



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 197 OF 1992

GEORGE A. ODHIAMBO.....PLAINTIFF

VERSUS

CHARLES INDIRI (deceased).....DEFENDANT

RULING

The application dated 21st April 2020 was filed by **GEORGE A. ODHIAMBO**, who sought an Injunction to restrain the family of **CHARLES INDIRI** (Deceased) from entering upon, working on, or in any other way interfering with the Plaintiff's right of proprietorship of the suit property, **L.R. NO. EAST GEM/NYAMNINIA/736**.

1. The Applicant also sought an order directing the **OCS**, Yala Police Station to execute the orders issued by the Court.
2. On 29th April 2020 the Law Firm of **N.E. MOGUSU & ASSOCIATES** filed Grounds of Opposition, which was in the following terms;

“1. This is a land matter. The High Court has no jurisdiction to preside over it.

2. Judgment was delivered herein.

For all intents and purposes, the Court is functus officio and cannot Entertain any extra application.

3. The Judgment herein was delivered more than 20 years ago. For all that time, the family of the deceased has been resident on land parcel NO. EAST GEM/NYAMNINIA/736 whereon the deceased was buried. The title of the plaintiff to the said land, if any at all was extinguished by dint of operation of Sections 7 and 17 of the Limitation of Actions Act, Cap 22. Accordingly, the Plaintiff is a trespasser who deserves to be jailed.

4. A judgment of more than 12 years is not enforceable. The judgment expired by operation of time. The Plaintiff's application should thus be dismissed with costs.”

3. On 29th April 2020 the Court gave Directions for the hearing of the application.
4. The Plaintiff was allowed 14 days to file and serve his submissions. Thereafter, the Respondent would file and serve his submissions, within 14 days of service of the Applicant's submissions.
5. Although the Respondent was served with the Applicant's submissions on 13th May 2020, he had not filed his own submissions by 3rd June 2020.
6. Indeed, although both parties were in court on 29th April 2020, when the matter was adjourned to 3rd June 2020, the Respondent failed to attend court on 3rd June 2020.
7. This Ruling has thus been put together without the benefit of the Respondent's submissions. However, I derived some help from the Respondent's Grounds of Opposition dated 29th April 2020.
8. I have given due consideration to the application, within the context of the long history of the case.

9. As alluded to by the Plaintiff, the case herein was already heard and determined.

10. On 18th October 2006, Mwera J., as he then was, delivered his judgment, after a full trial. The learned Judge had no doubt whatsoever, that the Plaintiff was the registered proprietor of the suit property.

11. Although the Defendants had asserted, at the trial, that the Plaintiff was registered as the proprietor of the land, for and on behalf of his brothers (Jotham Otieno Indiri and Charles Owala Indiri), the learned trial Judge held that the Plaintiff did not hold the land for and on behalf of his said brothers.

12. In his judgment the trial Judge noted as follows;

“During testimony this statute-bar issue was not brought up. However, the court assumed that quite probably, the 2nd defendant was pleading the doctrine of adverse possession to entitle him to a portion of plot No. 736. Whether in the alternative or not, this court observes that to plead a trust, the 2nd defendant would have done well to file a cross-claim with his defence.

But for the adverse possession bit he could only move the court by way of originating summons under Order 36 rule 3 (D) of the Civil Procedure Rules.”

13. After analyzing the evidence on record, the court arrived at the following conclusion;

“It was credible evidence by the plaintiff that he gave plot No. 734 to his elder and younger brothers (the defendants), to share between themselves, and he got No. 736 instead.”

14. A closer look at the judgment reveals that the Plaintiff had purchased plot No. 734, which was bigger than plot No. 736.

15. And the trial court made a finding as follows;

“Wanyanga wanted to sell plot No. 734, which was bigger than plot No. 736. The Plaintiff got it. But because it was bigger than No. 736, they agreed with his 2 brothers, the defendants and particularly the elder one, Jotham, in whose name plot 736 had been registered, to swoop this plot with No. 734. When that was done, the Plaintiff was registered over plot No. 736.”

