



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 115 OF 2013

**ANNA SEYENZIA ITANYUKHU INDECHE (substituted by
MESHACK MUNJURU INDECHE) PLAINTIFF**

VERSUS

TOM MAKOKHA MUSAMBAL DEFENDANT

J U D G M E N T

By an Originating summons dated 28th September 2004, the plaintiff **ANNA SEYENZIA ITANYUKHU INDECHE** (now deceased and substituted with his son **MESHACK MUNJURU INDECHE**) sought a determination of the following issues against **TOM MAKOKHA MUSAMBAL** (the defendant) with regard to the land parcel **NO NDIVISI/NDIVISI/217** (the suit land): -

- 1. Whether the plaintiff as widow, heir and administratrix of the Estate of her deceased husband PETER INDECHE MUINDI have been in continuous, open exclusive and undisturbed possession of the suit land for a period exceeding 12 years.**
- 2. Whether the defendant's father's title to the suit land was extinguished on expiry of 12 years from the period prescribed for a party to bring an action to recover land.**
- 3. Whether the defendant's father was a person through whom the defendant was claiming pursuant to the provision of CAP 22 LAWS OF KENYA.**
- 4. Whether the defendant's title is subject to the plaintiff's overriding interest under Section 30(f) of the Registered land Act CAP 300 LAWS OF KENYA.**
- 5. Whether the plaintiff has become entitled by way of adverse possession of the 3.04 Hectares comprised in the suit land and is therefore registered a proprietor of the same in place of the defendant upon reasons set out in the annexed affidavit of the plaintiff and on other grounds to be adduced at the hearing thereof.**

Arising out of the above, the plaintiff prayed for the following orders: -

- a. That the defendant's father's and consequently the defendant's right over the parcel of land measuring 3.04 Hectares comprised in the suit land got extinguished by operation of the law upon the expiry of 12 years when the plaintiff and her late husband was in possession.**
- b. A declaration that the plaintiff as widow of and administratrix of the Estate of PETER INDECHE MUINDI has become entitled by virtue of adverse possession of 12 years to those 3.04 Hectares or thereabouts registered under the Registered Land Act CHAPTER 300 LAWS OF KENYA and comprised in the suit land.**
- c. An order compelling the defendant to sign all the necessary transfer documents in favour of the plaintiff and in default, an Officer of this Honourable Court to do so in his place.**
- d. An order condemning the defendant to pay costs of this suit.**

Annexed to the Originating Summons is the plaintiff's supporting affidavit dated 7th October 2004, the Certificate of Death in respect of her deceased husband **PETER INDECHE MUINDI**, Grant of Letters of Administration Intestate issued to the plaintiff in respect to the Estate

of the deceased, the Green Card and Certificate of Search showing that the suit land is registered in the names of the defendant.

In the supporting affidavits it is averred, inter alia, that on 9th December 1968, the defendant's father who was the registered proprietor of the suit land sold it to **PETER MUINDI INDECHE (INDECHE)** at a consideration of Kshs. 2,000/= . The defendant's father thereafter abandoned the suit land to the plaintiff and **INDECHE** but did not affect the transfer. Plaintiff and **INDECHE** immediately took possession of the suit land on which they put up houses, planted coffee and other crops and reside thereon together with their children. Neither the defendant nor his late father **NGOSIA MUSAMBAYI MUYAYI (MUSAMBAI)** re – entered the suit land. Following the demise of **MUSAMBAI** in the year 2000, the defendant took out Grant of Letters of Administration in respect to his Estate and transferred the suit land in his names. It is the plaintiff's case therefore that she is entitled to the suit land by way of adverse possession.

Following the plaintiff's demise on 14th January 2017, her son **MESHACK MUNJURU INDECHE** substituted her and filed a supporting affidavit dated 21st September 2018 which is basically a rehash of the plaintiff's affidavit. He however annexed further documents being a Limited Grant Ad Litem in respect to his late mother's Estate, copies of sale agreement, Green Card for the suit land and list of the witnesses.

In opposing the Originating Summons, the defendant filed a replying affidavit dated 10th June 2014 in which he averred, inter alia, that the suit land no longer exists the same having been sub – divided by his late father to give rise to parcels **NO NDIVISI/NDIVISI/2588, 2589** and **2590** and transferred to him and therefore this suit is totally misplaced, incompetent and fatally defective. That although **PETER INDECHE MUINDI** was in occupation of the suit land, that occupation was never peaceful and infact he and his family were mere licencees with an interest in purchasing the suit land but his father **MUSAMBAI** never sold it. That one **MESHACK MUTSUIRU INDECHE** (deceased) on whose behalf this suit was filed and who is a member of the plaintiff's family had previously filed **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** against **MUSAMBAI** claiming the suit land by way of adverse possession. That suit was however dismissed with costs and this suit is therefore res – judicata. That on 1st August 2002, the High Court issued eviction orders against **MESHACK MUTSUIRU INDECHE**, his children and servants from the suit land. The defendant therefore prayed by way of Counter – Claim, that the plaintiff, her children and/or workers be evicted from the land parcels **NO NDIVISI/NDIVISI /2588, 2589** and **2590** and her suit be dismissed with costs. Annexed to the replying affidavit are the mutation forms showing how the suit land was sub – divided, the Certificates for Official Search in respect to the land parcels **NO NDIVISI/NDIVISI/2589** and **2590** both registered in the defendant's name, the proceedings and Judgment in **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 MESHACK MUTSUIRU INDECHE .V. NGOSIA MUSAMBAI MUYAYI** and eviction orders issued in that case.

