



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CIVIL CASE NO. 1641 OF 1998

FRANCIS GITONGA MACHARIA..... PLAINTIFF

VERSUS

MUIRURI WAITHAKA..... DEFENDANT

RULING

This application is brought under Order VI Rule 13 1(b) (c) and (d) of the Civil Procedure Rules in a suit wherein the Respondent is claiming ownership in adverse possession of a parcel of Land known as L.R. No. KIINE/KIBINGOTI/NGUNGUINE/1029 comprising of five acres and in the alternative a declaration that the Applicant though currently registered as owner holds the same in trust for the Respondent. The Respondent alleges in his plaint that he bought the land himself and that the Applicant was registered as owner on the understanding that he would later transfer the said property to him. The Applicant in his defence claims to have bought the property himself and denies the Respondents claim of ownership.

The grounds in support of this application are that the Respondent's suit is scandalous frivolous and vexatious, that it is meant to prejudice and embarrass the Applicant and that the same is an abuse of the process of the court since the same is res judicata. I have noted that the plea of res judicata appears in paragraph 2 of the Applicant's defence. It is not disputed that prior to this suit, the Respondent has filed other proceedings in respect of the same suit land namely: H.C.C.C. No. 118 of 1979, which was dismissed for non attendance on the part of the Respondent (as plaintiff); H.C.C.C. No.1172 of 1986 (Originating Summons); Arbitration proceedings before the District officer Ndia Division with the assistance of four elders who in a majority ruling dismissed the Respondents claim of ownership to the suit premises, and filed the same with the Court; an application in the same suit in an attempt to set aside the arbitral award, which application was dismissed by the Hon. Mr. Justice Shields after hearing; Civil Appeal No.110 of 1997 seeking to set aside the dismissal order which too was refused.

A suit which is res judicata is obviously an abuse of the process of Court and falls squarely within the description of a suit which is frivolous, vexatious, prejudicial and embarrassing to the party sued. The Respondents objection to these proceeding is grounded on 3 main grounds of opposition, to wit; That

1) the application is misconceived and without merit

2) that no suit has ever been heard and determined between the parties herein concerning the subject matter

3) that the application is an afterthought brought primarily to delay the just conclusion of this suit.

In his submissions Mr. Kibicho for the Respondent argued that res judicata has not been proven under Section 7 of the Civil Procedure Act since H.C.C.C. No.118 of 1979 was dismissed without a hearing. He also submitted that in view of the fact that the Court of Appeal in Civil Appeal No.110 of 1997 found the issue of prescription to have been prematurely litigated, the same could validly be raised in other words, the present suit. Mr. Kibicho avoided submitting on H.C.C.C. No. 1172 of 1986 in which his client had claimed the same suit premises from the Applicant and in which an arbitration was conducted under the direction of the Court wherein the same was adopted fully with the hearing of an application by the Respondent to have the same set aside. In my considered view, the said adoption put to rest the issue of ownership of the suit premises since the Court of Appeal saw no reason to upset the same.

In view of the above I find that the Respondents' claim of ownership of KIINE/KIBINGOTI/NGUNGUINE/1026 is clearly res judicata the same having been heard and determined in H.C.C.C. No.1172 of 1986. I do not find it necessary, in the circumstances, to consider whether a trust can be inferred herein or what the chances of such alternative relief would be since the present application is not brought under Order VI Rule 13 1(a).

In the premises and having considered the record, submissions by Counsel and all the facts of this case I find that the application does have merit and ought to succeed. I allow the same with costs.

Dated, Signed and Delivered at Nairobi this 29th day of April, 2005

M.G. Mugo

Judge

In the presence of:

N/A for Plaintiff/Respondent

Thiga h/b for Kaburu for applicant