



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.149 OF 2012

JAMES KASHAMBA ALUDIRA.....PLAINTIFF

VERSUS

ELIZABETH SAVALA

HEZEKIAH KILAH LIYOSI.....DEFENDANTS

RULING

1. This is ruling on a Notice of Motion filed here on 20/12/2012 and dated 19/12/2013. The application is brought under Section 13 of the Environment and Land Act (2011), order 40 Rule 1 & 3 of Civil Procedure Rules, 2010 and all other provisions of Law. **JAMES KASHAMBA ALUDIRA** is the plaintiff/applicant while **ELIZABETH SAVALA** and **HEZEKIAH KILAH LIYOSI** are the defendants/Respondents.
2. The prayers sought run from (a) to (f). Prayers (a) to (d) are expressed to run during the pendency of the application. This would mean that at this stage, these prayers are not for consideration since this ruling is essentially a determination of the application. The relevant prayers therefore are (e) and (f) which are as follows:

prayer (e) pending the hearing and determination of this suit, there be a stay of execution of the orders/judgment/decision of the Vihiga District Dispute's Tribunal case No.33/2011 as well as the order adopting the said decision and adoption by the Principal Magistrate Court at Hamisi in Hamisi **PMC MISC. CIVIL/APPLICATION NO.13/2011**.

Prayer (f): The costs of this application be borne by the 1st defendant/Respondent.

3. The grounds advanced in support of the application stipulate, inter alia, that the applicant is the registered owner of **NYANG'ORI/BANJA/1039** (hereafter the suit land), which he acquired lawfully, regularly and procedurally. The first defendant filed a case at Vihiga Land Dispute's Tribunal claiming ownership. She had sued the 2nd defendant – **HEZEKIAH KILAH LIYOSI** - who is the same person who sold the land to the plaintiff. The tribunal proceeded and awarded the suit land to the 1st defendant – **ELIZABETH SAVALA**.
4. The 1st defendant is said to lack Locus Standi as the suit land was sold to her late husband, one Savala. She had not obtained letters of administration. The tribunal is said to have acted without jurisdiction since the relevant law didn't allow it to deal with issues of ownership of land. The Principal Magistrate Court, Hamisi, is faulted for adopting the tribunal's illegal decision. The orders sought are said to be intended to preserve the suit land until the suit is determined.

5. There is a supporting affidavit sworn which generally amplifys the grounds advanced in support but which also explains at length the circumstances surrounding the subject matter. From it, it is clear the plaintiff/applicant bought the land in 2010. The requisite legal steps were followed and he was issued with title deed. Then the 1st defendant filed a suit at Vihiga Land Dispute's Tribunal in 2011. She was claiming ownership of the suit land. The tribunal gave a verdict in her favour and the Principal Magistrate Court at Hamisi later adopted the tribunal's decision. The 1st defendant is said to have obtained a decree which she intends to use to get herself registered as the owner of the suit land.
6. The tribunal is said to have no jurisdiction as the relevant provisions (Section 3(1)) of Land Disputes Tribunal's Act) does not confer on it power to decide on ownership. The Court that adopted the decision of the tribunal was said to have no jurisdiction because at the time it was adopting the decision, the Land Disputes Tribunal's Act from where it used to derive its jurisdiction had already been repealed.
7. The plaintiff also said he was not enjoined as a party in the case at the tribunal yet the tribunal's decision was to directly effect him.
8. The 1st defendant filed a replying affidavit. She said the suit land was bought by her late husband in 1972 and she took possession immediately. She has written sale agreements, one made during the earlier transaction with her husband and another one between herself and the 2nd defendant. The 1st defendant said she delayed in pursuing transfer of the suit land to herself because she had the onerous burden of bringing up her children alone.
9. The 2nd defendant then took advantage of her situation and transferred the land to the plaintiff. When she noticed this, she filed a suit against the 2nd defendant at the local Land Dispute's Tribunal.
- 10.The 1st defendant also said that this Court lacks territorial jurisdiction as the suit land is within the jurisdiction of Kakamega Court.
- 11.The plaintiff/Applicant filed submissions on 13/3/2013. The defendants have not filed any submissions. I have considered the plaintiff/Applicant's submissions. They are by and large a restatement of what the grounds on the face of the application and the supporting affidavit contain. I am constrained to observe that there is a lot in the submissions that I cannot conclusively deal with at this stage., Such issues are better reserved for the main case. If I deal with them at this stage. I would effectively be prematurely determining the suit. Such issues have to do with applicability of some legal provisions, jurisdiction, and merits of the case.
- 12.It was not however out of place to raise them. They throw some light and give direction to the Court. The other side has not filed submissions. A look at the plaintiff's submissions shows clearly that it is necessary to preserve the subject matter. The submissions are not countered by the other side. And a look at them shows they are well articulated. They invoke the necessary statutory provisions and where possible also avail decided case law.
- 13.For instance, the case of **JOHN B. TONJE & 2 OTHERS VS RTD GEN. DAUDI TONJE & ANOTHER (2004) eKLR** was availed to illustrate the plaintiff's lack of Locus Standi owing to lack of letters of Administration. The case of **NDIEMA S. SOTI VS ELUIS K. CHEPKESS (2010) EKLR** was availed to fight the claim of adverse possession by the 1st defendant. The main point made here is that there cannot be a claim for adverse possession when the one making the claim acknowledges the existence of a contract of sale for the same piece of land.
- 14.Overall, I find that the plaintiff has established a case deserving the granting of the orders sought in the interim. Accordingly I find the application herein meritorious and grant prayers (e) and (f) as prayed.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Dianga George – C/C

No party present

Interpretation – English/Kiswahili

Onsongo for Plaintiff

Musiega (absent) for defendants

COURT: Ruling on Notice of Motion filed on 20/12/2013 and dated 19/12/2012 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013