



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT & LAND CASE NO. 513 OF 2014

JIMMY HABEL MKIMBO -----PLAINTIFF

VERSUS

SOLOMON JUMA AMBUNYA-----DEFENDANT

JUDGMENT

By a Plaint dated 13/7/2010 and filed in court on 14/7/2010 Jimmy Habel Mkimbo (the plaintiff) filed a suit against Solomon Juma Ambunya (the defendant) seeking an order for immediate eviction of the defendant and his family members or his agents from parcel of land No. SOUTH KABRAS/SHAMBERERE/367 (the suit land).

The plaintiff averred that he was the absolute registered owner of the suit land measuring approximately 12.6 Hectares. That the defendant by himself or his family members are illegally occupying and using the whole parcel of land and has refused to voluntarily vacate the land despite the fact that they have no legal claim over the said property after the defendant claims for adverse possession through HCCC No. 167 of 2000 (O.S.) was dismissed on 29/6/2010.

The defendant filed a defence to the plaintiff's claim dated 2/7/2012 and although he admitted that there was civil suit HCCC No. 167 of 2000 which was decided in the plaintiff's favour, the defendant pleaded the defence of *res judicata* stating that HCCC No. 167 of 2000 involved same parties, related to same subject matter and since the plaintiff herein did not raise a counter-claim in that suit, the plaintiff's present suit was *res judicata*, and therefore, incompetent.

The suit was heard by Hon. Mr. Justice Chitembwe and after both the plaintiff and defendant had testified, Hon. Mr. Justice Chitembwe recused himself from the case as he had heard HCCC No. 167 of 2000 (O.S.) involving the same parties. The case was to be heard by Hon. Mr. Justice Dulu, but it was not possible. In the process, counsel for the plaintiff took out Notice of Motion by which he sought to strike out the defendants defence notwithstanding that both the plaintiff and defendant had already testified in court.

When the matter came up before me on 1/10/2014 for mention, counsel for the plaintiff agreed to abandon the plaintiff's application dated 14/1/2014, while counsel for the defendant agreed to close the defendant's case. Both counsel then agreed to give oral submissions and thereafter I was to write a judgment based on the evidence already on record. Submissions were taken on 6/10/2014.

The plaintiff testified that he is the owner of parcel No. SOUTH KABRAS/SHAMBERERE/367. He told the court that the suit land was initially owned by the defendant's father and later by the plaintiff's father who has passed on. The plaintiff said that he got the title for the property on 3/7/2000 and produced it as PExh.1. The plaintiff further testified that he cannot access the land because the defendant has been

violent towards him. He told the court that the defendant sued him in HCCC. No. 167 of 2000 (O.S.) claiming to have acquired an interest in the suit land by way of adverse possession, but the suit was dismissed on 29/10/2010. He produced a copy of the judgment as PExh.2. He therefore asked the court to order that the defendant and his family who reside and work on the land be evicted from his parcel of land.

After the plaintiff closed his case, the defendant took the witness stand and told the court that he and his family live on the suit land although he knows that the land belongs to the plaintiff. He testified that he does not know how the plaintiff became registered as the owner of the land yet the land was originally registered in his father's name, one NAMBWAYA MUSUNGU. It was the defendant's testimony that he has cultivated the land for long and currently he is growing crops such as Bananas, Cassava, Cane, Potatoes and Maize. He maintained that he has lived on the land since childhood and the plaintiff, though registered as the owner of the land, has neither lived on the land nor used it. The defendant further stated that although he lost in HCCC No. 167 of 2000 (O.S.), the plaintiff never filed a counter claim to that suit, and that he has since filed a Notice of Appeal signifying his intention to appeal against the judgment delivered in HCCC No. 167 of 2000 (O.S.). He therefore asked the court to dismiss the plaintiff's suit, and find that the land belongs to him.

