



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA..

ELC. NO. 219 OF 2014.

WILLIAM OGOLLA OPIYO.....APPLICANT

=VERSUS=

PHILIP MASINDERESPONDENT.

R U L I N G.

PHILIP MASINDE, the Applicant through M/S. J.V. Juma and company advocate filed the application dated 5th March, 2015 praying for the striking out of the originating summons filed by William Ogolla Opiyo, the Respondent. The application is based on two grounds on the application that it is res judicata in view of the decision in Busia CMC Land case No. 80 of 2009 and for being defective and incompetent. The Application is supported by the Applicant's affidavit sworn on 5th March, 2015 to which he annexed copies of eviction order in Busia CMC Land case No. 80 of 2009 against the Respondent dated 6th May, 2013 and copy of Ad Litem grant issued to him in Busia H.C. Misc. Cause No. 152 of 2014.

The application is opposed by the Respondent who filed his replying affidavit sworn on 14th April, 2015 drawn by his advocates, M/S. Ouma – Okutta Associates. The Respondent had on 19th March, 2015 been directed to file and serve the replying affidavit within seven days. The Respondent did not comply with the court order and did not seek enlargement of time before filing the replying affidavit on 14th April, 2015 which was about 26 days from the orders of 19th March, 2015.

When the application came up for hearing of the 20th April, 2015, Mr. Juma and Okutta Advocates presented their submissions.

The court has carefully considered the grounds on the application, submissions by counsel and the supporting affidavit.

1. That one Robert Masinde said to be a brother to the Applicant herein, had obtained eviction orders dated 6th May, 2013 in Busia CMC Land case No. 80 of 2009 against William Opiyo Ogolla (Respondent herein) and another in respect of Samia/Wakhungu-Odiato/18, which is the suit land herein.
2. That eviction order addressed to the O.C.S, Funyula Police station required that the Respondent herein, and one Isaac Ogutu keeps off the suit land as ordered on 11th November, 2010. There has been no successful appeal or review application over the said order and the issues therein had been decided with finality as between the parties.

3. That the said Robert Masinde passed away on 13th September, 2013 and the Applicant herein obtained grant of letters of administration Ad Litem on 15th December, 2014, under section 67(1) of the Law of Succession Act. The grant is limited to the purpose of representing the deceased's estate in Busia CMC. Land case No. 80 of 2009 which involves Land parcel Samia/Wakhungu/Odiado/18.
4. That when the Respondent filed the originating summons dated 19th December, 2014 claiming three acres of land parcel Samia/Wakhungu-Odiado/18, he named the Applicant herein as the Respondent. The copy of the register filed with the originating summons shows the registered proprietors of the suit land under entry number 5 are Robert Masinde and Philip Masinde. Robert Masinde is now deceased as shown in (3) above and the Applicant was therefore correctly enjoined as the Respondent in the originating summons. The Respondent to the originating summons had every right in law to move the court as he did in the Notice of Motion dated 5th March, 2015 as the originating summons concerns the same subject matter as Busia CMC. Land case o. 80 of 2009 for which he has obtained a grant Ad Litem.
5. That by the time the originating summons dated 19th December, 2014 were filed, the occupation of the suit land by William Ogolla Opiyo (Respondent) had been interrupted or terminated through the court order of 11th November, 2010 and eviction order of 6th May, 2013 in Busia CMC. Land case No.80 of 2009. The Respondent did not disclose the existence of that case in the pleadings filed herein.
6. That having found as in (5) above, it follows that the Respondent's occupation or possession of the suit land of the period before the orders in Busia CMC. Land case No. 80 of 2009 cannot be counted in his favour. Taking it that the Respondent took fresh possession of the suit land after the orders issued in Busia CMC. Land case No. 80 of 2009, then the time would start running after the re-entry. No specific date has been given in the originating summons post the orders of Busia CMC. Land Case No. 80 of 2009. In any case a period of twelve (12) years has not passed since the eviction orders in that case were issued to enable the Respondent lodge a claim over the suit land based on adverse possession.
7. That having found as above, the court finds that the suit commenced through the originating summons dated 19th December, 2014 is an abuse of court process, and meant to delay the execution of the orders issued in Busia CMC. Land Case No. 80 of 2009. The application dated 5th March, 2015 is therefore allowed and the following orders issued;
 - a. The originating summons dated 19th November, 2014 are hereby struck out and suit dismissed.
 - b. The Respondent to pay the Applicant the costs.

It is so ordered.

S.M. KIBUNJA

JUDGE.

DATED AND DELIVERED ON 28TH DAY OF MAY, 2015.

IN THE PRESENCE OF;

APPLICANT.....ABSENT.....

RESPONDENT.....ABSENT.....

COUNSEL.....MR. JUMBA FOR DEFENDANT/APPLICANT.....

JUDGE.