



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 65 OF 2013

THOMAS MUTERE KUSIENYA.....PLAINTIFF

VERSUS

JAMIN JUMA WEKESA

PATRICK MANYANDIO WEKESA

KEPHER WEKESA KHAMALA

CHARLES WECHENJE

FREDRICK MULONGO WEKESA

FREDDRICK KENYATTA WEKESA

GEOFFREY KHISA WEKESA

PHANICE OMULEYI

JUDITH MWACHI

KLEOPHAS MADEGWA

BENJAMIN WALUBENGO JAMIN

AGGREY ICHITWA

FRANCIS WEKESA.....DEFENDANTS

JUDGEMENT

This case is briefly that, at all material times, the plaintiff was and still is the absolute registered proprietor of the parcel of land designated as L.R. NO. KAKAMEGA/LUGARI/2079 containing by measurement approximately 12.1 hectares and the beneficial owner and administrator of the estate of the deceased Marko KusienyaSinino, the registered owner of land parcels Nos. KAKAMEGA/LUGARI/2076 and KAKAMEGA/LUGARI/2361 whose boundaries are clearly delineated on the ground. The plaintiff avers that he was enjoying exclusive, peaceful and quiet possession and use of land parcel L.R. Nos. KAKAMEGA/LUGARI/2079, 2076 and 2361 until February, 2013 when the defendants illegally, wrongfully, forcefully and without any colour of right, consent and or authority trespassed onto the parcels of land L.R. NOs. KAKAMEGA/LUGARI/2079, 2076 and 2361 and started ploughing and or working on the said parcels of land. The plaintiff has requested and pleaded with the defendants to stop ploughing the suit parcels of land and vacate the suit parcels of land in vain and the plaintiff's attempts to seek intervention of the local provincial administration have borne no fruits as the defendants have remained adamant and refused and or failed to vacate the same and continue in such refusal thus necessitating this suit. The plaintiff further avers that the defendants have threatened and intend, unless restrained by this court, to continue or remain in wrongful occupation of the suit parcels of land and or trespass thereon. By reasons of the defendants' acts of trespass the plaintiff has and continues to suffer loss and damage. Despite demand and notice of intention to sue having been issued to the defendants the defendants have adamantly and arrogantly refused, neglected and or otherwise failed to vacate the suit land. The plaintiff prays for judgment against the defendants jointly and or severally for orders that:-

(a) This honourable court does order and or declare that the plaintiff is the rightful owner of land parcels L.R. NO.S KAKAMEGA/LUGARI/2079, 2076 and 2361 and is entitled to exclusive, peaceful, quiet and unimpeded possession and use thereof and to issue an order that the defendants, their relatives, agents, servants, employees and or any other person claiming through them be evicted from the said parcel of land and all the structures, if any, erected on the suit land be demolished forthwith.

(b) This honourable court be pleased to issue a permanent injunction perpetually restraining the defendants either by themselves or through their relatives, employees, servants and or agents or any other person claiming under them from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on and or in any other manner dealing with land parcels L.R. NO.S KAKAMEGA/LUGARI/2079, 2076 and 2361 or interfering with the plaintiff's peaceful and exclusive ownership, possession and or use thereof.

(c) Costs of this suit and interest thereon.

(d) Any other or further reliefs deemed fit and just.

The defendants submitted that, the defendants did not get an opportunity to put in their evidence because of the misdirection on part of counsel that the matter was coming up for directions and that the court will peruse the following cases to ascertain whether the present suit is sub-judice or res-judicata namely:-

(a) Kakamega Misc. Award No. 106 of 2000.

(b) Kakamega HCCA No. 145 of 2003.

(c) Lugari Land Dispute Tribunal No. 9 of 2000.

They have brought these cases to the attention of the court because land parcel KAKAMEGA/LUGARI/2079, 2076 and 2361 were subdivisions of land parcel KAKAMEGA/LUGARI/101 which were the suit properties in the initial battle between the fathers of the present day parties hereby Wekesa Sinoino Alfunzi and Marko Kusienya Sinino. The award in Lugari Land Disputes Tribunal was adopted by the court in Misc. Award No. 106 of 2000 giving the 1st defendant's father 63 out of 80 acres that formed part of the original land parcel KAKAMEGA/LUGARI/101.

There is a grave danger if the court allows the plaintiff suit when there is already judgment by a court of law over the suit property that is awaiting conclusion. In the replying affidavit dated 3rd June, 2013 which is part of the court record they have shown that the land parcels herein were originally sub divided by the plaintiff's father on Marko Kusienya before he died and the defendants' father had lodged prohibitory orders even on the suit properties herein before the plaintiff undertook succession of Marko Kusienya Sinino. Therefore, even the process leading to the registration of the plaintiff to the suit properties is tainted by illegalities, irregularities and fraud. The fact that the defendant did not adduce evidence per se does not mean that the plaintiff is precluded from proving his case. He ought to prove his case nevertheless on a balance of probabilities. For the foregoing reasons they urge court to find and hold that:-

(a) That the present suit is both sub-judice and/or res-judicata.

(b) That the present suit is frivolous, vexatious and or abuse of the due process of this court.

(c) Condemn the plaintiff to pay the costs of this suit.

This court has considered the evidence and the submissions herein. The defendants submitted that this matter is both sub-judice and/or res-judicata the following cases;

1. Kakamega Misc. Award No. 106 of 2000.

2. Kakamega HCCA No. 145 of 2003.

3. Lugari Land Dispute Tribunal No. 9 of 2000.

In my opinion this court needs to determine this preliminary issue before going into the merits and the 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.”

On perusal of the files in the above cases I find that land parcel KAKAMEGA/LUGARI/2079 were subdivisions of land parcel KAKAMEGA/LUGARI/101 which were the suit properties in the initial battle between the fathers of the present day parties hereby Wekesa Sinoino Alfunzi and Marko Kusienya Sinino. The award in Lugari Land Disputes Tribunal which was adopted by the court in Misc. Award No. 106 of 2000 giving the 1st defendant's father 63 out of 80 acres that formed part of the original land parcel KAKAMEGA/LUGARI/101. The application in that matter is coming up on the 19th September 2018. Kakamega HCCA No. 145 of 2003 the appeal was allowed in favour of the Appellants/defendants herein to pursue their application in the Misc Application case in the judgement dated 18th April 2013. The plaintiff in this case confirmed that he was the administrator of the estate of one Mark Kusienya Sinino who was his father and the respondent in Kakamega HCCA No. 145 of 2003(having carried out succession vide Kakamega High Court Succession Cause No. 553 of 2009). The plaintiff then files this case on the 26th February 2013 knowing very well of the existence of the other cases namely Kakamega Misc. Award No. 106 of 2000, Kakamega HCCA No. 145 of 2003 and Lugari Land Dispute Tribunal No. 9 of 2000, touching on the same subject matter and the same parties. For those reasons this case is res judicata and sub judice and this court lacks jurisdiction it cannot go into the merits of this case. I therefore strike out this case with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE