



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 233 OF 2013

KWEYU KHAISIO APPLICANT

VERSUS

JOHN OMUKOBI ONYUNGO RESPONDENT

RULING

1. The applicant commenced this suit by way of originating summons, for a claim for adverse possession on L.R. no. Marama/Shinamwenyuli/1854 & 1855. He also filed together with it a notice of motion under order 40 of Civil Procedure Rules and section 3, 3A and 63 (e) of the Civil Procedure Act. In the motion, the applicant sought for orders restraining the defendant/respondent from entering, taking possession of, utilizing, dealing with and or in any manner interfering with plaintiff's possession of L.R. No. Marama/Shinamwenyuli/1854 & 1855 (hereinafter referred to as the suitland). The motion is premised on the grounds listed on the face of it and the affidavit sworn in support thereof.
2. The respondent filed a replying affidavit to oppose the motion. Besides opposing the motion, he also sought to have this suit struck out for being res judicata. He deposes that the subject matter L.R. no. Marama/Shinamwenyuli/373 was already adjudicated in Mumias District Magistrate's court vide land succession cause no. 4 of 1970 and Kakamega High court succession cause no. 169 of 1995.
3. The applicant submitted that he has been on the land for 20 years and if the orders are not granted, he may be dispossessed of it. That in paragraph 17 of the replying affidavit, the respondent admits the applicant is in possession of L.R. 1855 and the only parcel in dispute is L.R. 1854. On res judicata, he submits there has been no claim brought by the applicant for adverse possession. He urged the court to grant the application.
4. The respondent on his part submits the applicant has not made out a prima facie case to warrant the orders sought. He cited the case of **Giella vs. Cassman Brown and Wellington Chibayi vs. Dan M Musuku & 2 others Bungoma civil case no. 94 of 2002**. He submits the applicant is under obligation to establish that he has legal rights which have been violated and came to court with clean hands. That the applicant was lying when he said he did not know how the respondent acquired registration of the suitland. He has set out the background in his replying affidavit.
5. Further the respondent submits this matter has been determined by a competent court hence res judicata. He admits the applicant is entitled to L.R. 1855 but wants to use these proceedings to get L.R. 1854. The applicant will not suffer any loss as he has his own parcel of land. He continued that the balance of convenience lies in favour of the respondent and each party should use their respective portions until the suit is determined. He urged the court to refuse the application with costs to him.
6. The first issue of res judicata which will determine both the application and suit is what I will address

first. The respondent has stated this suit is res judicata while the applicant denies. The respondent in support of this contention annexed proceedings from both the Mumias District Magistrate's court and Kakamega High Court succession cause. In the case before Mumias court, the land in dispute was Marama/Shinamwenyuli/373 registered in the name of Khaisio Kweyu (father to the applicant). As per the proceedings annexed, the court heard the dispute and gave the following judgment;

“Wanyungu Katembu, Wafubwa Khaisio and Opanda Khaisio be registered proprietors of parcel no. 373/Shinamwenyuli/Marama. Wafubwa Khaisio and Opanda Khaisio to pay to Wanyungu Katembu Kshs. 144/45 costs. Right of appeal 28 days.”

7. In annexure marked **“JOW 3”** is a certificate of search for L.R. 373 showing the land was registered into the three names on 10.7.1970 as follows;

Wanyungu katembu ½ share

Wafubwa khaisio ¼ share

Opanda Khaisio ¼ share

In the case at Kakamega high court which was a cause in the matter of the estate of Zablun Wanyungu Katembu – the respondent herein was the petitioner. The applicant was one of the objectors.

“By consent,

- i). The grant issued to John Omukubi Wanyungu be confirmed.
- ii). The parcel of land title no. Marama/Shinamwenyuli/373 be shared as follows;
 - a). One half share to the petitioner
 - b). One quarter to go to Kweyu Khaisio
 - c). One quarter to go to Wafubwa khaisio
- iii). Each party to bear own costs.”

8. The respondent acting on this order subdivided L.R. 373 to new numbers L.R. Marama/Shinamwenyuli/1854 & 1855. L.R. 1854 remained to him while 1855 was given to the applicant and his brother and they ought to pay transfer costs. On the background of this, the applicant claims his suit is not res judicata as he has never filed a claim for adverse possession. He did not deny knowledge of the two suits as he never filed a supplementary/further affidavit to counter the facts raised in the replying affidavit. Section 7 of the Civil Procedure Act states thus;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.” see also explanations there under).

9. The initial claim for the suitland was brought to court by the respondent's father against the applicant's father in Mumias district magistrate's court no. 4 of 1970. The subject matter was L.R. Marama Shinamwenyuli/373. That court reached a determination that the respondent's father was entitled to a portion of this land and made an order for joint registration which order was executed on 10th July 1970. When the respondent's father died and he filed succession proceedings, the applicant herein filed an objection. The objection was determined by consent of the parties and the land L.R. 373 shared out accordingly. That order was executed partly with the result that the land no. 373 was subdivided into

L.R. 1854 and 1855.

10. The respondent says the applicant and his brother is entitled to L.R. 1855. The applicant does not need in my view to file suit to claim 1855 as the order was already made in Kakamega high court succession no. 165 of 1999. I do find that L.R. 373 was litigated both in Mumias District Magistrates cause no. 4 of 1970 and Kakamega high court succession 165 of 1999. L.R. 1854 and 1855 have come from L.R. 373. Therefore the same subject matter was already litigated as set out under sec. 7 of the Act. Secondly, the applicant herein was a party in Kakamega high court succession cause no. 165 of 1999 falling in the category of “substantially in issue between same parties.” The applicant ought to pay the costs of processing title documents for L.R. 1855 into his names instead of this claim.

11. With all respect, I find the applicant's suit as res judicata. He had the option to file his claim for adverse possession before the succession cause was finalized and probably stay it. He also did not apply to set aside the consent order recorded in the Kakamega cause. Filing a fresh suit in my view and I so hold is an abuse of the court process. Consequently I order that both the application and the suit be struck out with costs to the respondent.

DATED, SIGNED and Delivered in Bungoma this 30th day of sept. 2014

A. OMOLLO

JUDGE.