



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**

**ELC CASE NO.22 OF 2021**

**(FORMERLY KK ELC NO.648 OF 2014)**

**SHADRACK OBADI OMBIMA.....PLAINTIFF**

**VERSUS**

**THOMAS MUSOTSI**

**JAPHET BULUKA.....DEFENDANTS**

**RULING**

1. This ruling is in respect of the **Notice of Motion application dated 12<sup>th</sup> July 2021** brought by the Plaintiff pursuant to the provisions of Section 3A Civil Procedure Act, herein called “the Application.”
2. The Application seeks the following orders:
  - a) THAT this matter be certified urgent in the first instance
  - b) THAT the eviction order do issue to the Defendants/Respondents
  - c) THAT the Officer Commanding Vihiga Police Station be directed to provide security during the execution of the decree issues against the Respondents
  - d) THAT costs be provided for.
3. The Application is premised on the grounds contained in the Application and the averments in the Supporting Affidavit sworn by the Applicant on 12<sup>th</sup> July 2021.
4. The Applicant’s case is that he obtained a judgement and decree herein in his favour to the effect that the Respondents’ rights over land title numbers **NYANG’ORI/GAMARAKWA/216 and 217**, the suit lands, had been extinguished by adverse possession. That the Respondents have neglected and/or refused to move out and deliver up vacant possession of the suit lands. That he has therefore decided to seek the assistance of the court to forcefully evict the Respondents from the suit lands.
5. No response was filed on behalf of the Respondents.
6. The court has carefully read the Application and supporting Affidavit, the judgement, decree and the pleadings in the file.
7. The suit was commenced by way of Originating Summons dated 18<sup>th</sup> January,1994 claiming for:
  - a) A declaration that the defendants right over title Nos. NYANGO’RI/GIMARAKWA/2016 and 217 got extinguished by adverse possession.
  - b) A declaration that upon expiry of 12years the defendants held and currently hold the said pieces of land in trust for the Plaintiff.
  - c) An order under section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya that the Plaintiff herein be registered as owner of title NOS.NYANGORI/GIMARAKWA /216 AND 217.

d) An order that the Defendants be condemned to pay the costs of this suit.

e) Such further Order or relief as this Honourable court may deem fit to grant

8. Throughout his pleadings, testimony and submissions, the Applicant maintained that since he entered the suit lands in 1978 he has been exercising all rights of ownership of the suit lands and has enjoyed open, continuous, notorious and exclusive possession of the suit lands. That his possession has been peaceful and of right. That the Respondents' rights over the suit lands got extinguished.

9. It is true that after hearing the parties herein the court made a finding that the plaintiff had proved his case on a balance of probabilities and gave judgement in his favour as follows:

1. A declaration that the defendants right over title NO.NYANG'ORI/GIMARAKWA/216 AND 217 got extinguished by adverse possession

2. A declaration that upon expiry of 12 years the defendants held and currently hold the said pieces of land in trust for the plaintiff

3. That the Plaintiff/Applicant be declared the owner of Land Parcel Nos. NYANG'ORI/GIMARAKWA/216 AND 217 and to which he is entitled to by virtue of adverse possession and which the defendants /respondents be ordered to transfer the said suit land to the Plaintiff/Applicant within the next 0o(ninety)d days from the date of this judgement and in default the Deputy registrar to sign the transfer documents.

4. No order as to costs.

10. There is no evidence in the Application as to when and how the Respondents entered the suit lands. Whether the Respondents were on the suit lands as the trial proceeded and the Applicant testified that he had exclusive possession or whether they entered after delivery of the judgement or never entered at all are questions not answered by the Application.

11. It is a settled principle of law that a party is bound by its pleadings see case of **independent electoral and boundaries commission & another –vs- stephen mutinda mule & 3 others [2014] eklr** where the court held that;

**‘as the authorities accord with our own way of thinking, we hold them to be the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.’**

12. The pleadings filed by the Applicant so far show that he has had exclusive possession of the suit land and enjoyed all rights of ownership since the year 1978. There was no prayer for eviction and no order for the same in the Judgement.

13. The Application for eviction of the Respondents from the suit lands is therefore a departure from the Applicant's existing pleadings. It is inconsistent with the judgement and decree. The same is unfounded as it is not supported by any evidence of the Respondents' entry onto the suit lands.

14. For the above stated reasons the court finds that the Application is unmerited and dismisses the same. Each party to bear its own costs.

15. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT VIHIGA THIS 22ND DAY OF OCTOBER 2021.**

**E. ASATI**

**JUDGE**

In the presence of

For the Plaintiff/Applicant

For the Respondents

Court Assistant; Ajevi

**E. ASATI**

**JUDGE.**