



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 116 OF 2016

GEOFFREY OMARIBA BOSIRE.....PLAINTIFF

VERSUS

MARY NYABOKE MAINA.....1ST DEFENDANT

NABOTH SAGWE B. OGETO.....2ND DEFENDANT

R U L I N G

1. The plaintiff vide a plaint dated 27th April 2016 filed in court on 28th April 2016 sought a declaration that land parcel LR Nos. **Central Kitutu/Monyerero/1483** and **1484** in the names of the defendants respectively were unlawfully acquired and ought to be cancelled and the title register amended accordingly to revert to the original title number **Central Kitutu/Monyerero/182**. He further sought orders that the defendants yield vacant possession. The 1st defendant filed a defence and counterclaim asserting ownership to land parcel number **Central Kitutu/Monyerero/1483** which she claimed to have occupied for over 20years and thus entitled to ownership by virtue of the doctrine of adverse possession.

2. The court on 29th June 2016 ordered that **“the parties observe the present obtaining status quo and that there should be no sale and/or transfer of the suit properties until the suit is heard and determined.”** The 2nd defendant upon being served filed a statement of defence dated 10th February 2017 where he admitted that he was erroneously registered as owner of **LR No. Central Kitutu/Monyerero/1484** and offered to retransfer the same to the plaintiff. A consent judgment was consequently entered against the 2nd defendant on 13th February 2017 requiring him to transfer land parcel number **Central Kitutu/Monyerero/1484** to the plaintiff.

3. The court on 22nd June 2017 owing to contestation between the plaintiff and the 1st defendant as to who was entitled to harvest the mature trees on land parcel **Central Kitutu/Monyerero/1483** directed that the local chief investigate and advise the court who between the parties is entitled to the trees. The chief filed a report in court vide a letter dated 27th July 2017 where she confirmed that it was the plaintiff's husband who planted the trees presently standing on the suit property. On the basis of the report by the chief, the court on 31st July 2017 made an order allowing the 1st defendant the use of the trees growing on land parcel **1483**.

4. The plaintiff filed a Notice of Motion dated 3rd August 2017 under Sections 3 and 3A of the Civil Procedure Act, Order 40, Rule 1 and 2 and Order 50, Rule 1 of the Civil Procedure Rules seeking the following orders:-

- 1. That orders made on 31st July 2017 be stayed and/or set aside.**
- 2. That Anyona Mbunde advocate be disqualified from handling the matter on behalf of the defendant.**
- 3. That costs be provided for.**

The application is grounded on the following grounds set out on the body of the application:-

- (i) That the court gave status quo position on 29th June, 2016.**
- (ii) That the chief's letter is not clear as to minutes of the day.**
- (iii) That Anyona Mbunde Advocate was instructed by the current plaintiff and filed a suit against the current defendants in the High Court Kisii ELC No. 456 of 2014.**

5. The plaintiff's application is further supported on the affidavit sworn in support by the plaintiff dated 3rd August 2017. The plaintiff deposes that if the 1st defendant is allowed to harvest trees on the suit land the status quo will be interfered with to the detriment of the plaintiff should he be successful in the suit. The plaintiff further deposes that he instructed Anyona Mbunde Advocate in 2014 to file suit against the current defendants and that he filed the suit Kisii HC ELC No. 456 of 2014 as per plaint, verifying affidavit, witness statement, plaintiff's list of documents, pre-trial questionnaire and payment receipt annexed and marked "GOB 2a, b, c, e, 3 and f". The plaintiff wants Mr. Anyona Mbunde disqualified from acting for and representing the defendants as he is seized of information which he obtained from the plaintiff which he could use to the prejudice of the plaintiff.

6. The 1st defendant has sworn a replying affidavit in opposition to the plaintiff's application dated 11th September 2017. The 1st defendant deposes that when she was served with summons she gave instructions to the firm of Asati & Company Advocates to act for her. The 1st defendant further deposes that she has been informed by her advocate that ELC no. 456 of 2014 was dismissed by the court which would render the instant suit *res judicata*. She further deposes the plaintiff has not explained why he filed the present suit which is similar to ELC 456 of 2014 which he had filed earlier.

