



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 70 OF 2019

PATRICK KANYAKO KHACHINA.....PLAINTIFF

VERSUS

TOM LUKURU OJWANG (being sued on behalf of the estate of the late

SYLVESTER OJWANG KHACHINA)DEFENDANT

JUDGEMENT

This is the application of Patrick Kanyako Khachina who claims that he is entitled fully to L.R. No. North Wanga/Kholera/502 measuring approximately 2.6 Ha and registered in the name of the late Sylvester Lukuru Ojwang' Khachina by virtue of having been in continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years and in a peaceful manner and for determination of the following questions;

1. If the respondent is the legal representative of the estate of the late Sylvester Ojwang' Khachina;
2. If the deceased is the registered proprietor of L.R. No. North Wanga/Kholera/502;
3. If the applicant has had exclusive occupation and use of the entire plot 892;
4. If the occupation and utilization by the applicant with regard to the entire plot 502 has been in excess of 12 years and in an open, peaceful and uninterrupted manner;
5. If the occupation and utilization by the applicant with respect to plot 502 has been adverse to the proprietary interests of the estate of the deceased.
6. When did time necessary to constitute adverse possession in favour of the applicant begin to run;
7. If having been in possession and use of the parcel of land in a peaceful and open manner for a period in excess of 12 years, whether the applicant has acquired ownership of the same through prescription.
8. If the proprietorship of the estate of the deceased with respect to the parcel of land is subject to the prescriptive rights of the applicant.

PW1 testified that he has lived on the suit land from 1938 and has buried his wife there. That there was a case in Mumias and he placed a caution on the land.

The defendant in his testimony and replying affidavit stated that the applicant has not been candid enough to tell the court that other than Mumias SRM 1952 of 1995 which he has annexed, he also filed Kakamega HC Miscellaneous No. 150 of 1996 which resulted in him obtaining a prohibition order against his late father. That the applicant has also concealed from the court that he has also filed other proceeding prior to the originating summons known as Kakamega HC Civil Appeal No. 10 of 1997 in which he had sought to appeal against an order he had obtained dismissing the matter in the lower court but which was again dismissed. That even before he came to the scene by transmission of his father's estate to him, the applicant had legal battles with his father dating back to 1991 vide the SPMCC – Mumias No. 607 of 1991 where he was ordered evicted and was indeed evicted. That it's clear from the foregoing that the applicant has not had any peaceful occupation of the suit land as he has always been in court either suing or being sued for false claim on a property he has no right over. That the numerous court battles enumerated above do not constitute peace or peaceable utilization of the suit land and computing of time for adverse possession cannot ignore all that has been happening and which the applicant concealed from the view of the court. That the

reasons advanced in support of the claim that the land in question L.R. North Wanga/Kholera/502 was unlawfully taken away from the applicant has been litigated upon and are subject of court decisions in favour of his late father and are now res judicata and cannot be relitigated upon. That the judgment delivered on 27th February, 1996 by Hon. Ombae K.S. in Mumias SRMCC No. 1952 of 1995 was not executed as defendant died before it could be executed and he filed another cause Kakamega HCCC No. 134 of 1997 which stayed the execution of the lower courts decree.

This court has considered the evidence and the submissions herein. In the replying affidavit the defendant has raised a Preliminary Objection on the suit being res judicata. As stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised and should be determined at this stage even before going into the merit and demerits of the case. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue 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.”

The respondents submitted, the matter herein is res judicata. That the reasons advanced in support of the claim that the land in question L.R. North Wanga/Kholera/502 was unlawfully taken away from the applicant have been litigated upon and are subject of court decisions in favour of the defendant’s late father and are now res judicata and cannot be litigated upon as per the judgment delivered on 27th February, 1996 by Hon. Ombae K.S. in Mumias SRMCC No. 1952 of 1995. I have perused the proceedings and the judgement in Mumias SRMCC No. 1952 of 1995. Indeed I find that the applicant is the plaintiff therein and the defendant’s father is the respondent. The subject matter in the said suit is land parcel No. North Wanga/Kholera/502. It is not in dispute that this suit was filed in 2019 after the previous suit in 1995. I find that indeed the parties are the same in the two suits and so is the subject matter. I find that this matter is res judicata Mumias SRMCC No. 1952 of 1995 and later Kakamega Misc Civil Application No. 153 of 1995 between the same parties and concerning the same subject matter. For those reasons this suit is struck off with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH MARCH 2021.

N.A. MATHEKA

JUDGE