



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC NO. 341 OF 2017

PETER ODERO NYAMBOK.....PLAINTIFF

VERSUS

BENARD ODHIAMBO OMOLO.....DEFENDANT

RULING

1. The instant ruling is in respect of a preliminary objection dated 24th June 2019 and duly filed in court on 26th June 2019 (The P.O herein) further to the defendant's 12-paragraphed replying affidavit sworn on 22nd May 2017. The defendant, Bernard Odhiambo Omolo who initially appeared in person and currently represented by E. Apondi of the firm Apondi and Company Advocates has premised the Preliminary Objection on the grounds infra;

a) The suit land was transferred to me by my late father while he was still alive and after he acquired the same after a long court case with the plaintiff herein which terminated in 2009.

b) The suit is res judicata since I have been in possession of the land for only three years and the other years that would be the basis of adverse possession the land belonged to Henry Omolo Odeko who had land suit No. 138 of 1995 at Kisii High Court with the plaintiff herein wherein the issue of acquisition by adverse possession was adjudicated upon and dismissed by the High Court at Kisii.

c) The suit against me is misdirected as I am not the legal administrator of the estate of Henry Omolo Odeko against whom the adverse possession would run.

d) The suit is misconceived, frivolous and is an abuse of the court process.

2. Annexed to the Preliminary Objection are copies of a ruling delivered on 19th March 2009 in Kisii High Court Civil suit number 138 of 1995 and another ruling rendered on 30th October 2000 in the same suit.

3. In his response to the Preliminary Objection dated 22nd October 2019 and filed in court on 29th October 2019, the plaintiff, Peter Odero Nyambok through M/S Agure Odero and company Advocates, opposed the Preliminary Objection on grounds that:-

1) The Defendant filed Judicial Review viz Kisii Misc 138 of 1995 to oust the Decree of Land Dispute Tribunal Act No. 18 of 1990 viz Homa-Bay District Land Dispute Tribunal where court adopted the proceedings thereof viz Homa-Bay SRM No. 12 of 2008 and gave Peter Odero Nyambok room vide order dated 20/8/2013 for the Executive Officer to execute instruments of transfer in respect to parcel Kanyada/Kotieno Katuma 'A'/964 in the Plaintiff's names. (Annexed is a copy of Decree & Order).

2) The Defendant proceeded and transferred the title in his names without the Plaintiff's knowledge and during that process the Plaintiff had signed instruments of transfer. (Annexed is a copy attached herein).

3) That the Defendant was under a false impression that the Plaintiff's Application for injunction viz Kisii Civil Suit No. 138 of 1995 amounted to determination of the suit vide Ruling dated 19/3/2009 which ruling only touched on a technicality, and not determination thereof.

4) The Defendant Application seeking leave to file Judicial Review out of time viz Kisii No. 138 of 1995 was dismissed and never filed on appeal. (Annexed is a copy of the Ruling dated 17/6/2010).

5) That by virtue of the dismissal of Kisii Misc No. 138 of 1995(JR)the case rebutted to the original Homa-bay Miscellaneous No. 12 of 2008 hence validates the current O. S. No. 341 of 2017.

6) The Preliminary Objection is meant to divert the attention of the all issues and need be dismissed with cost.

4. The genesis of this matter in that on 21st April 2017, the plaintiff who was then represented by M/S Nyauke and company advocates, mounted the present suit by way of an originating summons dated 10th April 2017 and filed in court on even date (The O.S herein).He is seeking the following reliefs:

a) The plaintiff/applicant has acquired title by transmission via adverse possession.

b) That the plaintiff/applicant has acquired proprietary interest of land parcel Kanyada/Kotieno Katuma “A” 964 herein referred to as the “suit property”.

c) The Land Registrar (Homa Bay) register the plaintiff/applicant as the proprietor of the suit property.

5. The OS is anchored on a fourteen (14) paragraphed supporting affidavit of the plaintiff and copies of the accompanying documents namely a certificate of official search dated 5th June 2014 and photographs both marked as “POA”herein. Briefly, he claimed that he has possessed and occupied the suit property for a continuous period of more than 12 years without any interference whatsoever.

6. By the replying affidavit referred to in paragraph 1 herein above, the defendant opposed the O S. He annexed thereto, copies of documents marked as “BOO-1A to BOO-4” which include; a ruling and decree in Kisii High Court civil lease no.138 of 1995(BOO 1A and 1B), proceedings and verdict of the defunct Asego Divisional Land Disputes Tribunal in claim No.126 of 2007(BOO-3) and a ruling delivered on 19th March 2009 in Kisii HCCNo.138 of 1995(BOO-4). He termed the plaintiff’s claim an abuse of the court process and frivolous, hence, sought its dismissal accordingly.

