

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

ELC CASE NO. 209 OF 2012

ALI KATANA MWATSUMA.....PLAINTIFF

-VERSUS-

MBARAK ISLAM ABEID.....DEFENDANT

RULING

1. The plaintiff herein Ali Katana Mwatsuma filed this suit against the defendant Mbarak Islam Abeid for a claim of adverse possession. The Defendant filed a replying affidavit to the originating in which he raised a defence that he had sued the present plaintiff in Mombasa CMCC 2592 of 2010 which is concluded.
2. The plaintiff denied he has ever been sued by the Defendant. He denied he is known as Samini Katana Tsuma and that Samini Katana Tsuma and Ali Katana Mwatsuma refers to two different persons.
3. The defendant insisted the two names belong to the plaintiff. To buttress this allegation, the Defendant called the area assistant Chief to identify the plaintiff. Mr Omar Bakari is a retired senior assistant chief for Mwakirunge village where the suit plot is situated. He identified the plaintiff whom he said goes by the nick name of “Sami”. He said he knows the home of the plaintiff as he has been a resident of his sub-location for a long time. Mr Omar also knows the Defendant owns a plot which neighbours the plaintiff's plot.
4. Mr Omar confirmed that there had been a dispute over this plot between the parties herein arbitrated in his office and that the plot in dispute is No 505. The Defendant requested this Court to peruse file No CMCC 2592 of 2010 to confirm these averments.
5. I have perused the records in CMCC 2592 of 2010 where the present Defendant sued a Mr Samini Katana Tsuma over plot No Mombasa/MN/11/505 and judgement given in his (Defendant's) favour on 18th April 2013. This defendant got an order to have the structure encroaching on his plot demolished.
6. The present suit is also premised on a claim over plot No MN/11/505 which is registered in the defendant's name according to the postal search annexed by the plaintiff. The plaintiff's claim if granted would amount to setting aside the judgement rendered in favour of the Defendant.
7. Since the plaintiff has not denied that he is known by a nickname of “Sami” as stated by the chief under oath, I am convinced that he is the same person sued in CMCC 2592 of 2010. However if the two names refer to different parties, then the proper forum for the plaintiff to commence his claim is to apply to be joined as a party in CMCC 2592 of 2010 and set aside that judgement before this suit proceeds. I do hold so because the orders obtained in 2592 of 2010 has some link to the plaintiff's claim.
8. To proceed with this matter as it amounts to abuse of the Court process as the subject matter is the same i.e the Defendant's claim on plot 505 being encroached and the plaintiff's claim that he has lived on the suit land. His living on the suit land might be what constitutes encroachment in the Defendant's view. The Court of competent jurisdiction has rendered a finding after hearing the matter.

9. In conclusion, this matter is ordered struck out with no order on costs. The plaintiff advise to move the Court in Mombasa CMCC 2592 of 2010 as provided in law.

Ruling dated and delivered at Mombasa this 5th day of May 2016

A. OMOLLO

JUDGE