



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 184 OF 2014

1. WILSON BARASA WAUKHILA
2. ELIUD MANYALI WAUKHILA
3. FRANCIS NABILIKA WAUKHILA
4. DICKSON NAMBALU WAUKHILA
5. BENARD KITUKO WAUKHILA
6. STEPHEN KASILI WAUKHILA
7. FRED WACHIYE WAUKHILA
8. DAVID KISEKELI WAUKHILA
9. GEORGE KISIAGANI WAUKHILA
10. ELIUD NABILIKA WAUKHILA
11. NELSON WACHIYE WAUKHILA
12. ROBERT MANYALI WAUKHILA
13. WYCLIFF NAMBALU WAUKHILA
14. BEN KASILI WAUKHILA.....APPLICANTS

VERSUS

1. JOHN KISIERO ZEBEDAYO
2. AMOS NASIAN KISIERO
3. MARK MEIN CHNANGAT
4. DAVID CHESEBI CHANANGAT
5. JAIRUS WETUNDE KISIERO
6. FRANCIS SAMNONG CHENANGAT.....RESPONDENTS

RULING

[1] The respondents in this case raise a Notice of Preliminary Objection that the applicants in this Originating Summons have no locus standi to prosecute this suit. Further that this court has no jurisdiction to hear and determine this suit and finally that the suit is bad in law, frivolous, vexatious and an abuse of the process of the court.

[2] The respondents support their claim firstly on the ground that the applicants are the children of Simon Wachiye who purchased a portion of the suit land in 1974 from the respondents father Zebedayo Kisiero for 93 cows out of which he paid 73 cows leaving a balance of 20 cows to date.

Consequently the portion purchased could not be registered in his name. The respondents argue that the applicants who claim that they were born out of the suit land after their father settled therein can only claim through their said father and that they cannot have a better title than their father had. The respondents argue that this is permissive possession and it cannot be adverse until the contract of sale was repudiated. The possession would only be adverse to the owner of the land after payment of the last instalment of the purchase price and on occupation of 12 years thereafter. The applicants argue therefore, that under the circumstances possession never became adverse and time never started to run under the Limitations of Action Act until the last instalment is paid. That the sale was repudiated by the filing of Kakamega High Court case No. 96 of 1978.

[3] Secondly, that the court has no jurisdiction by dint of Section 8 of the Civil Procedure Act and Order 24 Rule 7 which bar the institution of a fresh suit based on the same cause of action as a suit that has abated. That the issues herein were in issue in Kitale High Court Case No. 90 of 2005 and that this court would equally have no jurisdiction to hear and determine this suit.

[4] Thirdly, that this suit is bad in law, frivolous, vexatious and an abuse of the process of the court. That the entry of the applicants is a permissive one. That the applicants and their father remained licensees in the suit land. That no cause of action ever occurred to the applicants' father through whom the applicants claim and by the same token no cause of action accrued to them.

That, that licence of the applicants father and by extension to the applicants, was determined by the 1978 Kakamega case aforesaid, further by the Kitale High Court No. 90 of 2005(OS) the land disputes tribunal case No. 25 of 2005 and Bungoma High Court Judicial Review Application No.74 of 2006.

[5] The applicants in reply state that the respondents in their reply to the Originating Summons did not plead the two issues of locus standi and jurisdiction. They further state that these issues must be pleaded in any pleading subsequent to a plaint. They relied on Order 2 Rule 4(1) of the Civil Procedure Rules and that therefore the Preliminary Objection cannot be raised.

[6] The applicants contend that although the respondents have raised the issue of locus standi and jurisdiction, they have in reality gone ahead and raised many issues of fact. That those issues of fact cannot be decided by the court without the court taking evidence. The applicants argue that the Preliminary Objection amounts to deciding the substantive suit by way of submissions without hearing the viva voce evidence. They relied on the provisions of Order 2 Rule 15(2). The applicants claim that they have a water tight case and say that they will rely on Nyeri Civil Appeal No. 4 of 2015 Gideon Mwangi Chege Vs Joseph Gachanja Gituto.

[7] A perusal of the Originating Summons filed in this court on 2nd October 2014, shows the 14 applicants as the applicants in the Originating Summons. They are the ones who applied that the court do declare them as joint adverse possessors of 48 acres out of Malakisi/E.Sasuri/553 having occupied the land for 12 years. They base their claim on the fact that their father Simon Wachiye purchased 40 acres out of the suit land in the year 1964 from the respondents father Zebedayo Kisiero after paying 70 cows out of the agreed purchase price of 93 head of cattle. They say they were born and brought up in the suit

land since the 1960's and that they have lived there peacefully for a period of over 12 years.

[8] It is plain therefore that the applicants have filed suit on their own behalf. Do they therefore need the letters of administration of their father's estate? The pleadings show that their late father entered the suit land through purchase. The purchase price was never completed. Could adverse possession continue to run when the purchase price was not completed? Their father was allowed to enter and occupy the suit land. According to the applicants he sired all of them in the suit land. They are now adults. Can the applicants bring a suit for adverse possession on their own? Further issues will be: How did they enter the suit land if at all? If they were born on the land, are they permissive entrants, adverse entrants or neither? Are they claiming adverse possession derived from their father's entry? At what age does a person born on the land that he claims adverse possession claim? Is the period he was a minor to be taken into account? All these are issues that will need to be canvassed at the hearing hereof. The Preliminary Objection raised herein if sustained, cannot determine these issues.

[9] In Kakamega High Court Civil case No. 96 of 1978, Kitale High Court Civil case No. 90 of 2005(OS), Lands Tribunal Case No. 25 of 2005 and Bungoma High Court Judicial Review Application No. 74 of 2006. The applicants' father was the party. None of the applicants in this Originating Summons was a party

The land in question may have been the same, the space occupied on the ground may have been the same but the applicants herein were not involved as parties. No court of law has determined any dispute against them in regard to Malaki/E.Sasuri/553. The court should hear their claim of adverse possession on merits. Their case cannot at this stage be said to be misconceived or frivolous or even having abated against them. The court has jurisdiction to hear them and their claim against the respondents.

[10] The Preliminary objection herein was properly pleaded and raised. The respondents reply through a replying affidavit of Amos Nasian Kisiero sworn on 18th November 2014 gave notice of this Preliminary Objection through paragraphs 9 and 21 of his reply.

A Preliminary Objection on a point of law can be raised any time and the respondents were within their rights to raise the same.

[11] I order therefore that the applicants have locus to bring this suit. The suit is not frivolous or vexatious and that this court has jurisdiction to hear the same on merits.

Costs shall be in the cause.

Dated, signed and delivered at Bungoma this 27th day of July 2016

S.MUKUNYA - JUDGE

In the presence of

Gladys/Joy - Court Assistants

Mr. Were for the Applicants

Mr. Ikapel for the Respondents