



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 992 OF 2001 (O.S.)

MUNYI ALFRED KAMURI

(suing as the personal and legal representative

of the estate of ALFRED

MUNYI KAMURI (DECEASED)).....PLAINTIFF/RESPONDENT

VERSUS

1. MARGARET WAMITI JONAH.....1ST DEFENDANT/APPLICANT

2. JOHN NJERU KANYARIRI2ND DEFENDANT/APPLICANT

3. FRANCIS THATHI JONAH3RD DEFENDANT/APPLICANT

4. NJERU MIKE EDWARDS4TH DEFENDANT/APPLICANT

RULING

The defendants' application by Chamber Summons, dated and filed on 24th May, 2002 was brought under Order VI rule 13(a),(b) and (d) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The application carried the prayers (a) that the plaintiff's Originating Summons and pleadings be struck out with costs; (b) that the plaintiff be made to pay costs. The grounds set out in support of the application were as follows: (i) that the suit was *res judicata*; (ii) that the orders sought had no basis in law, and were premature; (iii) that the suit was scandalous, frivolous, vexatious and an abuse of Court process.

Further support for the application was in the affidavit of *Francis Thathi Jonah*, the third defendant, sworn on 24th May, 2002. The most significant elements in this affidavit may be set out as follows:-

(i) that, the suit lands were originally owned by the deponent's late father, *Jonah Kubuta*;

(ii) that, the plaintiff's father, the late *Alfred Kamuri*, was originally adopted by the said (late) *Jonah Kubuta*'s clan and he was allowed by *Jonah Kubuta* to settle on part of the suit lands with his family.

(iii) that, subsequently the said *Alfred Kamuri* (the late father of the plaintiff) attempted to alienate the land parcels Nos.

constructed a permanent dwelling house, and he cultivates and grazes thereon, and he has erected a fence around the same;

xiii. that, the defendants' suit, HCCC No. 1715/99 was later discontinued by the plaintiffs, upon agreement that each plaintiff would enforce his own rights individually since each had a title deed for his land.

Responding to the defendant's application, the plaintiff filed, on 7th June 2002, grounds of opposition and a replying affidavit sworn on 6th June, 2004 by *Munyi Alfred Kamuri*, the plaintiff. The averments in the affidavit are as follows:-

(i) that, the suit lands had never been owned by the late *Jonah Kubuta*, and that the late *Alfred Kamuri* had never been adopted into the clan of the said *Jonah Kubuta*;

(ii) that, the late *Alfred Kamuri* was from the Marigu clan, and that this clan was the owner of all the suit lands;

(iii) that, in the award made by the Minister for Lands and Settlement, the late *Alfred Kamuri* had been awarded several parcels of land which are currently occupied by members of the *Kamuri* family;

(iv) that, the suits which had been filed by the late *Alfred Kamuri* had no relation to the occupation of the suit lands;

(v) that, the eviction orders obtained by the defendants in HCCC No. 1715 of 1999 had been fraudulently obtained and so were subsequently set aside;

(vi) that, due to a threatened contempt of court application, the defendants had, on 30th September, 2000 complied with the Court order and allowed members of the *Kamuri* family to re-occupy the suit lands, and since then they have remained in occupation;

(vii) that, the defendants have never filed suit to challenge the occupation of the suit lands by the plaintiffs.

The defendants' application came up for hearing on 21st June, 2004 and on that occasion Mrs. Wanyaga represented the defendants/applicants, while the plaintiffs/respondents were represented by Mr. Muriithi.

Mrs. Wanyaga submitted that the status of ownership of the suit lands had been determined by the Minister for Lands and Settlement in Land Appeal No. 65 of 1976 and No. 72 of 1976, by virtue of Section 29(1) of the Land Adjudication Act, No. 35 of 1968. She noted that the plaintiff had then challenged the Minister's decision in a judicial review application, in High Court Miscellaneous Application No. 200 of 1976. The record shows that the substantive judicial review Notice of Motion was flawed in terms of the law, and dismissed by the Honourable Justices *E.O. O'Kubasu* (as he then was) and *S.J.A Couldrey* on 2nd August, 1993 for incompetence. From this decision the plaintiff had lodged an appeal, but this, again was struck out on 6th November, 1996, for incompetence. The plaintiff then applied, in Civil Application No. Nai 50 of 1997, for extension of time within which to lodge the notice and record of appeal against the decision of the High Court; but this application was rejected and dismissed with costs.

