



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 48 of 1994

JEAN OMOYO IRARU 1ST PLAINTIFF
GEORGE OMOYO 2ND PLAINTIFF

V E R S U S

HUMPHREY EJILONG ESUBA 1ST DEFENDANT
LEONARD JOSHUA IKAROT 2ND DEFENDANT
BEN OJILONG 3RD DEFENDANT
BRAMWEL IRARU OJILONG 4TH DEFENDANT
A I O (MINOR) 5TH DEFENDANT
ANDREW ISUBA OJILONG 6TH DEFENDANT

R U L I N G

In the chamber summons dated 2nd July, 2009 the applicants seek orders that the registration of the 2nd to 6th respondents as the proprietors of plot number MALAKISI/MWALIE/300 be cancelled or nullified and that the applicants be registered as the joint proprietors of the suit land.

Mr. Elung'ata, counsel for the applicants submitted that the applicant's father was the original plaintiff, the matter was fully heard and judgement entered on 3rd June 1998. The 1st respondent filed an application for review but the same was dismissed. The respondents did not take any other legal step. On 25th March 2008, the 1st respondent transferred the suit land to the 2nd to 6th respondents who are his sons. This was meant to defeat the judgement of the court as the 1st respondent had no title to pass to the other respondents.

Mr. Mikisu for the 1st respondent opposed the application. Counsel submitted that the land has changed hands and that the applicants are guilty of laches. The order being sought can only be granted in a substantive hearing and evidence need to be tendered. The 1st respondent had a good title to pass the suit land as he was the registered proprietor.

The 2nd respondent submitted on behalf of himself and the 3rd to 6th respondents. He relied on his affidavit sworn on 3rd September, 2009. The respondent submitted that the application is brought in bad faith and ought to be struck out. The 2nd to 6th respondents were not parties to the suit and that the applicants have no locus to challenge the respondents' ownership. The court finalized the matter in 1998 and is now functus officio.

The court record shows that judgement was delivered on 3rd June, 1998 by Justice B. Tanui. The plaintiff was SIMON MUTORO IRARU and the 1st respondent was the defendant. The court granted the suit land to the plaintiff by way of adverse possession and ordered the defendant to transfer the property to the plaintiff and in default the Deputy Registrar was authorized

to sign the necessary documents and transfer the property to the plaintiff.

From the grant annexed by the applicants, the plaintiff died on 6th October, 1998. This was after the judgement had been delivered. The suit herein relates to a claim of land and the death of the plaintiff did not cause the suit to abate as the plaintiff was awarded the land which now forms part of his estate.

The 1st respondent did not appeal against the decision of the court. The letters of administration was issued on 2nd July, 2001. On 28th April 2009 the applicant's were allowed to substitute their deceased father and are therefore properly before the court.

The judgement delivered on 3rd June, 1998 has not been challenged by way of Appeal. It therefore cannot be held to have lapsed or its effect eroded. I do find that the 1st respondent had no title to pass to the 2nd to 6th respondents as his title had already been extinguished by the court. Had the Deputy Registrar effected the decree, the 1st respondent could not have circumvented the decision of the court. The 2nd to 6th respondents cannot allege that they were not parties to the initial suit as they are beneficiaries of an illegality. The 1st respondent's action is contemptuous of the court process as he was aware of the court decision.

I am satisfied that the 1st respondent's action to transfer the suit property to the 2nd – 6th respondents was aimed at defeating the court decision. He had no valid title to pass to the other respondents as the land belonged to the late Simon Mutoro Iraru.

In the end the application dated 2nd July, 2009 is granted as prayed. The respondents shall bare the costs of the application.

SAID J. CHITEMBWE

J U D G E

Delivered, dated and counter-signed by the Hon. Justice Isaac Lenaola this 15th day of April, 2010

ISAAC LENAOLA

J U D G E