



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 252 OF 2017

JULIUS BARASA BURUDI

ISAAC JOAB BURUDI

JACKSON WAMBUNYA

MACHONI WAMBUNYA

JAMES WAMBUNYA.....APPLICANTS/RESPONDENTS

VERSUS

JIMMY ABEL MKOMBO.....RESPONDENT/APPLICANT

RULING

This application is dated 20th November 2015 and brought under section 1A, 1B and 7 of the Civil Procedure Act and order 2 rule 15 (B), (C) and (D) and sub rule 3 of the Civil Procedure Rules seeking the following orders;

1. The application hereto be certified as urgent and be heard on a priority basis.
2. The purported originating summons filed herein be struck out and or be dismissed with costs.
3. The applicants/respondents above named be evicted forthwith from land parcel No.S/Kabras/shamberere/367 and any structures erected thereon be demolished.
4. The costs of this application be provided for.

The applicant submitted that he came to learn of the existence of this suit when he discovered that the land registrar at Kakamega had placed a restriction on land parcel No. south Kabras/Shamberere/367 on the basis of the orders issued herein. That he then instructed his current advocates who perused the file and advised him that the applicants had filed an originating summons herein dated 20th July, 2015 simultaneous with a Notice of Motion dated 20th July, 2015 under certificate of urgency on the basis of which the Deputy Registrar gave ex parte interim orders for a restriction to be placed on the suit parcel. That his said advocates further inform him that to date both the originating summons and the said motion have not been duly served upon them. That he has had legal disputes over the suit parcel for a period of well over 15 years now and he has thus been denied the enjoyment of the suit property since 27th of June, 2000 when he got registered as the absolute proprietor and was issued with a title deed thereof. A copy of the said title is annexed hereto and marked 'JHM-1'. That the suit parcel was first registered on 9th of July, 1973 in the names of one Ambunya Musungu. That it is well within his knowledge that the original owner stated above charged the suit property to secure a loan from Kenya Commercial Bank and when he failed to service the loan the property was duly sold through a public auction on 27th of July, 1977. That it is also within his knowledge that his late father Habil Robin Mkimbo is the one who bought the suit property and got registered as the proprietor on 24th of October, 1978. That when his father died in 1994 he succeeded his land vide succession cause No. 459 of 1998 filed in the High Court of Kenya at Kakamega and got registered as the absolute proprietor of the suit parcel on 27th of June, 2000 (annex hereto a copy of the relevant land register (Green card) as proof marked 'JHM-2'). That his late father had instituted a suit for eviction of the original owner vide Kakamega Principal Magistrate's Civil suit No. 37 of 1989 but both his father and the original owner died before the conclusion of the suit. That upon becoming the new registered proprietor of the suit parcel he instituted a case before the Malava Land Disputes Tribunal for the eviction of one Solomon Ambunya one of the family members of the said original owner and the said tribunal referred the matter to the High Court at Kakamega. That subsequently the said Solomon Ambunya filed suit against him by way of originating summons in Kakamega HCC No. 167 of 2000 (O.S) claiming adverse possession of the suit property. That on 29th of June, 2010 the High court made a finding that the plaintiff had not proved the claim of ownership of the suit property by way of adverse possession and dismissed the suit with costs to the defendant. A copy of the said judgment is annexed hereto and marked 'JHM-3'. That he then filed suit to evict the said Solomon Ambunya, his family and or

agents from the suit parcel on 14th of July, 2010 vide Kakamega Environment & Land Court Case No. 513 of 2014 and after substantive hearing of the suit the land court entered a judgment in his favour which was delivered on 15th of October, 2014 whereby the defendant, his family and or agents were ordered to vacate the suit land within 6 months from the date of the judgment and in default to be forcibly evicted. A copy of the said judgment is annexed hereto and marked 'JHM-4'. That on 11th of November, 2014 his advocates on record extracted a signed decree in terms of the said judgment and upon application they sought and were issued with orders for provision of security for the eviction on 9th of June, 2015. A copy of the said decree and order are annexed hereto and marked 'JHM-4 (a) and (b) respectively. That it is within his knowledge that on 2nd of July, 2015 Eshikhoni Auctioneers duly executed the said decree and order when the defendant including the applicants herein were evicted from the suit parcel and all structures illegally erected on the suit property were demolished. That it is within his knowledge that the applicants herein were on the suit property by virtue of leasing the suit property from the said defendant or upon invitation on the suit property by the said defendant who on account of the above judgments has been declared a trespasser and such the applicants cannot claim any independent rights and thus litigating under the title of the said defendant.