Counsel for the defendants/applicants submitted that in these circumstances, the Minister's decision of 1976 remained unchallenged, and could not now be challenged in an ordinary suit, or in a suit by Originating Summons, because by Section 29 of the Land Adjudication Act (Cap. 284) the Minister's decision was final.

Counsel submitted that the matters in issue in the Originating Summons suit were already decided and so

the suit was *res judicata*. He relied on the case, *Salem Ahmed Hasson Zaidi v Faud Hussein Humeidan* [1960] E.A. 92, and in particular the holding of Forbes, V-P at page 97:

“The points for consideration are (1) whether the matter ‘directly and substantially in issue’ in the suit from which this appeal has been brought was directly and substantially in issue in the earlier suit; and (2) if so, whether such issue was ‘heard and finally decided’ in the earlier suit. If these two questions are answered in the affirmative, S.20 [of the Civil Courts Ordinance of Aden Protectorate] will apply and the later suit will be barred”.

Counsel submitted that the award made by the Minister could not, in these circumstances, be opened up in a fresh suit. And in further support of this submission he cited the case *Gilbert Mwangangi Melika v Mwakavi Mbuvi* Civil Appeal No. 267 of 1999, in which the Court of Appeal stated (p.4):

“The learned judge in his ruling delivered on November 10, 1999 agreed the suit was *res judicata* because prior to the Resident Magistrate’s Court case, the respondent had been awarded the land by the Minister, whose decision is final under the Land Adjudication Act and that decision still stands because attempts to have it quashed have been aborted by the withdrawal of the said Miscellaneous Case No. 5 for 1993. On our part, we do not see any basis upon which the learned judge can be faulted in that respect. The appellant having, by the withdrawal of the Miscellaneous Case disintitiled himself [from] the only means permitted to have the Minister’s decision under Section 29 of the Land Adjudication Act quashed, cannot thereafter purport to challenge that decision by way of an ordinary suit, which mode of challenge has been forbidden by the express language of the Act which makes the Minister’s decision final”.

Counsel drew an analogy between that decision and the instant matter, in which all attempts by the plaintiff to have the Minister’s decision quashed had *failed*. And the parties to the Minister’s decision had included the father of the plaintiff/respondent as well as the father of the second and third defendants/respondents, and the husband to the first defendant; and the fourth defendant was a purchaser from the first defendant. Counsel laid emphasis on the fact that the parties were related, or connected in some special manner; and thus they are, for purposes of the operation of the *res judicata* doctrine, essentially the same parties. Counsel submitted that the Originating Summons should be dismissed and struck out for being *res judicata*.

Mrs. Wanyaga for the applicants, argued in the alternative, that the orders sought by the plaintiff were premature : because the issue of adverse possession would become relevant only with effect from 10th March 1999 when the last decision of the Court of Appeal was made dismissing the plaintiff’s application. And while the matter was in Court, the defendants were all along asserting their title.

With reference to paragraph 8 of *Munyi Alfred Kamuri’s* replying affidavit which avers that, “the defendants herein unlawfully and fraudulently obtained eviction orders in HCCC 1715 of 1999 and which orders were later set aside”, learned counsel disputed the insinuation of fraud, and attributed the setting aside solely to improper service. I have had the opportunity to see the ruling of the Honourable Lady Justice Rawal in the said HCCC No. 17.15 of 1999, given on 6th July, 2000. I have to observe that the attribution of *fraud* to the defendants/applicants is somewhat exaggerated; for the learned judge stated (p.2):

“Averments of fraud have neither been pleaded nor proved as required”.

The reason for setting aside the eviction orders is given by the learned judge (p.4) as follows:

“The non-service of the summons makes all the subsequent orders ineffective, null and void. The defendant [i.e., the plaintiff herein] has averred that the members of his family who are evicted as a result of the null – and – void order has been occupying the suit premises [from] time immemorial. They opportunity to be heard.

“When this Court has found that the defendant was not served, the orders and actions taken in pursuance thereof cannot stand and they have to collapse. The plaintiffs [i.e., the present defendants] cannot take any advantage [thereof]. The *status quo* before the filing of the plaint must be preserved”.

Now the said suit, HCCC No. 1715 of 1999 under which the application determined by the Honourable Lady Justice Rawal on 6th July, 2000 had been brought, was later withdrawn by the plaintiffs (the defendants in the present suit). The plaintiff in his replying affidavit (para 12) avers:

“When the defendants herein realized that they had no good case against me and my family members, they withdrew and/or discontinued HCCC No. 1715 of 1999, and by the time of such withdrawal we were already in occupation”.