16. The said agreement and the exchange happened whilst the Plaintiff was still working in Nairobi, whilst his brothers lived at home.

17. The trial Judge found that the Defendants continued tilling the suit property, although it was registered in the Plaintiff's name.

18. When the Plaintiff returned home, after retirement, his brothers refused to vacate his parcel of land. As the trial Judge noted, it was at that stage, and because of the Defendants' refusal to give the Plaintiff his parcel of land, that these proceedings were instituted.

19. The trial court ordered that the Defendants be evicted from the suit land, if they did not vacate within 90 days from the date of the judgment.

20. The trial court expressly pronounced itself thus;

“The orders of eviction will issue against the 1st and 2nd defendants to vacate plot No. 736. It belongs to the plaintiff. They are ordered to vacate it on their own or in the next 90 days due execution will issue.

The two are not to trespass on the subject land, either to cultivate it or otherwise.

Trespass to land is actionable per se’.

The claimant need not demonstrate damage. Trespass by itself is damage enough.”

21. In the light of the said judgment, this court is not being called upon to render another determination.

22. The Respondents did not lodge any appeal to challenge the Judgment. However, the Respondents made an application, seeking orders to the effect that the suit be marked as wholly compromised.

23. By the said application, the Respondents urged the court to direct that;

“..... the order given on 18th October 2006 be substituted, directing the District Land Registrar, Siaya, to proceed with sub-division and the plaintiff to hand over the original title deed, failure to which the two title deeds to be deemed as cancelled and the new two title deeds be issued.”

24. The application was heard and determined by Chemitei J. The learned Judge noted that;

“In regard to the 1st defendant’s widow, the plaintiff seemed to have been magnanimous enough to permit her perform burial rites of her husband and thereafter move to her parcel number 734.”

25. In his Ruling dated 26th October 2011, Chemitei J. made it clear that the Judgment delivered by Justice Mwera still stands. In the event, the Defendants’ application was dismissed, and the Court made it clear that the Judgment of the court has to be enforced.

26. I hold the considered view that the Respondents were being extremely cheeky, by suggesting that the Plaintiff was a trespasser, who ought to be jailed. That is a most unfortunate attitude.

27. The Plaintiff holds a Decree, against which no appeal has been lodged. He is fully entitled to the fruits of the Decree.

28. On 13th June 2012 Hon. Lucy Gitari CM (as she then was), expressed herself thus, when handling a Notice To Show Cause;

“I find that there is nothing on record to prevent the execution of the judgement.”

29. In my considered view, the Judgment remains as valid today, as on the date it was delivered.

30. The Plaintiff cannot have been converted from a lawful proprietor, who was recognized by law, into a trespasser on his own property.

31. The magnanimity of the Plaintiff, when he permitted the widow of the 1st Defendant to conduct funeral rites on the suit property, did not and could not have varied, set aside or in any other way diminished the Judgment.

32. This court refuses to give a seal of approval to the provocative and unlawful actions of the Respondents.

33. I find that the said Respondents, if they should persist in their utter disregard of the Judgment, must be forcibly removed from the suit land.

34. If the court permitted the Respondents to remain on the suit property, I would be abetting the Respondents contempt of the court.

35. Accordingly, the Respondents are ordered to immediately vacate the suit premises.

36. In the event that they or their agents, servants, children or any other relative should not have moved out of the suit premises within the next 7 Days, (from the date his order is brought to their attention), the Plaintiff may move the court for the twin orders for;

a. Eviction; and

b. Committal to Civil Jail, for being in contempt of court.

37. I reiterate what has been stated previously in this case: Litigation must come to an end.

DATED, SIGNED at DELIVERED at KISUMU This 10th day of September 2020

FRED A. OCHIENG

JUDGE