



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

E & LC NO. 37 OF 2014

MOSES MURIITHI WANGOMBE.....PLAINTIFF/RESPONDENT

-VERSUS-

BERNICE WAMUYU MUREITHI.....1ST DEFENDANT/APPLICANT

JOSEPH NJARAMBA WANDIMI.....2ND DEFENDANT/APPLICANT

RULING

1. On 22nd February, 2017 the applicant herein filed the notice of motion dated 20th February, 2017 seeking to strike out the suit herein, for being *Res Judicata* Nyeri CMC Award No. 46 of 2002 and for being vexatious, misconceived and an abuse of the process of the court.

2. The application is premised on the grounds that the defendant/respondent filed the suit herein after he realised that the report filed by the Land Registrar pursuant to the orders issued in Nyeri CMC Award No. 46 of 2002 was not favourable to him; that the respondent who in the previous proceedings claimed that the subject matter of the suit herein belonged to him has since changed that claim and now contends that he has become entitled to the same portion of land by adverse possession; that the current suit is *Res Judicata* the suit commenced in the lower court and an abuse of the process of court as it seeks to defeat the judgment therein.

3. The application is supported by the affidavit of the 2nd applicant, Joseph Njaramba Wandimi, sworn on 22nd February, 2017 in which in addition to reiterating the grounds on the face of the application, the deponent has annexed the following documents in support of the averments therein:-

(i) The award of the Land Appeals Tribunal, marked JNW-1;

(ii) Order of the court adopting the Appeals Tribunal, marked JNW-2;

(iii) Letter forwarding the Land Registrar's report ordered by the court pursuant to the award of the Appeals Tribunal which had been adopted as the judgment of the court; marked JNW-3;

4. In reply and opposition to the application, the respondent filed the affidavit he swore on 28th February, 2017 in which he contends that the suit is not *res judicata* as the issue of adverse possession raised in the current suit has never been tried or was not an issue for consideration in the previous suit and that the Tribunal lacked jurisdiction to hear and determine the issue of adverse possession.

5. Terming the application an afterthought, the respondent points out that on 16th June, 2015 the parties to this suit took directions on the hearing and disposal of the suit.

6. The application was disposed of by way of written submissions.

Applicants' Submissions

7. In the submissions filed on behalf of the defendants/applicants, reference is made to the case urged by the respective parties before the defunct Land Disputes Tribunal and the award made in respect thereof which has since been adopted as an order of the court.

8. It is pointed out that the respondent did not challenge the award of the Appeals Tribunal and the judgment made in respect thereof and submitted that the order issued in those proceedings is still valid.

9. The report of the Land Registrar filed pursuant to the judgment of the lower court adopting the award of the Appeals Tribunal is said to have resolved the dispute between the applicants and the respondent concerning ownership of the suit property.

10. Arguing that the suit herein is meant to defeat the course of justice by circumventing the report of the Land Registrar who found the respondent to have encroached on the applicants' land, the applicants have submitted that the respondent should not be allowed to change his case just because the Land Registrar's report is not favourable to him.

11. According to the applicants, by changing his claim merely because the report of the Land Registrar was not favourable to him, the respondent abused the court process.

12. Maintaining that the suit herein is meant to defeat the judgment of the lower court, the applicants urge the court to dismiss the suit herein with costs to them as the respondent still has an opportunity to challenge the report of the Land Registrar after it is read to the parties.

Respondent's submissions

13. On behalf of the respondent, it is admitted that the respondent's parcel of land, Nyeri Ngarengiro/5 has encroached into the applicants' parcels of land to wit Nyeri Ngarengiro/449 and 568 by 0.30 and 0.36 hectares respectively.

14. It is also admitted that there has been a dispute between the respondent and the applicants over the said encroachment and that the dispute culminated in the award and judgment referred to herein above.

15. Concerning the report of the Land Registrar which was filed pursuant to the award of the Appeals Tribunal and which was adopted by the lower court as its judgment, it is contended that the report was presented in court after the suit herein was filed.

16. The foregoing notwithstanding, it is submitted that the issue which forms the subject matter of this suit to wit whether or not the respondent has become entitled to the portions of land in question by adverse possession has never been an issue in the previous proceedings. Besides, it is submitted that the Tribunal had no jurisdiction to hear and determine the issue of adverse possession or even the issue presented before it for determination.

17. According to the respondent, the case herein is not a proper candidate for being summarily struck out as it raises real and trial issues.

Analysis and determination

18. From the pleadings filed in this motion and the submissions made in respect thereof, the issues for determination are found to be:-

- (i) Whether the suit herein is *res judicata* Nyeri CMC Award No. 46 of 2002?
- (ii) Whether the suit herein amounts to an abuse of the process of the court?
- (iii) What orders should the court make?

19. On whether the suit is *res judicata* Nyeri CMC Award No. 46 of 2002, applying the law on *res judicata* against the special circumstances of this case, I agree with the submissions by the respondent's counsel that the suit herein is not *res judicata* that preferred in the lower court. This so because the Tribunal lacked jurisdiction to determine whether or not the respondent had become entitled to the suit property on account of his alleged adverse possession of the parcels of land he has encroached into.

20. On whether the suit herein amounts to an abuse of the court process, while I agree with the applicants' that by bringing this suit shortly after realising that the report of the Land Registrar was unfavourable to him, the respondent was circumventing the outcome of the orders issued in the lower court, being of the view that the report of the Land Registrar did not take away the respondent's right to claim the subject matter of the dispute preferred before the Tribunal on account of adverse possession, I find the applicant's contention that the respondent's claim is an abuse of the process of the court to be unsustainable.

21. I say so because the right to claim land by adverse possession is a right enshrined in law.

22. By dint of the provisions of **Sections 7, 13 and 38** of the Limitation of Actions Act, Cap 22 Laws of Kenya, the right to claim right belonging to another person accrues to a person in occupation if that person is able to satisfy the conditions for acquiring land by adverse possession specified in the said provisions of the law.

23. In my view, in the circumstances of this case, the mere finding by the Land Registrar that the respondent has encroached on land belonging to the applicants did not take away the right of the respondent to urge a claim for adverse possession for the parcels he was found to have encroached into.

24. Whether or not the respondent will succeed in the claim for adverse possession is an issue to be determined upon considering the case to be urged by the respective parties during trial.

25. For the foregoing reasons, I find the motion herein to be lacking in merits and dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nyeri this 12th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Nderi for the plaintiff/respondent

N/A for the 1st applicant

Joseph Njaramba Wandimi 2nd applicant

Court assistant - Esther