



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HCCR APP 43 OF 1998

JOSECK OMUTOKO ----- APPLICANT

VERSUS

MESHACK MATAYO ----- RESPONDENT

R U L I N G

The applicant, **JOSECK OMUTOKO**, is the Plaintiff in this suit.

He has moved the court by way of a Chamber Summons pursuant to **Order 44 rule 1 (a)** of the Civil Procedure Rules, as read together with **section 3A** of the Civil Procedure Act.

It is the applicant's contention that there was an error apparent on the face of the record in this case. The error is said to be in the judgement which was delivered on 17th March 1998.

As far as the applicant was concerned, the learned trial judge erred by citing the parcel **No. E. BUNYORE/EBUNAGWE/1305**, in the judgement, whereas the correct title should have been **E. BUNYORE/EBUNANGWE/1307**.

In the light of that alleged error, the applicant asserts that he had been unable to execute the judgement of the court. It is for that reason that the applicant asks this court to delete the parcel No.1305 from the judgement, and to replace it with parcel No. 1307.

In answer to the application, the respondent submitted that the applicant had, from the very outset, cited parcel No. 1305, as the suit property. It was the respondent's position that parcel No.1307 is his property, which he had inherited from his late grandfather.

But the applicant insists that the respondent did sell to him the parcel No.1307. Therefore, when he came to court in this case, the applicant says that he was claiming parcel No.1307.

I have perused the judgement of Hon. Mr. Justice B. K. Tanui. In the said judgement, the learned trial judge specifically stated that the applicant herein had sought a declaration that he had acquired, by adverse possession, title to **L. R. No. E.BUNYORE/EMUSIRE/1305**.

Having given due consideration to the evidence which was adduced before him, the learned trial judge held that the applicant had acquired **ONE ACRE out of parcel No. 1305**, by way of adverse possession. He therefore ordered the respondent herein to sub-divide the said parcel of land, with a view to transferring one acre thereof to the applicant.

The trial court further ordered that if the respondent did not take the necessary steps to transfer the one

acre of land to the applicant, the learned Deputy Registrar of the High Court would have authority to execute all the necessary documents to give effect to the judgement of the court.

Three years after the judgement, the applicant filed an application for review of the said judgement. On that occasion, the applicant sought to have the title of the suit land altered by removing L.R. NO. E/BUNYORE/EMUSIRE/1305 and replacing it with L.R. NO. E/BUNYORE/EBUNANGWE/1305.

When the application dated 13th July 2001 came up for hearing on 5th February 2002, the applicant did not attend court to prosecute it. Therefore the court adjourned the said application indefinitely.

Thereafter, the applicant appears to have abandoned the application dated 13th July 2001, as he never took steps to prosecute it.

On 16th November 2004 the applicant filed another application (which was dated 16th November 2004). By that application, the applicant sought the eviction of the respondent from L.R. NO. E.BUNYORE/EBUNANGWE/1305

Having given consideration to that application, Hon. Mr. G. B. M. Kariuki, J. struck it out. His reason for so doing was that until and unless the applicant had first got the one acre of land transferred to his name, there would be no basis for ordering that the respondent be evicted from land which was registered in his name.

More than 2 years after the learned judge struck out the application for the eviction of the respondent, the present application was filed. The application is dated 8th September 2008, and it was filed on that very same date.

I have perused the record of the proceedings. First, it is clear that when the applicant filed the Originating Summons and the affidavit in support thereto, he lay claim to **L.R. NO. E/BUNYORE/EBUNANGWE/1305**. The Originating Summons was filed in court on 4th March 1996.

On 22nd January 1997, this court granted leave to the applicant to amend the Originating Summons, by enjoining a 2nd defendant to the case.

Originally, the only defendant was one MATAYO NABALE. Thereafter, MESHACK MATAYO was enjoined to the action, as a 2nd defendant.

When the defendants did not file their respective replying affidavits within the period allowed by the court, the applicant filed a Request for Interlocutory Judgement dated 31st July 1997.

Acting on that request, the learned Deputy Registrar entered judgement in favour of the applicant, on 2nd October 1997. The case was then set down for formal proof on 23rd February 1998.

The record shows that the applicant testified as PW1. And in his evidence he said that:

“The defendant sold me one acre in parcel No. East Bunyore/1305. It is registered in the name of Meshack Matayo. This is a certified copy of the register (Ex.1).”

A perusal of the exhibit produced by the applicant shows that it relates to L.R. NO. E/BUNYORE/EBUNANGWE/1305.

In the light of all the foregoing, I am satisfied that the applicant has consistently cited the suit property as being **EAST BUNYORE/EBUNANGWE/1305**. He did so in the Originating Summons; the Amended Originating Summons; the affidavit in support of the Originating Summons; his oral evidence during the formal proof; and in the exhibit he produced.

At no time did the applicant make reference to L.R. NO. EAST BUNYORE/EMUSIRE/1305, which is the property cited in the judgement of the court.

Consequently, I am satisfied that the learned trial judge erred by giving judgement in respect to a property which was not the subject matter of the case before him. There is no doubt at all that there is an error apparent on the face of the record.

In order to give effect to the judgement, I do hereby order that the error be corrected by deleting from the said judgement L.R. NO. E/BUNYORE/EMUSIRE/1305, and replacing it with **L.R. NO. E/BUNYORE/EBUNANGWE/1307.**

The costs of the application are awarded to the applicant.

Dated, Signed and Delivered at Kakamega, this 19th day of March, 2009.

FRED A. OCHIENG

J U D G E