Contrariwise, the defendants state that the defendants agreed among themselves that the suit should not proceed as one, but that instead, each defendant (plaintiff in HCCC No. 1715 of 1999) since he held a separate title deed, should pursue his own claim, as the suit was in its form then, “too amorphous to proceed”, as counsel put it. So the intention was that individual suits be filed; but before this could happen, the plaintiff/respondent filed the Originating Summons now being impugned.

Mrs. Wanyaga contended that since the withdrawn suit, HCCC No. 1715 of 1999, was an *assertion of title* by the present defendants, it followed that any claim based on adverse possession, by the present plaintiffs, must be based on a count of time running only thenceforth – and the effect would be that there is no legal basis for a claim founded on adverse possession and hence the present Originating Summons is incompetent. Counsel submitted that the plaintiff’s suit deserved to be dismissed with costs to the defendants.

Mr. Muriithi for the plaintiff/respondent stated that, no sooner had the plaintiff filed Civil Suit No. 992 of 2001(O.S.) than he discovered that there were other suits relating to the same subject matter, namely HCCC No. 870 of 2000, and HCCC No. 991 of 2001 (O.S.). Counsel stated that an order had been made (presumably in the holding file, which is for HCCC No. 870 of 2000) on 17th June, 2002 for the consolidation of the three suits, namely, HCCC No. 870 of 2000, HCCC 991 of 2001 (O.S.), and HCCC 992 of 2001 (O.S.).

Counsel stated that there were *four* parties now laying claim to the suit lands – firstly the plaintiff in HCCC No. 870 of 2000; secondly, the plaintiff in HCCC No. 991 of 2001 (O.S.); thirdly, the plaintiff in HCCC No. 992 of 2001 (O.S.); and the present defendants who are also defendants in the other suits.

Mr. Muriithi submitted that the Court cannot strike out the plaintiff’s suit at this stage, and that there ought to be a full hearing to determine who, among the four parties, should have rights of ownership over the suit lands. In the circumstances, counsel submitted, the defendant’s instant application would have to be filed under all the consolidated suits. To this contention, Mrs. Wanyaga for the defendants raised the objection that there was a difference between the claims in HCCC No. 991 of 2001 (O.S.) and those in HCCC No. 992 of 2001 (O.S.); and the defendants/applicants were not parties to a number of these suits. In her view it was essential, in the circumstances, that the several applications now pending be either withdrawn or amended, failing which each application must be heard separately.

Mr. Muriithi submitted that the present suit could not be heard independently from the other suits, and that they have been consolidated to enable the Court to determine the ownership question.

Counsel stated that the plaintiffs were in occupation of the suit lands and had possession thereof since the 1950’s; so that the doctrine of adverse possession could be invoked. He submitted that the question whether such possession had ever been interrupted was a contentious one, which can only be properly determined in a full trial. Counsel further supported his argument with the assertion that up to now, there had been *no suit by the defendants for the eviction of the plaintiff and his family members*; and this implied that the defendants had not staked their claim to ownership or possession of the suit lands. On this account, counsel contended, the plaintiff’s suit was not *res judicata*. He noted, I think correctly, with

due respect, that H.C. Miscellaneous Application No. 200 of 1976, which was a motion for judicial review, had not been heard on the merits but had been struck out for want of the statutory notice to the Registrar, before lodgment of the application. And thus, the issue of occupation and ownership of the suit lands has never been determined. He cited Section 7 of the Civil Procedure Act (Cap. 21) which provides that issues must have been heard and finally determined by the Court before *res judicata* can apply.

Mr. Muriithi stated that in a suit brought by the present defendants, HCCC No. 1715 of 1999, the present plaintiffs had raised the defence of adverse possession. To give effect to that line of defence, the present plaintiffs were set to file suit by Originating Summons. However, before they could do so, the present defendants withdrew their suit. There was then, apparently, judgment given against the present defendants, in HCCC No. 870 of 2000, in favour of third parties who were allowed to occupy the suit lands, or some of them.

Counsel submitted that it was appropriate that the court do order that the three suits proceed to hearing, to enable the parties to give their evidence and the matters be heard on the merits.

It is not in dispute that the suit under the umbrella of which this application was brought, namely HCCC No. 992 of 2001 (O.S.) has been consolidated with other suits. So long as the order of consolidation itself has not been challenged, it will manifestly be improper to resolve in favour of the defendants an application which seeks to strike out just one of the suits falling under the consolidated unit. It is only by hearing that particular suit, as part of the consolidated package, that the fundamental issues of merit can be identified and resolved.