That the applicants have illegally re-entered the suit property upon being evicted thereof and this suit is an illegal attempt by them to validate their stay on the suit property. That the applicants should have moved the court to oppose the said eviction before Eshikhoni Auctioneers executed the said eviction in accordance with the orders of the land court. See a copy of the pictures taken by the auctioneers during the eviction exercise annexed hereto and marked 'JHM-5'. That the allegation then they were given an oral notice to vacate the suit property is a blatant lie and a deliberate concealment of material facts from the court. That in the premises this suit is an abuse of the due process of the court and is meant to deprive him the fruits of a valid judgment and bring about a multiplicity of suit on a matter already finally tried and determined by the courts.

The respondent submitted that none of the applicants in the originating summons has ever been sued by the respondent applicants herein in any court of law in respect of land parcel No. South Kabras/Shamberere/367. That I also they have been in occupation and are still in occupation of the said parcel of land at all material times from the period his alleged father was registered as proprietor up to and including the period the applicant in this application got registered after the death of his alleged father continuously and without any interruption. That they have never been party to Kakamega High Court civil suit No. 167 of 2000 as well as ELC No. 513 of 2014 and the respondents Annexures JHM3 and JHM4 speak for themselves. That they have also seen the decree of the court issued in ELC NO. 513 of 2014 dated 11th November, 2014 which does not touch on any of them as applicants in originating summons save for Solomon Juma Ambunya who was to be evicted with his family members only and state that none of the applicants in the originating summons is a member of the family of said Solomon Juma Ambunya. That court decrees are specific and that they cannot be executed against any party outside the decree otherwise that will climax in impunity and abuse of the court process. That the two houses exhibited by the respondent/applicant as annexure JHM5 belong to the said Solomon Juma Ambunya and not any of them as applicants in the originating summons. That originating summons herein against the respondent is not res judicata.

This court has carefully considered both the applicant's and the respondents' submissions and annexures herein. It is based on the supporting affidavit of Jimmy Habel Mkimbo and the grounds that, the court has no jurisdiction to hear the applicants' claim filed herein. There have been several court proceedings over the same land and the combined effect of the said proceedings and eviction of the applicants amounts to interruption of any alleged adverse possession of the suit parcel. The applicants ought to have obtained restraining orders when the respondent/applicant was enforcing the eviction orders obtained in the land court. The applicants do not have any legal right to claim on the suit parcel as they were trespassers on the suit land. The applicants have bought this suit to validate their illegal stay on the land perpetrated when they re-entered the suit parcel after they were evicted from the suit land through a valid order of the court as stated above. The suit filed herein is clearly an abuse of the due process of law and a violation of the legal principle that litigation must come to an end. The respondent/applicant herein has a right to enjoy the fruits of the judgment emanating from the due process of the law. The respondent/applicant is also the absolute registered proprietor of the suit parcel and it would be therefore unconstitutional and contrary to the law for him to continue being deprived user of his property.

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."

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. It is not in contention that a previous suit exists being **Kakamega HCC NO. 513 OF 2014, Jimmy Habel Mkimbo vs. Solomon Juma Ambunya**. The said suit dealt squarely with the same subject matter and was against the defendant by himself or his family members for illegally occupying the suit land, this has come out clearly on page one of the said judgement. The issue was one of ownership which is the same question in the present case. Res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy raised. Referring to the case of in the case of **Pop In Kenya Ltd & 3 Others vs. Habib Bank A.G. Zurich C.A. NO. 80 of 1988** where it was held quoting with approval the case of **Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581**.

“Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because of they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res-judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.”

In the case of **Henderson vs. Henderson (1843) 3 Hare 100 to 115** the same holding was reached that *“Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.”*

The applicants/respondents have not disclosed to this court that they were evicted from the suit land on 2nd of July, 2015 by Eshikoni auctioneers vide orders obtained in the High Court at Kakamega case No. 513 of 2014 when the court passed a judgment in favour of the respondent on 15th of October, 2014 and issued orders on 9th of June, 2015 for the OCS, Kabras Police Station to provide security for eviction. Indeed page 12 of the judgement stated that,

“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 land parcel No.S/Kabras/Shamberere/367 within six 6 months from the date of this judgment and in default they shall be forcefully evicted. Costs of the suit to the plaintiff”.

I find that, the suit is res judicata and in contravention of section 7 of the Civil procedure Act. I find this application has merit and I grant the following orders;

1. This originating summons filed herein be struck out.
2. The applicants/respondents are given 3 (three) months to vacate from land parcel No.S/Kabras/Shamberere/367 from the date of this ruling and in default they shall be forcefully evicted.
3. The costs of this application to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 29TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE