



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 82 OF 2019**

**MICHAEL MUGERA KIHUGWA**

**ZAKIEL ODIRA LUKE.....PLAINTIFFS**

**VERSUS**

**HESBON OBOTE VIKIRU.....DEFENDANT**

**JUDGEMENT**

This is the application of the plaintiffs who are entitled to the whole of land parcel L.R. Kakamega/Kegoye/35 measuring approximate 0.32 ha designated on map sheet No. 10 by adverse possession and for reasons set out in the affidavit of the applicants filed herewith and other reasons for determination of the following issues and make orders as follows:-

- (a) A declaration that the respondent holds the land-Kakamega/Kegoye/35 in trust for and on behalf of the applicants.
- (b) A declaration that the applicants acquired the rights/interest including ownership of the land by the operation of the law, adverse possession in the land.
- (c) A declaration that Birisira Mideva Ubwayo rights/interest had extinguished by operation of the law and had no rights/interest to transfer the land to the respondent.
- (d) An order that the whole land be transferred to the applicants.
- (e) An order that the respondent do execute all relevant transfer documents, transferring the land to the applicants in default the Deputy Registrar of this court be authorized to sign the same.
- (f) An order that the respondent do pay costs of the transfer and this suit.

PW1, the 1<sup>st</sup> plaintiff testified that he was born in 1973 and has since resided on the suit land together with his brother the 2<sup>nd</sup> plaintiff. That in 1973 the land was registered in the name of Lubai Cheieri now deceased who was his grandfather's sister. His grandfather Kanzika Kamarichi is now deceased. Prior to her death the plaintiffs were allocated the suit land and they settled there. In 2010 they agreed to commence succession proceedings only to discover it was registered in the name of the defendant. They took the matter to the tribunal which ordered the title to be cancelled and the order was adopted by the court. The defendant appealed to the Provincial Appeals Committee and to the High Court HCCC No. 177 of 2010. He produced all the proceedings as exhibits. PW2 the 2<sup>nd</sup> plaintiff corroborated his evidence. PW3, 4, 5 and 6 all stated that the plaintiffs reside on the said land and it belongs to them. DW1 testified that he inherited the suit land from his grandmother and it was transferred to him in 2006. He stated that he was awarded the land by the High Court in Kakamega Case No. 177 of 2010. The matter is now on appeal. DW2 and DW3 corroborated his evidence.

This court has considered the evidence and the submissions therein. DW1 testified he was awarded the land by the High Court in Kakamega Case No. 177 of 2010. The matter is now on appeal. The plaintiff's admit that the said suit exists. The issue as to whether or not this suit is res judicata or sub judice is therefore a preliminary issue to be determined even before going into the merits and the 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 plaintiffs submitted, that Vihiga Division Land Disputes Tribunal awarded the suit land to the plaintiff vide Case number 46 of 2010. The award was adopted in Vihiga Senior Resident’s Magistrates Court Misc Application No. 32 of 2010 (PEx6 and DEx2e). The defendant went to the Provincial Land Disputes Appeals Committee and lost the appeal (PEx4). He then went to the High Court in HCCC No. 177 of 2010 and won the appeal. The judgement was produced as an exhibit by both the plaintiffs and the defendant. Indeed the parties are similar and so is the subject matter. I find that this matter is res judicata Kakamega High Court HCCC No. 177 of 2010. This suit is therefore struck off with costs to the defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> FEBRUARY 2020.**

**N.A. MATHEKA**

**JUDGE**