



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 519 OF 2003

ODEK OCHOKO & SEVEN (7) OTHERS.....PLAINTIFFS

V E R S U S

GERISHON KAMAU KIRIMA & ANOTHER.....DEFENDANTS

R U L I N G

This is a Preliminary Objection raised by Mr. Kowade for the Defendants in bar against the hearing of the Notice of Motion dated 20.5.2003 by the Plaintiffs/Applicants who in that application, claim inter alia adverse possession over LR No. 6825/2 because they (Applicants) have stayed on the same land for over 12 years and also that they be granted leave to file a representative suit on their own behalf and on behalf of others against the Respondents.

The written objections filed herein state that the application is incompetent, and void ab initio; that the suit is commenced by way of Notice of Motion when a suit should not be so commenced and that a claim for adverse possession ought not be so instituted (4) That proceedings offend Section 7 Rule 4 of the Cap 21 for being against Res judicata principles under that said Section or on the alternative the proceedings are barred by operation of issue estoppel, that in view of previous suit HCCC No. 249 of 2003 the proceedings herein are barred by provisions of Section 6 of Cap 21, that the procedure of taking over and instituting a representative suit has not been complied with in particular the alleged claimants have not signed the proceedings herein to confer authority upon the alleged Applicants to institute these proceedings, that no claim for adverse possession is sustainable where there are more than 200 alleged claimants whose actual physical possession of the suit land cannot and has not been ascertained, that the litigants are vexatious and frivolous and are guilty of abuse of Court's process; that no abstract title has been annexed to the application, that there is no re-disclosure of material facts, the proceedings and order in HCCC No. 243 of 2003.

Mr. Kowade argued these grounds seriatim and vehemently, but Mr. Ngala for the Applicants opposed the objections. He said res judicata did not apply as parties are different in HCCC No. 249 of 2003.

That Notice of Motion can originate a case under Order 8 and sometimes even Chamber Summons is used to apply for bail. That this is an application under Order 1 Rule 8 for leave to start a case and not an application for adverse possession, that issue estoppel does not apply. That under Order 1 Rule 8 there is no requirement or authority needed.

I have heard both counsel in their strong arguments but I think I can decide the matter on the decided cases off two of the grounds argued.

The Court of Appeal in CIVIL APPEAL NO. 262 OF 1998 PATRICK ODAKO & MESHACK ODAKO vs. WILLIAM M. KIRERO the Court decided that case filed under Order 36D of the Civil Procedure Rules under Section 38 of Limitations of Act Cap 22 shall be by Originating Summons. Where provision is made for instituting a case by Originating Summons then, Originating Summons is the most

appropriate way of approaching the Court. That was not done here.

The decision of the Court of Appeal above binds this Court and must be applied the effect of which is that the action here is incompetent for omitting to do so.

The other point is the ruling by Rimita J., on 19.5.2003 in the High Court CIVIL CASE NO. 249 OF 2003 which in fact directly affects the claims intended in the present case. In my view, those orders are final and another case like HCC No. 519 of 2003 filed to circumvent them is as I see it an abuse of this Court's process.

There can only be an appeal or setting aside of those orders before any such suit is filed.

For these reasons, I feel the action here is an abuse of Court's process, is incompetent and must be struck off which I hereby do with costs to the Respondent/objector.

DATED this 11th day of July 2003.

A.I. HAYANGA

JUDGE

Read to: -

Mr. Okatch and Mr. Ngala for Applicant

Mr. Kowade for Objector

A.I. HAYANGA

JUDGE