

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Case 18 of 2003

PATRICK KALABAYI MAKOKHA APPLICANT

VS

MOSES HASAMBE WAKASIAKA RESPONDENT

RULING

Patrick Kalabayi Makokha filed an originating summons in which he sought to be declared to have acquired L.R.NO.KIMILILI/KIMILILI/3736 by adverse possession. The summons is supported by an affidavit sworn by the applicant. Moses Hasambe Wakasiaka opposed the summons by filing a replying affidavit. Pursuant to the Provisions of Order VI rule 13 (1) (a) and (d) of the Civil Procedure Rules, Moses Hasambe Wakasiaka has applied for the summons to be struck out. The application is opposed by Patrick Kalabayi Makokha who filed a replying affidavit.

The main ground raised by the applicant is that L.R. NO. KIMILILI/KIMILILI/3736 is registered in the joint names of the Respondent, the applicant and 3 other people. It was argued that it was not possible for the applicant to acquire the land by adverse possession because he is one of the 5 registered proprietors. It was further argued that between 1991 and 2002 Moses Hasambe Wakasiaka was in occupation of the land in dispute by right and prescriptive rights would not be available at that stage.

On his part Mr. Kituyi Advocate for the Respondent argued that prescriptive rights had accrued by 2002 because the Respondent had been in continuous and uninterrupted occupation of L.R. NO.KIMILILI/KIMILILI/3736 from 1991 until 2002 when the applicant caused L.R.NO.KIMILILI/KIMILILI/60 to be subdivided thus creating L.R.NO. KIMILILI/KIMILILI/3736. It is not denied that L.R. NO. KIMILILI/KIMILILI/60 was registered in the name of Sindani Chapurukha, now deceased. It would appear title NO. KIMILILI/KIMILILI/60 was subdivided and distributed on the strength of succession proceedings in respect of the Estate of Sindani Chapurukha, deceased.

The issue to be resolved is whether or not the Respondent can claim this land by adverse possession. The Respondent has named the applicant as the defendant in his originating summons. It is not clear in what capacity the applicant was sued. Is it because he is one of the registered proprietors of L.R. NO.KIMILILI/KIMILILI/3736 or is he the legal representative of the Estate of Sindani Chapurukha. If he was sued as the registered proprietor of L.R. NO. KIMILILI/KIMILILI/3736, then I do not think the Respondent can succeed because his rights by adverse possession has not accrued because the title was only 1 year old. In any case he has not brought on board the other 3 registered proprietors. If on the other hand the applicant was sued in his capacity as a legal representative, then the Respondent cannot succeed because the law is very clear on the remedies available for such an aggrieved party if well advised. In the end, I am satisfied that the summons must succeed. Consequently, the originating summons dated 24th March 2003 is ordered struck out with costs to the applicant.

Dated and delivered this 16th day of November 2005.

J. K. SERGON

JUDGE

In open Court and in the absence of the parties.