The trial commenced on 11th March 2020 when **ALFAYO WEKESA KHAOYA (PW 1)** testified and adopted as his evidence the witness statement dated 14th May 2018. He is a retired Senior Assistant Chief and knows the parties herein. He confirmed that the plaintiff is the wife of **PETER INDECHE MUINDI** who before his demise purchased the suit land from **NGOSIA MUYAYI** for Kshs. 2,1000. That the plaintiff and his family took possession of the suit land where they have lived peacefully, openly and without force since 1968.

MESHACK MUNJURU INDECHE (PW 2) also relied on his supporting affidavit as his testimony in this case. He confirmed that he was substituted in place of the plaintiff who was his mother. He produced as his documentary evidence the list of documents dated 21st September 2018.

BENSON MASINDE (PW 3) also adopted as his evidence, his statement dated 13th March 2020 in which he states that he is brother to the defendant and that their father **MUSAMBAI** sold the suit land to **PETER INDECHE MUINDI** on 9th December 1968. That the family of **PETER INDECHE MUINDI** has since then been living on the suit land openly and peacefully and he was even buried thereon when he died in 1990. That the original plaintiff **ANN SEYENZIA ITANYUKHU INDECHE** was also buried on the suit land when she died in 2017.

When the matter came up for further hearing on 29th October 2020, the defendant's new Counsel **MR SHIKHULE** sought time to place himself on record by filing his Notice of appointment. The Court gave him upto 11 a.m to file his papers since the defendant's previous Counsel **MR KASSIM WAFULA** had ceased acting for him. By 11:20 a.m, both **MR SHIKHULE** and the defendant had not turned up. The Court gave them upto 12 p.m. The Court waited upto 12.15 p.m. when the trial proceeded and the plaintiff's witnesses testified. Thereafter, **MS RATEMO** Counsel for the plaintiff closed her case and, on her application, the defence case was marked as closed.

The Court then directed that the plaintiff files and serves her submissions within 14 days. The defendant had not filed any submissions nor any documents as at the time I was drafting this Judgment.

I have considered the plaintiff's evidence, the documents filed and the submissions by Counsel.

As the defendant did not testify, the plaintiff's evidence is un – controverted. While the plaintiff's claim is that she is entitled to the suit land by way of adverse possession having been in open and peaceful occupation and possession of the same since 1968 when her late husband purchased it from the defendant's late father **MUSAMBAI**, the defendant resisted that claim by his replying affidavit in which he Counter – Claimed for orders that the plaintiff, her children and workers are trespassers thereon and should be evicted therefrom. However, in support of the defendant's Counter – Claim, all that this Court has is his pleading by way of the replying affidavit. That alone cannot prove a case. As **MADAN JA** (as he then was) stated in **CMC AVIATION LTD .V. KENYA AIRWAYS LTD (CRUISAIR LTD) 1978 eKLR: -**

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in Section 3 of the EVIDENCE ACT, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in CASSELL’S ENGLISH DICTIONARY P 394.

Anything that makes clear or obvious; grounds for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

From the above, it is clear that there is no basis upon which the defendant’s Counter – Claim can be founded.

Having said so, however, and even before this Court can proceed to interrogate the plaintiff’s claim to the suit land by way of adverse possession, this Court must determine as a first point of call if in fact this suit is res – judicata.

The doctrine of res – judicata is provided for in **Section 7 of the Civil Procedure Act** as follows: -

7: “No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

Section 28 of the Environment and Land Court Act similarly bars the Court from adjudicating over dispute between the same parties and relating to the same issue previously heard and determined by a Court of competent jurisdiction.