Mr. Amasakha, counsel for the plaintiff, addressed the court on behalf of the plaintiff and submitted that the plaintiff is the absolute owner of the suit land measuring approximately 12.6 Hectares and referred to Exh.1 (copy of Title Deed) produced by the plaintiff. He also referred to P.Exh.2, a copy of the judgment in HCCC No. 167 of 2000 delivered on 29/6/2010. He emphasized that the court having dismissed the defendant's claim for adverse possession, the defendant lost any legal right, claim or interest over the plaintiff's suit land and became a trespasser. The learned counsel submitted, that the dismissal of the defendant's claim for adverse possession over the plaintiff's parcel of land, entitled the plaintiff to bring an action seeking to evict the defendant from the suit land. According to counsel, the Tort of trespass arose upon the court's declaration that the defendant had no cause of action. The defendant's action is a continuing tort until the decision of the court is rendered herein, counsel submitted.

Regarding the defendant's defence, Mr. Amasakha submitted that the defendant had admitted that he lost the suit against the plaintiff and the defendant's action of filing a Notice of Appeal cannot hold back the plaintiff's right. He also submitted that the defendant's defence that the plaintiff's suit is *res judicata* is unfounded and according to counsel, the plaintiff did not have to file a counter claim in HCCC No. 167/2000 (O.S.). He referred to **HCCC No. 275 of 2013 NANCY MWANGI T/A WORTHLIN MARKETERS -VS- AIRTEL NETWORKS (K) LTD. (formerly CELTEL (K) LTD.) & OTHERS** to buttress his arguments. He, therefore, urged the court to find in favour of the plaintiff.

Miss Rauto, counsel for the defendant, submitted on her part that the plaintiff's suit is *res judicata*. She referred to Section 7 of the Civil Procedure Rules, arguing that the parties in the present suit were same as those in the former suit, that the subject matter was same as it related to land parcel No. SOUTH KABRAS/SHAMBERERE/367 and that the issues were also similar. She maintained that the plaintiff's remedy lay in HCCC No. 167 of 2000 (O.S.) but since he did not file a counter-claim in that suit, the present suit is *res judicata*. She referred to a decision in **Ogina -vs- Omondi Nairobi Land and Environment Case No. 515 of 2013** which according to her gave weight to her arguments. According to Miss Rauto, the decision in HCCC No. 167 of 2000 (O.S.) did not declare the plaintiff herein as the owner of the suit land. Counsel argued, that it would be dangerous for the court to grant an eviction order against the defendant who, according to learned counsel, has been staying on the land since 1964. She further submitted that the defendant has filed a Notice of Appeal against the judgment in HCCC No. 167 of 2000 (O.S.) and asked that the plaintiff's suit be dismissed with costs.

I have considered the evidence of the plaintiff and that of the defendant in support of their respective positions in this case. I have also considered rival submissions by counsel for both parties. The issues that arise for my determination are two, namely:-

1. Whether the plaintiff is the owner of the suit land and therefore, whether he is entitled to the relief

sought in the suit.

2. Whether the plaintiff's suit is *res judicata* and therefore should be dismissed.

The plaintiff testified that he is the registered proprietor of the suit land namely SOUTH KABRAS/SHAMBERERE/367 and produced the Title Deed as an exhibit. This fact of ownership is acknowledged by the defendant both in his defence and testimony. I have gone through the entire file to establish how the plaintiff became the owner of the suit land, and the answer to this is found in the judgment of this court (Chitembwe, J.) in HCCC No. 167 of 2000 (O.S.). Testifying in that court the plaintiff (who was the defendant) testified that his father ROBIN MKIMBO purchased the suit land in a Public Auction on 27/7/1977, after the defendant's father had failed to service a loan he had taken from Kenya Commercial Bank. When the plaintiff's father died, the plaintiff was registered as the owner by way of transmission and obtained a title to the land on 27/6/2000. As to the first issue, I find that the plaintiff is the owner of parcel number SOUTH KABRAS/SHAMBERERE/367.

The defendant took out an Originating Summons and filed HCCC No. 167 of 2000 (O.S.), asking the court to declare that he had acquired right over the suit property by operation of the law. After hearing the suit, the court (Chitembwe, J.) dismissed the defendant's claim in that suit. The plaintiff's right of ownership over the suit property, therefore, remained indefeasible.

Section 27 of the Land Registered Act Cap.300 (now repealed) which then governed the suit property provided as follows:-

“S. 27 – Subject to this Act –

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging to or appurtenant thereto.”