Secondly the fact that a plurality of suits and applications have been brought before the court, since the Minister for Lands and Settlement, within the context of land appeal, under the Land Adjudication Act, determined the relevant questions, suggests that beyond his award, matters of legal significance falling within the jurisdiction of the court have arisen. Whenever the Court's jurisdiction is properly invoked, a constitutional obligation immediately falls upon the judge to give an impartial hearing to the parties and to make an authoritative pronouncement on rights and liabilities. From the several interlocutory orders already made by the court, it is clear that the stage has been set for the aggrieved parties to canvass their claims in court, to the intent that the court shall set at rest the contending issues. Part of the setting of the stage for a full hearing is represented by the consolidation of the suits already noted hereinabove. It will certainly defeat such a setting for trial if the defendant were to be allowed to pull one suit out of the consolidated package, and to have it struck out; and therefore such a possibility will tend towards abuse of court process.

While it is true that the various applications so far made by the plaintiff/respondent have been mainly unsuccessful, it is clear that such applications were not concerned with the merits of the case, which centre on *rights of ownership over the suit lands*. It is a well recognized principle of law that abiding judicial decisions are those arrived at after a hearing of the merits of the case; and so a suit does not become *res judicata* if all the decisions so far taken and bearing upon it, where such have been consistently adverse to a party, have rested on technicalities; such a party does not thereby lose his right to lodge a proper suit subsequently. I believe it is correct, as testified for the plaintiff/respondent, and as argued by his counsel, that all the motions so far filed by the late *Alfred Kamuri* did not lead to a determination of the substantive question of ownership and occupation of the suit lands.

In the ruling by the Honourable Lady Justice Rawal, in Civil Case No. 1715 of 1999, she ordered maintenance of the status quo and vacated eviction orders which had been secured by the present defendants. There was no appeal from that ruling and I take it to be correct and binding. The effect is that, in occupation of at least some of the suits lands, are the plaintiff/respondent and those associated with him. This means that as things now stand, part of the suit lands are under the occupation of the plaintiff and part, that of the defendants. Such is a state of uncertainty, and the authoritative status of ownership and occupation needs to be settled; and this can only be done in a full trial. Therefore, it would be wrong to strike out the plaintiff/respondent's suit as prayed by the defendants.

Part of the delay in resolving the issues as to the status of ownership of the suit lands must be ascribed to

the defendants/applicants, who withdrew their suit, HCCC No. 1715 of 1999 without any apparent justification. They ought, therefore, to allow the plaintiff/respondent to proceed with HCCC No. 992 of 2001 (O.S.), as a basis for settling conclusively the ownership question.

The defendants' assertion that the plaintiffs must start counting the time required for an adverse possession claim, from the date of withdrawal of HCCC No. 1715 of 1999, is, with respect, an inappropriate one. For the claim presumes to broach a subject that can only be resolved by the Court, on the basis of evidence. I am in agreement with counsel for the plaintiff/respondent that, the question whether adverse possession can be invoked in the matter, is a contentious one which can be properly determined only in a full trial.

Although counsel for the defendants/applicants sought to rely on the decision in *Gilbert Mwangangi Melika v Mwakavi Mbuvi*, Civil Appeal No. 267 of 1999, I do not think that, on the facts of this matter, it would be of any avail to the defendants. While it is true that a Minister's award by virtue of section 29 of the Land Adjudication Act, where it is properly made in accordance with the law, would dispose of the questions raised in a land grievance, such is not the case here. Attempts have been made to challenge the Minister's decision; the parties have fully submitted themselves to the jurisdiction of the Court seeking certain reliefs; and the Court has made several orders distinctly setting the stage for a hearing of the continuing disputes regarding ownership and occupation of the suit lands.

The foregoing review of the evidence and the submissions by counsel, lead me to make the following orders:-

1. The defendants' prayer that the plaintiff's Originating Summons of 14th June, 2001 and all the pleadings be struck out with costs, is refused.
2. The defendants shall bear the costs in this application.

DATED and DELIVERED this 12th day of November 2004.

J.B. OJWANG

AG. JUDGE

Coram : Ojwang Ag. J

Court Clerk – Mwangi

For the defendants/applicants : Mrs. Wanyaga,

instructed by M/s Jane W. Wanyaga & Co. Advocates

For the plaintiff/respondent : Mr. Muriithi, instructed by

M/s Kinyua Muriithi & Co. Advocates