Before the doctrine of res – judicata can be successfully invoked as a bar to a suit, the following must be proved: -

- 1: The issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded.**
- 2: The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3: The former suit must have been heard and finally decided.**
- 4: The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA & ANOTHER .V. ATTORNEY GENERAL 2005 1 E.A. 83**. It was also held in **HENDERSON .V. HENDERSON 1843 67 E R 313** that: -

“Where a given matter become the subject of litigation in and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plead of re – judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Therefore, the moment it is brought to the attention of the Court that a given dispute may in fact be res – judicata, it is incumbent upon the Court to examine that fact. Res – judicata is a principle of law that can even be taken up by the Court on its own motion at any time so long as there is available any evidence upon which it can be founded. This is because, res – judicata once up – held, is a complete bar to any proceedings. **Section 7 of the Civil Procedure Act** uses the words **“No Court shall try and suit.”**

Although the defendant did not testify, he raised the issue in paragraph 9 of his replying affidavit that this suit is in fact res – judicata because **MESHACK MUTSUIRU INDECHE** had previously filed **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** against **MUSAMBAI** claiming the suit land. That fact was admitted by **MESHACK MUNJURU INDECHE** (who must be the same person referred to in paragraph 9 of the defendant’s replying affidavit) because, in paragraph 17 of his supporting affidavit dated 21st September 2018, **MESHACK MUNJURU INDECHE** who substituted the plaintiff herein has deponed as follows: -

17. “That it is in my knowledge that through civil suit No 91/96, I sued the father of the defendant in a capacity that is not similar to the capacity in which I am now suing.”

The existence of **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** is therefore not in dispute. A copy of the proceedings and Judgment in the said case were indeed annexed to the defendant’s Notice of Motion dated 9th June 2016 and are therefore available for this Court’s perusal. Therefore, since **MESHACK MUNJURU INDECHE** who substituted the plaintiff concedes that indeed he filed **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** against the defendant’s late father **MUSAMBAI** over the same land, there is sufficient evidence upon which this Court can proceed to consider if indeed this case is res – judicata.

In **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996**, **MESHACK MUTSUIRU INDECHE** (as plaintiff) had filed the suit against **NGOSIA MUSAMBAYI MUYUYI** (as defendant) seeking the main prayer that he be registered as the proprietor of the suit land by way of adverse possession. The basis of his claim was that **NGOSIA MUSAMBAYI MUYUYI (MUSAMBAI)** had sold the suit land to

MESHACK MUTSUIRU INDECHE's father in 1968 but refused to attend the Land Control Board to finalize that transaction. That case was heard by the late C. O. ONG'UDI J who however dismissed the claim having found that the possession of the suit land was not peaceful as there were continuous wrangles between the parties. There appears not to have been any appeal preferred against that Judgment which is undated. In trying to deny that this suit is not res – judicata BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996, MESHACK MUNJURU INDECHE has deponed in paragraph 17 of his supporting affidavit, which I have already referred to above, that he **"sued the father of the defendant in a capacity that is not similar to the capacity in which I am suing now."**

A perusal of the Judgment in BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 shows that the claim, like in this case, was one of adverse possession. This is what the Judge stated in the first paragraph of the said Judgment.

"The plaintiff seeks to be registered as proprietor of land parcel NO NDIVISI/ NDIVISI/217 by virtue of adverse possession. He depones in his affidavit sworn on 21st May 1992 that the defendant sold the said parcel of land to his late father in 1968. The defendant then fled to Uganda and never transferred the same to the plaintiff's father who died in 1990."

It is clear therefore that not only was the suit land the subject in both BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 and this case but the claim in both cases is adverse possession. The plaintiff herein has tried to distinguish BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 by stating that he was suing in a different capacity. However, it is clear from the proceedings in BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 that he is pursuing the same claim in this case as he was pursuing in BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996. The claim to the suit land is anchored on the sale agreement between his late father PETER INDECHE MUINDI and MUSAMBAI dated 9th December 1968. That is clear from the supporting affidavit of his late mother ANNA SEYENZIA ITANYUKHU INDECHE dated 7th October 2004 at paragraph 5 and also paragraph 5 of his own supporting affidavit dated 21st September 2018. And when he testified before C. O. ONG'UDI J on 24th April 1997, this is what MESHACK INDECHE said: -

"I am a farmer. I have sued the defendant over land. On 9.12.69, one mzee INGOTSE sold land to PETER INDECHE at Sh 300/= per acre. INDECHE bought 6 acres. He was paid Sh 2,000/=. My father waited his number but INGOTSE refused. My father became sick. INGOTSE refused to go to Land Control Board 3 times. Later he went to Uganda and refused to come back. My father died.

I asked for a number but he refused to give me the number. We have built on that land, planted coffee and bananas.

I asked the Court to help us. This is the agreement and other documents."

Although not specifically referring to the doctrine of res – judicata, Counsel for the plaintiff made the following submissions with reference to BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 at paragraph 32: -

"Further to that, your lordship in HCC No 91 of 1996 it is imperative to state that from the proceedings filed by the Respondent, it is quite clear that the Respondent's father (NGOSIA MUSAMBAI) never filed a Counter – Claim against the Applicant herein or a separate suit claiming eviction. It is also imperative to state that the suit was between the Respondent's father and the Applicant (in his own capacity)."