7. The Preliminary Objection was argued by way of written submission further to this court’s orders and directions pursuant to **Order 50 Rule 16 of the Civil Procedure Rules, 2010: see also Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

8. Accordingly, learned counsel for the respondent filed submissions dated 8th April 2021 on 12th April 2021 whereby reference was made to the grounds of the Preliminary Objection the response thereto, Section 7 of the Civil procedure Act Chapter 21 Laws of Kenya and authorities inclusive of **Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates versus Salama Beach Hotel Limited, and 3 others(2017) eKRL** on res Judicata. Counsel also cited **The Black’s Dictionary** in respect of the term “Abuse”, and termed the suit an abuse of court process thus, is res judicata. That the suit be dismissed.

9. The defendant’s submissions are deemed to be in form of the response as noted in paragraph 3 hereinabove.

10. I have thoroughly considered the entire Preliminary Objection the response thereto, the parties’ respective pleadings and the parties submissions including the authorities cited therein. In that regard, twin issues emerge for determination at this stage namely whether:

(a)The instant suit resjudicata and

(b)The suit is misdirected at the defendant who is not the legal administrator of the estate of Henry Omolo Odeko(deceased).

11. Concerning res judicata, the defendant asserted that the adverse possession claim over the suit property by the deceased was mounted in Kisii HCC No. 138 of 1995.That the same was dismissed as per the two rulings stated in paragraph 2 hereinabove.

12. The plaintiff contended that Kisii HCCC No.138 of 1995 concerned his application for an injunction. That the ruling rendered on 19th March 2009 only touched on a technicality and did not amount to a determination.

13. The said ruling followed an application by the plaintiff for a declaration that the defunct Asego Divisional Land Disputes Tribunal’s award dated 26th June 2008, was null and void as well as for a permanent injunction. The court (Musinga J ,now JA) concluded thus:

“...I have to strike out his application, which I hereby do , but grant him leave to institute the appropriate proceedings. The applicant will bear the costs of the application.”

14. The principle of res judicata is captured in Section 7 (supra) which I need not reproduce herein. Nonetheless, I note the elements of res judicata discerned therein.

15. Similarly, the **Black’s Law Dictionary 10th Edition at page 1504** has fashioned the meaning of the term “res judicata”. That elements of the term are captured therein thus:-

i) an earlier decision on the issue

ii) a final judgment on the merits, and

iii) the involvement of the same parties, or parties in privity with the original parties.

16. The defendant and another filed their claim pursuant to section 38 of the Limitation of Actions Act against the plaintiff in Kisii HCC No. 138 of 1995. It was an adverse possession claim over the suit property, LR No. Kanyada/Kotieno-Katuma 964. The claim was dismissed as the award disclosed in paragraphs 6 and 13 hereinabove was not in their favour as per the ruling delivered on 30th October 2000.

17. In the ruling, the court (Wambilyanga, J) held in part:

“...It is evident that the arbitrator looked for in evidence in support of the plaintiff's assertion in their case but found none...”

18. Indeed, the defendant's claim for adverse possession over the suit property was heard and disposed of by a court of competent jurisdiction. The claim involved the plaintiff and the deceased. Clearly, the same was heard and determined on its merits as observed by the Court of Appeal in *Philip Chemwolo & another v Philip Kubende (1982-88) KAR 103* thus, the doctrine of res judicata is applicable accordingly as **per Section 7 and the Black's Law Dictionary (supra)**.

19. It was the assertion of the defendant that he is not the legal administrator of the estate of Henry Omolo Odeko (deceased). This court is aware of the definition of the term **“legal representative”** as defined under **Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya** and alongside the decision in the case of *Rajesh Pranjivan Chudasama-s- Sailesh Pranjivan Chudasama (2014)eKLR*, among other authoritative pronouncements.

20. It is common baseline that in Kisii HCCC No. 138 of 1995, the claim involved the deceased and the plaintiff. As noted above, it was finally decided on 30th October 2000 as shown in the ruling (B00-1A) alongside a decree (B00-1B) annexed to replying affidavit to Originating summons and the Preliminary Objection and another ruling marked as “PON3” and a decree marked as “PONa” annexed to the response to the Preliminary Objection.

21. The cardinal principle is that litigation has to come to an end; see **Halsbury's Laws of England 4th Edition volume 22 page 273**.

22. The plaintiff's counsel submitted that this suit is an abuse of the court process. In the case of **Muchanga Investments Ltd-vs-Un-Limited (Africa) Ltd and two others (2009) KLR 229**, the Court of Appeal described the term an abuse of the process of the court as hereunder;

“...a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive....has an element of malice in it....”

23. Accordingly, it is the final finding of this court thus;

a) The defendant's Preliminary Objection dated 24th June 2019 and filed herein on 26th June 2019 is hereby upheld in terms of grounds 1 to 4 thereon and as set out in paragraph 1 hereinabove.

b) The plaintiff's suit commenced by way of the originating summons dated 10th April 2017 and filed in court even date be and is hereby struck out with costs to the defendant.

24. It is so ordered.

DELIVERED DATED and SIGNED AT MIGORI this 28th DAY OF JULY 2021

G. M.A. ONGONDO

JUDGE

Judgment delivered in the presence of:

Mr. Agure Odera learned Counsel for the plaintiff

Ms. Okota holding brief for E. Apondi learned counsel for defendant

Tom Maurice – Court Assistant