



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO 44 OF 2003 (OS)**

TOKESHI IMBUKA MAMBILI

LABAN SANYI MAMBILI

SILVANUS MALOVA MAMBILI PLAINTIFFS

VERSUS

JOSEPH ONZEKE SAMBWA

SIMION LITSANGA SAMWA DEFENDANTS

RULING

At the hearing of this case on 2nd March 2004, Counsel for the defendants raised preliminary objections. He submitted that the suit touched on a parcel of land in Kakamega and the plaintiffs through an Originating Summons were seeking for a declaration of ownership by adverse possession. He submitted that the suit is an abuse of the process of the court and is also res-judication.

On the issue of an abuse of the process of the court, he submitted that under Order 36 Rule 3D(2) Civil Procedure Rules, the Originating Summons has to be supported by an affidavit attaching a certified copy of the title. The supporting affidavit does not attach a certified copy of the title and therefore the suit is a non-starter. He urged the court to strike out the suit under Order 6 Rule 13 of the Civil Procedure Rules.

On the issue of re-judicata, he submitted that a similar suit existed in Kakamega between all the parties except for the first defendant who was not a party to that suit. The plaintiff in that suit is the 2nd defendant in the current suit. That case was concluded on 3rd July 2001 when the court ordered the eviction of the plaintiffs herein from the suit land, and they were evicted in September 2001. They went even to the Court of Appeal and the appeal was dismissed. On this basis, he urged this court to dismiss the suit.

He further argued that the affidavit of the plaintiffs dated 21/7/2003 is in Swahili language while the language of the High Court is English. Further that the question of adverse possession does not arise as the 2nd defendant has been pursuing the matter as evidenced by the previous court proceedings. He urged the court to dismiss the motion with costs.

Mr. Laban SanyaMambili – one of the plaintiffs, opposed the preliminary objection. He submitted that the certified copy of title is attached to the replying affidavit, so it is in the file. On whether the case was decided, he submitted that they were denied their right in Kakamega Court, which favoured the other party. He submitted that the Kakamega Court awarded the other party 30.6 acres and awarded the plaintiffs 5.0 acres only. On the affidavit being in Swahili, he submitted that, it was because they did not have any money to engage an Advocate. Mr. Tokesi Imbwaka Mambili and Mr. Silvanus Maloba Mambili supported the submissions of Laban Sanya Mambili.

I have to decide whether the proceedings are defective for not attaching a certified copy of title deed in the affidavit of the plaintiffs; whether the matter is res – judicata; whether the affidavit of the plaintiff is defective for being in Swahili language and whether in any event the issue of adverse possession does not arise herein.

The law under Order 36 Rule 3D(2) provides that the proceedings shall be commenced by Originating Summons supported by an affidavit to which a certified extract of the title to the land has been annexed. When the Originating Summons was filed on 23rd May 2003, no affidavit or certified copy of extract of title was attached. However an affidavit was filed on 6th August 2003, after the defendant had filed a replying affidavit on 19th June 2003. In my view, the Originating Summons was defective as it did not comply with mandatory legal requirements.

On whether the matter is res- judicata, I have perused the judgment in Kakamega HCCC 316 of 1990 and the Judgment of the Court of Appeal in Kisumu Civil Appeal No.90 of 2001. In both instances Tokesi Mambili, Sanya Mambili and Silvanus Mambili lost to Simion Litsanga Sabwa. The plaintiffs herein themselves admit in their submissions that the case was decided, though they claim unfairly, against them. I come to the conclusion that a decision has been made by courts of competent jurisdiction between the parties on the same subject matter. Therefore the case is res-judicata.

On the issue whether the affidavit of the plaintiffs is defective as it should have been in English, I hold that as the language of the High Court is English all documents filed have to be in that language and, if not, a certified translation into the English language should be filed. Short of that, the court cannot consider that document, which is in another language. Therefore the affidavit in Swahili which was filed cannot be considered by this court, or taken into account in determining the matter. The import therefore is that no affidavit was filed by the plaintiffs that can be taken into account in these proceedings.

I also hold that on the basis of the contents of the Judgment in Kakamega High Court Civil Case No.316 of 1990, the issue of adverse possession does not arise, as the 2nd defendant has not failed to take action for a period of more than 12 years in asserting his rights of ownership.

On the basis of the above reasons, I dismiss this suit that was brought by way of Originating Summons with costs to the defendants. It is so ordered.

Dated and delivered at Eldoret this 25th Day of May, 2004

George Dulu

Judge

Delivered in the Presence of: