



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL SUIT NO. 34 OF 2009.**

**ODHIAMBO MAYUNGA.....PLAINTIFF**

**VERSUS.**

**PIUS WANJALA SAENYI.....1<sup>ST</sup> DEFENDANT**

**RICHARD PIUS WANJALA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT.**

[1]. The plaintiff in this case filed this suit claiming that he was the Registered owner of West Mateka/Khasoko/270. He alleged that the defendants father and son, bought a part of the suit land therein from the plaintiff and that the 1<sup>st</sup> defendant has gone to an extent of applying for subdivision of the plaintiffs land No. West Mateka/Khasoko/270 and have subdivided the same into West Mateka/Khasoko 204 and 705. He prayed for an order that the said subdivision was unlawful and that the said land West Mateka/Khasoko 270 be restored into the plaintiffs name and that the defendants be evicted therefrom.

[2]. The defendants were allegedly served and having not filed appearance, the plaintiff requested for Judgment on 11/7/2009. The Judgment was entered on 4/7/2009. The advocate for the defendants were appointed and filed an application dated 8/3/2011. The parties to this suit agreed by consent that the suit be heard by way of affidavits. The ruling was delivered by the court on 12/7/2011. In her ruling Lady Justice F.N. Muchemi stated;

*“The facts leading to this application are that there has been a long standing dispute between the parties involving land reference number West Mateka/Khasoko/270 which led to Bungoma SRM CC No. 39 of 1980 being filed. The applicant/Defendant benefited in the suit where it was ordered that the subdivision be done to exise his portion out of the suit premises. The subdivision resulted in the applicants land LR No. West Bukusu/Khasoko/704. The plaintiff filed this suit HCCC 34 of 2009 on 30/04/2009 to nullify the orders of subdivision given in favour of the defendant in the earlier suit”.*

The Judge allowed the application and allowed the defendants herein to file and serve his defence within 14 days.

[3]. In their joint statement of defence filed on 11/5/2011, the defendants in paragraph 5 of their defence stated,

*“5. The defendants in answer to paragraph 6 of the plaint aver that*

*(a) In view of the verdict of the court in Bungoma SPMCC No. 39 of 1986, Pius Wanjala Saenyi Vs. Odhiambo Mayunga.*

*(b) In view of the verdict in court in Bungoma SRMCC No. 110 of 1993, Pius Wanjala Saenyi Vs. Odhiambo Mayunga Wambongo. The prayers sought herein are unavailable to the plaintiff as the suit herein is Res Judicata. At the opportune moment the defendant shall crave for leave of the court to strike out the plaint as an abuse of the due process of the court”*

The plaintiff in their reply to the defence dated 29/7/2011 in paragraph 4 stated,

*“In answer to paragraph 5 of the defendants defence avers that this suit is properly instituted and that further is not a matter of resjudicata and/or an abuse of the process of the court. Nevertheless the defendants are put to absolute strict proof.”*

The plaintiff in his reply to the defence does not deny knowledge of the existence of the suit. He does not deny that he indeed was a party to the suits. In the first suit he was ordered to transfer 8½ acres to the applicants and in the second one he was evicted out of those 8½ acres by High Court Bungoma. Certified copies of the proceedings and Judgment of those Judgments were annexed to the defendants list of documents dated 3<sup>rd</sup> October, 2011 and filed in Court on 10/10/2011.

[5]. When this suit came for hearing on 22/6/2017, Mr. Murunga Learned Counsel for the defendants raised his preliminary objection as per paragraph 5(a) and (b) of his defence above quoted. The parties agreed to file their submissions on the same by way of written submissions. In his submission the respondent said that the documents annexed in relation to Bungoma SRMCC 39 of 1986 and SRMCC No. 110 of 1993 were photocopies and that their authenticity can only be proved by production of the original at the main hearing of the suit and that on Limitation, that time does not run since the defendants are trespassers.

[6]. I have carefully perused, the documents produced herein. The copies produced in support of the application are certified. Lady Justice Muchemi referred to this Judgments in her ruling allowing the defendants to file their defence. That decision was not appealed from. The plaintiff has not denied anywhere that he was not a party to the proceedings. The plaintiff herein has had notice of those proceedings since the defendants List of documents were filed on 3<sup>rd</sup> October 2011. Some seven years ago. He was a party in those proceedings. All those cases were in Bungoma Courts. There was no letter by the plaintiff to the Deputy Registrar High Court or Registrar Lower Court asking that those files be availed to the plaintiff. I am of a firm view that the plaintiff knew of those cases, he was indeed aware of the determination therein. This suit besides being resjudicata, was filed in excess of 12 years after the issues between the parties were determined by the courts above quoted. The preliminary objection is sustained. This suit is struck out with costs to the defendants.

Judgment read in open Court in the presence of Counsels.

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

**Joy: Court Assistant**

**Mr. Murunga: For the defendant**

**Mrs. Isye: For Bw'Onchiri for defendant**