



Buluka v Ombima (Environment and Land Miscellaneous Application E006 of 2024) [2024] KEELC 6619 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2024
E ASATI, J
OCTOBER 9, 2024**

BETWEEN

JAPHETH BULUKA APPLICANT

AND

SHADRACK OBADI OMBIMA RESPONDENT

RULING

1. The application before court for determination is the Notice of Motion dated 25th March 2024 expressed to be brought under the provisions of Rule 3 of the [High court \(Practice and Procedure\) Rules](#) & section 13(2) (e) & 7(h) of the [Environment and Land Court Act](#). The application seeks for; -
 - a. The court to make declaration that; -
 - i. Kakamega ELC Cause No. 648 of 2014 and Vihiga MCLE Cause No. E034 of 2022 are both res judicata Kakamega High Court Civil Case No. 150 of 1994 and therefore the decree therein incapable of execution and
 - ii. The decree in Kakamega High Court Civil Case No. 150 of 1994 is similarly incapable of execution the same having lapsed after the expiration of 12 years following the issuance on 5th day of March 2012.
 - b. The court be pleased to issue orders directing the Vihiga County Land Registrar to reinstate parcel No.s Tiriki/gimarakwa/216 & 217 in the respective names of the late Thomas Musotsi and Japheth Bafuka.
 - c. Costs be provided for.
2. The grounds upon which the application was brought as shown on the application are that one Thomas Musotsi deceased and the parties herein are biological brothers. That vide case no. HCC No. 150 of 1994 the Respondent obtained an order dated the 5th March 2012 for the eviction of the



deceased and the applicant from land parcel Nos 216 and 217. That vide case No. Kakamega ELC No. 648 of 2014, the Respondent obtained orders that he was entitled to the two parcels of land by adverse possession. That the pieces of land then belonged to the deceased and the applicant respectively. The judgement was entered on 24th March 2021. That the Respondent again obtained eviction orders against the deceased and the applicant by Judgement rendered on 2th September 2023 vide Vihiga MCLE Cause No. 34 of 2022. That ownership of the two parcels of land having been determined in Kakamega HC C. Cause No. 150 of 1994, it follows that the decree in Kakamega ELC No. 648 OF 2014 and Vihiga MCLE Cause No. E034 OF 2022 are of no legal effect because they are res judicata. That additionally the decree in Kakamega HCC Cause No. 150 of 194 is now incapable of execution as per section 4 (4) of the Limitation of Actions Act, that the said decree lapsed on 5th March 2024. That applicant's impending eviction from parcel Nos 216 and 217 based on the decree in Kakamega HC Civil case No. 150 of 1994 or Vihiga MCLE cause NO. E034 of 2022 is irregular. That the two parcels of land be reinstated in the names of the deceased and the applicant respectively. The application was supported by the contents of the Affidavit in Support of the Motion sworn by Japheth Buluka on 25th March 2024.

3. The application was opposed vide the contents of the Replying Affidavit to Notice of Motion sworn by the Respondent on 10th June 2024. The Respondent's case is that there should be an end to litigation that the application is frivolous and unmerited. That judgement was delivered in his favour in Kakamega ELC No. 648 of 2014 on 24/3/2021 and decree issued on 12/7/2021. That after an application he filed vide Vihiga ELC Case No. 22 of 2021 was dismissed, he served the deceased and the applicant with eviction notice which they failed to abide by and he filed Vihiga PMCL&E case No. 34 of 2022 in which judgement was entered in his favour granting him orders of eviction. That proceedings in case No. 34 of 2022 have since ended thus they cannot be stayed. That the issue of res judicata does not arise.
4. The application was argued by way of written submissions. It was submitted on behalf of the applicant that the doctrine of constructive res judicata barred the Respondent herein from bringing Vihiga MCLE Cause No. E034 of 2022 seeking for an order of eviction. That the question of eviction had been settled in the Ruling dated 5/10/2021 in Vihiga ELC Cause No. E022 of 2021. Counsel relied on the case of Mburu Kinyu v Gachiru Tutu (1978)KLR 69 to support the submissions.
5. On behalf of the Respondent three issues were framed for determination.
6. On the first issue was whether Kakamega ELC case No, 648 of 2014 and Vihiga MCLE Cause No. E034 OF 2022 (hereinafter former cases) are both res judicata Kakamega HCC No. 150 of 1994. It was submitted that case No. Kakamega HCC No. 150 of 1994 is what was transferred to the Environment and Land Court and registered as Kakamega ELC No. 648 of 2014. That the ex parte judgment dated 5/3/2012 in case no. 150 of 1994 was set aside and is no longer operative. That it is trite that the principle of finality states that decision of a court of competent jurisdiction unless set aside or quashed must be accepted as uncontrivable correct. That res judicata does not arise since the former suit dealt with the issue of adverse possession and the latter case was initiated through eviction notice.
7. On second issue of whether Vihiga Land Registrar should be directed to reinstate the subject properties into the names of the applicant respectively, Counsel relied on the provision of sections 24, 25 and 26 of the Land Registration Act and submitted that there is no evidence warranting cancellation of the Respondent's proprietorship of the 2 parcels. That the applicant has never appealed against the order that adjudicated the Respondent as owner of the land. On costs the Respondent prayed that the applicant be directed to bear the same. This matter has been brought to court by way of Misc



application. The issues raised concern cases that exist namely; Kakamega 648 of 2014 and Vihiga PMC E&L case No. E034 of 2022. There is no explanation why the application not filed in the existing cases.

8. Secondly, it is clear through the evidence and submission's that Kakamega HCC No. 150 of 1994 and Kakamega ELC No. 648 of 2014 were one and the same case. That it was No.150 of 1994 that was transferred to the ELC and registered as 648 of 2014 hence res judicata does not apply.
9. It is also clear that the Judgment dated 5/3/2012 which was ex parte was set aside and the case proceeded to hearing inter partes. It cannot therefore be said to have become time barred under the provisions of section 4(4) of the *Limitation of Actions Act*. The evidence shows that the subsisting judgment that was ultimately passed in Kakamega ELC 648/2014 (Formerly Kakamega HCC No. 150 of 1994) is dated 24th March 2021 and this has no doubt not been caught up by the limitation in section 4(4) of the *Limitation of Actions Act*.
10. Finally, a reading of the decision in case No. Kakamega ELC 648 of 2014 and the one in Vihiga MCEL 034 of 2022 show that the cause of action were different. I find that the application lacks merit and improperly before court. The application is hereby dismissed. Costs to the Respondent
Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 9TH DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Ikhumba h/b for Kundu for the Applicant.

Edaki h/b for Luvai for the Respondent.