7. The court in the face of the allegations made by the parties regarding HC ELC No. 456 of 2014 *suo moto* requested the file to be retrieved from the court registry for perusal to be appraised of the status of the suit. These were the findings:

1. The suit was filed by the plaintiff on 24th November 2014.

2. The parties were the same as in the present suit.

3. The prayers sought in the plaint against the defendants were identical as in the present suit.

4. The plaint was drawn by the firm of Anyona Mbunde & Company Advocates.

5. There is no evidence of service of summons to enter appearance on the defendants.

6. The court on 1st February 2017 issued a Notice to Show Cause under Order 17 Rule 2 for the dismissal of the suit for want of prosecution.

7. On 21st March 2017 the matter was listed before Kullow, J. when Anyona Advocate appeared for the plaintiff and applied for the suit to be withdrawn. An order was made withdrawing the suit with no order as to costs.

8. The parties argued the application dated 3rd August 2017 by way of written submissions. I have reviewed the pleadings, the record and the submissions filed by the parties. Quite clearly the plaintiff/ applicant has not laid any basis upon which the court can vary or set aside its order of 31st July 2017 allowing the 1st defendant to utilize the trees on the suit property. The court before making the said order made an inquiry as to who between the plaintiff and the 1st defendant had a right to the trees. The local area chief carried out investigations and reported that the trees were intact planted by the husband of the 1st defendant which therefore entitled the 1st defendant to utilize the same. The order of status quo of 29th June 2016 was merely intended to preserve the suit property and that is why it was specific that there was to be no sale and/or transfer of the property until the suit was heard and determined. That position would remain until the determination of who is entitled to the property. I therefore decline to vary or set aside the order of 31st July 2017 as I am urged to do.

9. As regards the prayer to disqualify Mr. Anyona Mbunde advocate from representing the defendants in the suit, I am persuaded that the prayer is merited. Mr. Anyona Mbunde advocate is definitely in a position of conflict he having represented the plaintiff in the earlier matter ELC No. 456 of 2014 where his law firm Anyona Mbunde & Co. Advocates drew the pleadings and filed the same on behalf of the plaintiff in that suit. It is the same person who is the plaintiff in the present suit but is now represented by a different law firm. I have looked at the plaint drawn by Anyona Mbunde & co. Advocates in the earlier suit and the same is virtually similar almost word for word to the plaint filed on behalf of the plaintiff in the present suit. For Mr. Anyona Mbunde advocate to have drawn the plaint in the earlier suit he must have taken instructions from the plaintiff and information was given to him. Information passed between a client and an advocate is confidential and ought not to be divulged except on the express authority of the client. Mr. Anyona Mbunde advocate ought not to have agreed to represent the defendants against his former client in the same subject matter. It amounts to professional misconduct to do so. What would prevent Mr. Anyona Advocate from using confidential information that he got or may have gotten from the plaintiff to the prejudice of the plaintiff?

10. The plea of *res judicata* raised by the defendants counsel is farfetched. The earlier suit was neither dismissed nor determined. As I illustrated earlier in this ruling the suit was withdrawn on the application of the same Anyona Mbunde advocate. For *res judicata* to apply the suit must have been finally determined and/or dismissed in circumstances where the filing of a fresh suit is precluded. Where a suit has been withdrawn the issues in the suit have not been determined on merits and hence the doctrine of *res judicata* would not be applicable. Of course the filing of the instant suit by the plaintiff when the earlier suit was pending was in abuse of the court process as it was in contravention of Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides as follows:-

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

11. The earlier suit ELC No. 456 of 2014 having been withdrawn without the same proceeding to hearing paved the way for the present suit to proceed to be heard. If the situation was that the earlier suit was pending the court would invariably have stayed the present suit or struck out the same altogether.

12. In the final result although I have disallowed the plaintiff's prayer for variation or setting aside of the court's order of 31st July 2017, I nonetheless allow the plaintiff's prayer for the disqualification of Anyona Mbunde advocate from continuing to act for and represent the defendants in the present suit as I hold and find that there would be a conflict of interest, he having acted for and represented the plaintiff in a similar matter previously. I make no order for costs and I direct that each party meets their own costs of the application.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 9TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyawencha for the plaintiff

Mr. Omwega for Anyona for the 1st and 2nd defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE