIPLETING CHEMEI Vs KANAMOI CHEPTOO KIMOTUK & ANOTHER: ELC No 47 "A" of 2012, ELDORET** and **JAMES NJUGUNA CHUI Vs JOHN JOGU KIMANO: ELC No 711 of 2012, NAIROBI**. Both authorities involved situations generally similar to the situation at hand. The parties in the two suits had agitated their matters before the relevant Land tribunals and, on losing, had proceeded to re-agitate the matters before Courts. They had decided to do so without first having recourse to the procedure laid down for challenging the decision of the tribunals. In both cases, the Court agreed with the parties who were challenging the suits filed. The suits were either struck out and/or dismissed.

9. In this matter, it is clear that the plaintiff and the defendants late mother disputed over the same piece of land before the land tribunal as alleged. The plaintiff's father lost. He didn't appeal. The plaintiff himself was a witness in the tribunal matter. After his father's death, he didn't challenge the decision anywhere. This suit itself is not a challenge to the tribunal's decision. It is a fresh suit brought to agitate the same issues that the plaintiff, by his own admission, had also raised before the tribunal.

10. I think the plaintiff got it wrong. It was not open to him to bring this suit as a fresh suit while the decision of the tribunal still stands. In the decided authorities availed by Omondi the issue of the jurisdiction of the tribunals arose. In this matter, it has not been raised, and even if it were, I think I would deal with it the way P. Nyamweya J dealt with it in **JAMES NJUGUNA's** case (ante). For clarity, I think I should point out a bit of P. Nyamweya's J observation concerning jurisdiction. It was as follows:

“It is my view that the plaintiff is estopped from raising the issue of jurisdiction of the Kikuyu Land Disputes Appeals Tribunal having been the party who filed the complaint and appeal in the said tribunals, and having submitted to their jurisdiction.”

11. In the matter at hand, it is clear that the plaintiff's late father was the one who had dragged the defendants late mother and others to the tribunal. The plaintiff herein is claiming the land as heir of his late father. The defendants are sued as administrators of their late mother. The issue before the tribunal was ownership. The issue in this matter is ownership. The plaintiff fails to appreciate that the tribunal's decision still stands as it has not been successfully challenged in any Court of law. It is clear therefore that the plaintiff is labouring under a serious misapprehension of law and facts.

12. It is clear in light of the foregoing, that the application herein is meritorious. I agree with the counsel for the 1st defendants that this matter is one for striking out and/or dismissal. I choose to dismiss the matter and I hereby do so, with costs to 1st defendant.

Dated, signed and delivered at Busia this 31st day of October, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

Counsel of Plaintiff: Absent

Counsel of Defendants: Present