



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 29 OF 2012**

**SOLOMON KASUDI CHAGALA .....PLAINTIFF**

**VERSUS**

**RAMADHAN KIVAIRU ISINDU**

**YUSUF ACHONO ISINDU**

**IBRAHIM KASUDI CHAGALA .....DEFENDANTS**

**JUDGEMENT**

This is the application of Solomon Kasudi, who claims for adverse possession of Land Parcel No. KAKAMEGA/SHISEJERI/564 for the determination of the following questions:-

- a. Whether the plaintiff and his family members have acquired adverse possession of land parcel No. KAKAMEGA/SHISEJERI/564.
- b. Whether the title jointly issued to the defendants in respect of Land Parcel No. KAKAMEGA/SHISEJERI/564 has been extinguished.
- c. Whether the title issued to the defendants and their registration thereof should be cancelled.
- d. Whether the plaintiff should be registered as the proprietor of the said parcel.
- e. Whether the defendants should be condemned to bear the costs of this originating summons.

The plaintiff stated that the defendants are his paternal brothers. That he has been on land parcel no. KAKAMEGA/SHISEJERI/564 since 1953 when he was born. That the said land was demarcated in 2001 by the area chief into 3 portions according to how they are staying but it has not been duly surveyed. That the above parcel is ancestral land traced to his grandfather Isoke Likhoyi who died during the colonial times before registration of land. He was in fact buried on this land. That their grandfather married one wife by the name Andolo who gave birth to a son by the name Magondo Isohe and they were living on the suit land. That on the death of Shivairu the son of the first registered proprietor of the suit land one Hassani Isindu their grandfather inherited his mother by the name Imali Likongolo and as a result their father Samwel Chagala Isohe was born. That Imali and the said Hassani Isindu continued staying on a separate land where their father was buried while their grandfather decided to stay on the suit land with their father. That when his father became an adult he married one wife by the name Miriam Anzuki their mother and they continued staying on the suit land and got children namely Dishon Amuyunzu, Catherine Libese (deceased), Harun Kitungulu who died in 2006 and was buried on the suit land but is survived by a wife, 2 sons and 3 daughters all living on the suit land, himself with his wife and family, Reuben Samwel Isohe with his family all living on the suit land. That during adjudication their mother got mentally ill, Hassan Isindu took advantage of the fact that they were minors and obtained first registration of the suit land when their father died sometimes in 1958. That nevertheless he never occupied and or possessed the suit land upto the time he died. That since he was born in 1953 stayed peacefully and continuously used and lived on the suit parcel together with other family members for over a period of 12 years including establishing a homestead and cultivating the suit parcel to date. That he is making a claim of ownership based on adverse possession of the suit land.

The 3<sup>rd</sup> defendant/respondent testified and submitted that the said application is res judicata as all the issues between the applicant and respondent had been fully determined by the court in KAK. MISC. AWARD NO. 27 OF 2011 (copy of the order and tribunal proceedings are PEx 3,4,5 and 6). The defendants are all brothers and the suit land is registered in their name (DEX 2).

This court has considered the case and submissions therein. The defendant have raised the issue that this suit is res judicata as in KAK. MISC. AWARD NO. 27 OF 2011 the parties and the subject matter was the same. The issue as to whether or not this suit is res judicata as a preliminary one and this court has to make a determination before going into the merit and demerits of this 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.”

This court has taken the liberty to peruse the pleadings Kakamega MISC. AWARD NO. 27 OF 2011 (copy of the order and tribunal proceedings PEx 3,4,5 and 6) and indeed find that the parties are the same and subject matter is the same. The order of the court dated 12<sup>th</sup> March 2012 still stands and has not been set aside and hence has finalized this matter. With this finding there will be no need to go into the merits and demerits of this case. I find that this matter is res judicata. For these reasons this suit is struck out with costs to the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> MAY 2019.**

**N.A. MATHEKA**

**JUDGE**