

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 347 OF 2014

THOMAS INDANGASI.....PLAINTIFF

VERSUS

WILLIAM MUDANYA IDAMBO.....DEFENDANT

JUDGEMENT

The plaintiff avers that at all material times, he is the registered proprietor of land parcel number Tiriki/Hamisi/"A"/311. That during the year 1998, the defendant and his mother Ziporah Munyasa Idambo and his brother Albert Mudanya Idambo offered land parcel number Tiriki/Hamisi/"A"/311 for sale to the plaintiff. That the defendant and his said siblings refused to grant the plaintiff vacant possession and failed to transfer the land to the plaintiff. That the plaintiff was forced to sue for refund of purchase price of Ksh. 180,360/= in Kakamega CMCC No. 320 of 2000 whereby the court ordered that the defendants do refund him the money. That the defendant and his siblings were unable to satisfy the decree in CMCC No. 320 of 2000 and any effort to put him in civil jail failed as the court was of the view that the plaintiff could sale land parcel number Tiriki/Hamisi/"A"/311. That the plaintiff thereupon filed a citation in Kakamega High Court Citation Cause No. 23 of 2006 and the defendant and his siblings failed and or neglected to enter appearance. That hence the plaintiff filed succession cause number Kakamega HCCC No. 756 of 2007 and the land was duly transmitted to him on 11th August, 2009. That the defendant is aware of the fact that the plaintiff is the registered owner of land parcel Tiriki/Hamisi/"A"/311 but he has refused to vacate the same despite notice demanding that he does so. The plaintiff has therefore suffered loss and damages and prays for an eviction order against the defendant, his agents, personal representatives and employees from land parcel number Tiriki/Hamisi/"A"/311. The plaintiff prays for the following orders:-

- (a) Eviction of the defendant, his employees, agents and personal representatives from land parcel number Tiriki/Hamisi/"A"/311.
- (b) Costs of this case.
- (c) Any other order the court may deem fit and just.

The defendant categorically denies that the plaintiff is the registered proprietor of L.R. No. Tiriki/Hamisi/'A'/311, but instead holds that the said parcel of land is registered in the name of his late father, one Javan Indambo Milimu. That in the alternative and without prejudice to any pleadings hereof, the defendant holds that if indeed the plaintiff is the registered proprietor of the said parcel of land, then the same was done fraudulently, by suppression of material facts, and most importantly, without reference to either the defendant or his family members. The defendant holds that he has never been aware of Kakamega CMCC No. 320 of 2000 or any other civil or criminal suits involving the plaintiff and that further, the defendant maintains that he has never received the sum of Ksh. 180,360 or any other sums of money whatsoever, from the plaintiff or any other person in connection with any transactions concerning L.R. No. Tiriki/Hamisi/'A'/311 or any other parcels of land. The defendant holds that if judgment was indeed entered against him in Kakamega CMCC No. 320 of 2000 (which cause he still maintains that he is unaware of), then the said judgment cannot hold in law as it purports to enforce an agreement which is null and void an initio. The defendant denies knowledge of the said causes and avers that he has never been personally served with documents of the said proceedings, and the defendant shall during the proceedings hereof, applied to stay this suit in order to revoke the grant issued in Kakamega H.C. Succession No. 756 of 2007.

This court has considered the evidence and the submissions therein. The defendant failed to attend court to give oral evidence. The plaintiff avers that he was forced to sue for refund of purchase price of Ksh. 180,360/= in Kakamega CMCC No. 320 of 2000 whereby the court ordered that the defendants do refund him the money. That the defendant and his siblings were unable to satisfy the decree in CMCC No. 320 of 2000 and any effort to put him in civil jail failed as the court was of the view that the plaintiff could sale land parcel number Tiriki/Hamisi/"A"/311. That the plaintiff thereupon filed a citation in Kakamega High Court Citation Cause No. 23 of 2006 and the defendant and his siblings failed and or neglected to enter appearance. That hence the plaintiff filed succession cause number Kakamega HCCC No. 756 of 2007 and the land was duly transmitted to him on 11th August, 2009. 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.”

I have perused the proceedings of the above mentioned cases produced as exhibits and indeed find that the parties are similar and so is the subject matter. I find that this matter is res judicata Kakamega CMCC No. 320 of 2000 and Succession Cause number Kakamega HCCC No. 756 of 2007. This suit is therefore struck off with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE