



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**HCC NO. 81 OF 2011**

**CAREEN ANYANGO NYAKENO.....PLAINTIFF**

**VERSUS**

**ELISHA OMBUJO TUNGA.....DEFENDANT**

**RULING**

1. The Defendant, **Elisha Ombujo Tunga**, filed the notice of motion dated 10th June 2014 seeking to have the suit filed by **Careen Anyango Nyakeno**, the Plaintiff, struck out for the following reasons:

- a) Being scandalous, frivolous, vexatious, abuse of the court's process and failure to disclose any reasonable cause of action.
- b) Being res judicata in terms of Section 7 of the Civil Procedure Act.

The notice of motion is based on the six grounds on the application and is supported by the affidavit of **Elisha Ombujo Tunga**, filed on 10th June 2014 but whose date of commissioning is not indicated.

2. The application is opposed by the Plaintiff through her replying affidavit sworn on 20th June 2014.

3. The counsel for the parties appeared before the court on 29th September 2014 and consented to file written submissions in respect of the application. The Plaintiff's counsel filed theirs dated 13th January 2015 on the 28th January 2015. No submissions have, been filed by the Defendant's counsel despite having requested for a last opportunity to do so in seven days on 1st March 2016.

4. The issues for determination are as follows;

- a) Whether or not the suit discloses a cause of action.
- b) Whether the suit is res judicata.
- c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties and written submissions by the Plaintiff's counsel and come to the following determinations:

- a) That though the Defendant contention in this application is that the portion of land the Plaintiff claim is not part of **Kisumu/Kadero Got Nyabondo/2159**, the Plaintiff has insisted that it is part of that land. That the court can only make a finding on what parcel of land that portion falls after hearing the evidence that will be tendered and not at this stage.

b) That the Plaintiff claim is that she has been in exclusive possession of the portion of land measuring 126 by 48 feet or 0.07 hectares of **Kisumu/Kadero Got Nyabondo/2159** since 1983. Though the Defendant disputes that claim in his replying affidavit to the originating summons, the court is of the view that the Plaintiff's pleadings discloses a reasonable cause of action that should be allowed to proceed to full hearing and determined on merit.

c) That though the Defendant claimed that the suit was res judicata and annexed a document described as "**proceedings/decision of Elders Court dated 19th July 2014**" and marked "**EOT 3**", the said document is in a language other than English or Swahili and no translation was availed. The court is therefore unable to make any finding on a document that is not in the language of the court. The court finds that there is no evidence availed to show that any other court of competent jurisdiction has determined a suit in which the parties herein had litigated over the same subject matter and in the same capacities as in this case.

6. That in view of the foregoing findings, the notice of motion dated 10th June 2014, filed by the Defendant, is without merit and is dismissed with costs to the Plaintiff.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 12TH DAY OF MAY 2016**

In presence of;

Plaintiff        Absent

Defendant       Absent

Counsel        Mr Baganda for Onyango for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

12/5/2016

12/5/2016

S.M. Kibunja J

Oyugi court Assistant

Parties absent

Mr Bagasnda for Onyango for Plaintiff/Respondent

Court: Ruling delivered in open court in presence of Mr Baganda for Onyango for Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/5/2016**