This Court will later in this Judgment make a finding on the eviction order referred to above. However, for purposes of res – judicata, MESHACK MUNJURU INDECHE, who substituted his mother as plaintiff herein, cannot escape the provisions of Section 7 of the Civil Procedure Act by claiming that he has filed this suit in his own capacity. And neither could the original plaintiff ANNA SEYENZIA ITANYUKHU INDECHE. The doctrine of res – judicata affects parties and their privies. Under explanation No 6 of Section 7 of the Civil Procedure Act, it is stated thus: -

(G): "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the persons so litigating." Emphasis added.

As I have already stated earlier in this Judgment, the right being claimed by the plaintiff in this case is the same as the one that was being claimed in BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996. As was held in SIRI RAM KAURA .V. M.J.E. MORGAN 1961 E.A 462: -

"It is therefore not permissible for parties to evade the application of Res – judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

Infact when ANNA SEYENZIA ITANYUKHU INDECHE filed this suit in 2004, she was basically attempting to revive BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 which had been dismissed way back in 1997. And as fate would have it, she was substituted by the same plaintiff who had filed BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996 thereby giving him a second biting at the cherry which is essentially the mischief which the doctrine of res – judicata is meant to address.

It is clear from the above that the plaintiff's suit is caught up by the provisions of Section 7 of the Civil Procedure Act and must be struck out.

By the same token, the defendant's Counter – Claim seeking to evict the plaintiff must also be struck out. This is because, explanation No 4 of Section 7 provides as follows: -

(4): “Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.” Emphasis added.

As was held in **HENDERSON .V. HENDERSON** (supra), the parties were required to bring out all the points that belonged to **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996**. And the defendant’s Counter – Claim seeking eviction orders against the plaintiff and her family is an issue that belonged to the previous litigation.

The totality of all the above is that **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** was a dispute involving a claim to the same suit land by way of adverse possession. That case was heard and finally decided by a Court of competent jurisdiction. The parties herein are the same and/or privies of the parties in the previous suit. There is nothing to suggest that the decision of the Court in **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** was over – turned on appeal or set aside by the same Court. Given the above circumstances, it would be difficult for this Court to conclude otherwise than that this suit is res – judicata.

Even assuming that I am wrong in my discussion on the doctrine of res – judicata, the plaintiff’s claim to the land parcel **NO NDIVISI/NDIVISI/217** was always anchored on quick sand. This is because, the land parcel **NO NDIVISI/ NDIVISI/217** no longer exists having already been sub – divided to give rise to the land parcels **NO NDIVISI/NDIVISI/2588, 2589 and 2590**. The Originating Summons ought to have been amended to reflect this new development even if the sub – division was done during the pendency of this suit. A claim in adverse possession is always directed at the registered proprietor of the land in dispute. The land in dispute according to the Originating Summons dated 28th September 2004 is **NDIVISI/NDIVISI/217** which no longer exists. Therefore, even if the plaintiff established his case, it would be difficult to make orders in respect to land that does not exist. That is why in his Counter – Claim, the defendant sought eviction orders against the plaintiff in respect to the land parcels **NO NDIVISI/ NDIVISI/2588, 2589 and 2590** and not land parcel **NO NDIVISI/NDIVISI/217**. Therefore, even on the evidence, the plaintiff would not be entitled to orders in adverse possession for land that does not exist. It must be remembered that it is the party’s pleadings that determine what remedy the trial Court can award.

Having said so, there is an issue that has been brought to this Court’s attention and which I must address. This is because failure to do so will allow the defendant to continue to pervert the process of justice. Although the Judge dismissed the plaintiff’s claim in **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996**, he did not issue any orders for the eviction of the plaintiff from the land parcel **NO NDIVISI/NDIVISI/217**. That notwithstanding, an eviction order was extracted and purportedly signed by the Deputy Registrar of this Court on 1st August 2002 directing the **OFFICER IN CHARGE WEBUYE POLICE STATION** to remove the plaintiff from the said land. That order could not have been extracted from the Judgment in **BUNGOMA HIGH COURT CIVIL CASE No 91 of 1996** and it would be a dereliction of duty on my part to let it remain on the record. Counsel for the plaintiff has urged me to ask the Respondent “**how he got the eviction order.**” Having already determined this dispute, I don’t have any opportunity to do so. The most I can do to safe guard the process of this Court is to declare that order null and void and expunge it from the record.

Ultimately therefore and having considered the evidence herein, I make the following orders: -

- 1. The plaintiff’s suit is struck out.**
- 2. The defendant’s Counter – Claim is struck out.**
- 3. The eviction order dated 1st August 2002 is declared to be null and void and expunged from the record.**
- 4. Each party to bear their own costs.**

Boaz N. Olao.

J U D G E

18th January 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 18th January 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

18th January 2021.