



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.20 OF 2016

**SILA MORENYA ODILA (suing on behalf of the estate of
ROBERT ODILA OYOKO).....PLAINTIFF**

VERSUS

BENTER OTHINO.....1ST DEFENDANT

ANGELO OCHIENG.....2ND DEFENDANT

R U L I N G

1. **Benter Othino and Angelo Ochieng**, the 1st and 2nd Defendants respectively, through notice of motion dated 17th March 2016, prays for the suit to be dismissed with costs for being res judicata. The application is based on the eight grounds marked (a) to (f) on the notice of motion and the supporting and further affidavits sworn by **Benter Othino** on the 17th March 2016 and 6th July 2016 summarized as follows:

- a) That the Plaintiff's father sold the suit land, **East Gem/Nyandiwa/734, to Humphrey Othina**, the late husband to the 1st Defendant in 1988.
- b) That the Plaintiff challenged the title to the land held by Humphrey before the Gem Land Disputes Tribunal which ruled against the Plaintiff. That the tribunal award was adopted by the lower court and its decision has not been varied.
- c) That the Plaintiff filed appeal No.084 of 2009 with the Nyanza Provincial Appeals Committee but the committee was disbanded before hearing and determining it.
- d) That the appeal has been brought to this court and given the reference of ELC No. 81 of 2014.
- e) That the foregoing shows that this suit is res judicata in view of the existing tribunal award.

2. The application is opposed by Sila Malenya Odila, the Plaintiff (suing on behalf of the estate of Robert Odila Oyoka) through the replying affidavits sworn on 5th May 2016 and another sworn on unspecified dated and filed on the 16th May 2016 whose contents are as summarized herein below;

- a) That the matter before the tribunal was between him and Humphrey Othino Awedhi and not the Defendants herein.

b) That he was aggrieved with the tribunal award and filed an appeal **No.84 of 2009** with the Provincial Appeals Committee through his memorandum dated 4th November 2009.

c) That the Tribunals and Appeals Committees were abolished before the appeal could be heard.

d) That the appeal was transferred to this court.

e) That the dispute before the tribunal is different from the dispute in this case.

3. The application came up for hearing on the 26th July 2016 when M/S Asuna for the Defendant and the Plaintiff made their submissions.

4. The following are the issues for the court's determination;

a) Whether the issues raised for determination in this suit are the same issues that were for determination in the Gem Land dispute Tribunal case.

b) Whether the parties and the subject matter herein were the same as those in Gem Land Disputes Tribunal dispute.

c) Whether the issues herein have been finally decided on merit by another court of competent jurisdiction.

d) What would be the fate of the Nyanza Appeals Committee appeal No.084 of 2009 which has been moved to this court and registered as ELC No. 81 of 2014.

e) Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides and oral rival submissions and come to the following findings:

a) That the Plaintiff herein had filed Gem Land Disputes Tribunal claim No.92 of 2009 against Humphrey Othino Awedhi over land parcel **East Gem/Nyandewa/734**. That a reading of the evidence adduced by the Plaintiff in the copy of the tribunal proceedings availed shows that his claim was that Humphrey obtained registration with the land through some mistake on the part of his father as Humphrey was meant to get a smaller piece of land than he got. That the tribunal went ahead to make a ruling that seemed to affirm the title or ownership of the suit land to Humphrey, who was the objector.

b) That the Plaintiff was not satisfied and preferred an appeal with the Provincial Appeals Committee which was however disbanded following the repealing of the statute that had established it under **Section 31** of the Environment and Land Court Act No.19 of 2011 with effect of 30th August 2011.

c) That the court takes judicial notice of the fact that the jurisdiction of the tribunals was as restricted under **Section 3(1)** of the Land Disputes Tribunals Act 1990 (Chapter 303 A of Laws of Kenya) now repealed, to the division of, or the determination of boundaries to land including land held in common; a claim to occupy or work land or trespass to land. That with the foregoing in mind, the Plaintiff had lodged his claim against Humphrey on the title or ownership of **East Gem/Nyandewa/734** in a forum without the requisite jurisdiction to determine a question of title to or ownership of the said land.

d) That the decision or award of Gem Land Disputes Tribunal on ownership of land parcel **East Gem/Nyandewa/734** was without jurisdiction and hence null and void ab initio and to pursue the appeal with the Appeals Committee, being Appeal No.84 of 2009, which has now been registered as Kisumu ELC **No.81 of 2014** while the Plaintiff has filed Kisumu ELC **No.20 of 2016** over the same land, being East **Gem/Nyandewa/734**, would be a waste of judicial time. That it would

also be in contravention of Sections 1A (1) and 1B of the Civil Procedure Act Chapter 21 of Laws of Kenya, that emphasizes on expeditious and timely disposal of cases among others.

e) That though the Gem Land Disputes Tribunal case had Humphrey Othino Awedhi as the objector (Defendant), the Plaintiff has in this case sued the two Defendants named above and in view of the findings in (d) above this suit is not res judicata as the tribunal had no jurisdiction to decide on ownership of registered land.

f) That in view of the disbandment of the Appeals Committee and the finding in

(d) and (e) above, the Plaintiff should move with speed and withdraw Kisumu ELC No.81 of 2014 so as to pursue his claim over land parcel East Gem/Nyandwa/734 in this case.

5. That flowing from the foregoing the notice of motion dated 17th March 2016 is without merit and is dismissed with costs in the cause.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2016

In presence of;

Plaintiff Present

Defendants Absent

Counsel Mr. Kouko for Asuna for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/11/2016

S.M. Kibunja Judge

Oyugi Court Assistant

Plaintiff present

Defendant absent

Mr Kouko for Asuna for Defendant

Court: Ruling dated and delivered in open court in presence of Plaintiff, Mr. Kouko Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/11/2016