



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CASE NO. 48 OF 2019

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION OF DEFINED PORTION ON LAND PARCEL SOUTH TESO/OSURETTE/202 BY JOHN OMUSE

= BETWEEN =

JOHN OMUSE IMUKATA.....APPLICANT

= VERSUS =

SIFROSA AKUMU OBURON (Being the Administratrix

Of the estate of OBARASA MATIENGI (deceased).....RESPONDENT

R U L I N G

1. The applicant has moved the court vide his motion dated 15th July 2019 seeking for the following orders:

(i) Spent

(ii) Spent

(iii) THAT the Land Registrar Busia County do place a prohibitory order on Land Parcel No. South Teso/Osurette/202 against disposal pending determination of suit.

(iv) THAT the cost of this application be in the cause.

2. The application is supported by the applicant's affidavit and the grounds listed on its face which include:

(a) That the applicant has been in actual possession/occupation of Land No. South Teso/Osurette/202 for over 60 years.

(b) That the respondent is in the process of disposing the suit land and such an action would make this suit be a mere academic exercise.

(c) That the applicant is desirous that this matter be heard and determined on merit.

(d) That the applicant stands to suffer great irreparable loss and rendered landless if the suit land is disposed together with his 50 descendants.

(e) That it is in the interest of justice that this application is heard urgently and on merit.

(f) That the applicant and his entire family reside on the suit land and depend on the land for their livelihood.

3. The application is opposed by the Respondent through her replying affidavit dated 22/8/2019. She deposed that she is the registered owner of the suit land South Teso/Osurette/202 having acquired the title after succeeding her father. That the applicant tried to revoke the grant issued to her unsuccessfully. The Respondent argues this suit is *res judicata* because the same issues were raised in the succession cause. She urged the court to dismiss the application.

4. The parties advocate rendered oral submissions which I have taken into consideration. The court frames the following two issues for determination:

(i) *Whether or not the application is res judicata.*

(ii) *Whether or not the application has merit.*

(iii) *Who bears the costs of the application?*

5. The Respondent submit that this application is *res judicata* the notice of motion dated 30th March 2017 filed in Busia CMC Suc. Cause No. 339 of 2016. The prayers sought in the previous application annexed as “SAO 3” were as below:

1. THAT this application be and is hereby certified as urgent and heard ex-parte at first instance.

2. THAT pending hearing and determination of this application interparties an order of injunction do issues against the petitioner from executing or implementing the Grant issued on 6/3/2017.

3. THAT Honourable Court be please to annul/revoke grant issued to the petitioner on 16/3/2016.

4. THAT the applicant/objector be enjoined as a Co-petitioner in this application.

5. THAT the applicant/objector be enjoined in this proceedings as beneficiaries together with others to be enjoined on the list of beneficiaries.

6. THAT this court do issue any and all such other orders as necessary in the circumstances of the case.

6. The orders of injunction sought in that motion were to subsist pending the hearing of the proceedings to annul the grant issued to the petitioner (Respondent). The current application before court is seeking injunction pending determination of the applicant’s claim to the land by way of adverse possession. The question I ask is whether the current claim was capable of being litigated in CMC Succession Cause No. 339 of 2016?

7. Section 7 of the Civil Procedure Act provides that for a suit/application to be rendered *res judicata*, the matter must have been in issue directly and substantially in the former suit 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.

8. Two questions come up for analysis in view of the provisions of section 7 of Civil Procedure Act. The first is whether or not the present claim of adverse possession could have been litigated in the Succession file. The second question is whether the Court trying/hearing the objection proceedings in the Succession Cause was/is competent to try the subsequent suit (i.e. claim for adverse possession). My answer to both questions is in the negative because the magistrate’s court is not clothed with jurisdiction to hear claims for adverse possession. Neither can a dispute concerning ownership of land be determined in a succession cause. Consequently an application premised on a new suit that could not be litigated in the former suit cannot be held to be *res judicata* the former suit. The orders sought in the motion dated 30th March 2017 were also distinct from the orders sought in the present application. My holding is that neither this suit nor the application is *res judicata* CMC Succession Cause No. 339 of 2016.

9. Is the application merited? The applicant deposed that he has lived on the land for over 12 years. That the Respondent has started the process of sub-dividing the land and disposing it to 3rd parties which action will render his family homeless and suffer irreparable loss. In response, Ms Sifrosa Akumu (The Respondent) deposed at paragraph 12 of her affidavit thus: **“That the applicant came to my father’s parcel of land in the year 1992 to take care of our sick mother and remained there and refused to move away after the death of our mother”**.

10. The Respondent thus confirms that the applicant is living on the suit land. The Respondent has also not denied that she has commenced the process of sub-dividing the suit land and selling to 3rd parties. If that process is allowed to proceed, the result is that the case will be rendered an academic exercise. I am therefore satisfied that the applicant has demonstrated that he has a prima facie case with a probability of success. I do therefore grant him the prayers as sought in number 3 of his motion with costs ordered in the cause.

Dated, signed and delivered at BUSIA this 24th day of October 2019.

A. OMOLLO

JUDGE