The current law governing land Registration in this country namely Land Registration Act (No.3 of 2012) contains a similar provision in Section 24. Section 26 of the Act further provides as follows:-

S.26 “The certificate of title issued by the Registrar upon registration or for a purchase of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme.”

The defendant herein acknowledges that the plaintiff is the registered proprietor of the suit land. He does not allege that the plaintiff acquired registration as the proprietor illegally, unprocedurally or through a corrupt scheme. Although the defendant alleges that he does not know how the plaintiff became the registered proprietor of the land, there is a finding of fact by a competent court, that the suit land was purchased by the plaintiff's father in a public auction after the defendant's father failed to service a loan advanced to him by Kenya Commercial Bank Ltd. which was exercising its statutory power of sale. After the plaintiff's father passed on, the plaintiff acquired registration through transmission. I do not find anything that vitiates the plaintiff's registration as proprietor of the suit property.

The second issue that I have to decide on is whether the plaintiff's suit is *res judicata*. The defendant has argued that the plaintiff's suit is *res judicata* that having failed to raise a counter claim in HCCC No. 167 of 2000 (O.S.) he cannot file the present suit. The defendant maintains that the issues in the former suit were similar to the present suit; that parties are the same and that the subject matter is the same. I agree that parties in HCCC No. 167 of 2000 (O.S.) and those in the present suit are the same. The subject

matter in the two suits relates to parcel No. SOUTH KABRAS/SHAMBERERE/367. However, the issues in the former and present suit are not the same. In the former suit, the defendant had sought a declaration that he had acquired a right in the property through adverse possession. That being an Originating Summons, the plaintiff who was the defendant in that suit could, not have filed a counter claim seeking an eviction order. After the defendant lost the suit, he remained a trespasser and the plaintiff was in order to file the present suit seeking to evict the defendant from his land.

In advancing her arguments, Miss Rauto, counsel for the defendant, cited a decision by this court (Gitumbi, J.) in NBI. *E & L Case No. 515 of 2013 OGINA –VS- OMONDI*. However, in that decision, an earlier application for injunction had been dismissed by Odunga J. and the application that Gitumbi, J. was considering was a replica of the one dealt with earlier. That is not the situation in the present case. Prayers in HCCC No. 167 of 2000 (O.S.) and those in the present suit are not similar. Neither were the issues canvassed in the former suit same as those in the case before me. I am fortified by the decision in *Gichu-ki –vs- Ghichuki 1982 KLR 285* where it was held that for *res judicata* to apply, the dispute between the same parties involving the same cause of action must have been previously adjudicated upon by a court of competent jurisdiction and no appeal was brought against that decision. In yet another decision, the Court of Appeal held in *Mwanthe –vs- Imaneve [1982] KLR 323* that for a matter to be *res-judicata*, the issues directly and substantially in issue in the suit must have been the same ones directly and substantially in issue before the court (in the former suit).

The matter before court in HCCC No. 167/2000 (O.S.) was in respect of a claim for adverse possession while the claim in the present suit seeks to evict the defendant from the suit land. These are two different issues which do not make the suit herein *res-judicata*. I find and hold that the plaintiff's suit is not *res-judicata*.

Miss Rauto raised yet another issue, submitting that the defendant had filed a Notice of Appeal against the impugned judgment (in HCCC No. 167/2000 (O.S.)). The much I can say is that a Notice of Appeal is not an appeal. It only signifies an intention to appeal. It cannot stop the plaintiff from pursuing his claim before court. As to the assertion that the defendant has been on the suit land for a long time and continues to cultivate the land, the answer to this is simple. To the extent that the defendant's claim in HCCC No. 167/2000 (O.S) failed, the plaintiff's right over the parcel of land remains indefeasible.

Accordingly, I enter judgment in favour of the plaintiff against the defendant as prayed in the plaint. The defendant, his family and or agents shall vacate the suit land namely SOUTH KABRAS/SHAMBERERE/367 within six (6) months from the date of this judgment and in default, they shall be forceably evicted. Costs of the suit to the plaintiff.

Dated and delivered at Kakamega this 15th day of October, 2014

E. C. MWITA

J U D G E