



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 115 OF 2013

ABDALLA MAKOKHA KACHISA.....PLAINTIFF

VERSUS

JENIPHER EMIESO WESALA

ESEVI INDOSIO ENDIRI

MOHAMED WESTUKA WESALADEFENDANTS

JUDGEMENT

This is the application of Abdallah Makokha Kachisa who claims to have acquired by prescription and/or adverse possession of portion of land measuring/equivalent to two (2) acres out of L.P. NO. E/Wanga/Lubinu/1058 for determination of the following issues;

1. A declaration that the applicant right to recover a portion of land equivalent to two (2) acres out of L.P. No. E/WANGA/LUBINU/1058 is barred under the limitations of actions Act Cap 22 Laws of Kenya and his title therefore extinguished on grounds that the applicant has cultivated and extensively developed and has been in actual possession openly, peacefully and continuously for a period exceeding twelve (12) years without any interruption and exclusive of the respondents.
2. That there be an order that applicant be registered as the proprietor of a portion equivalent to two (2) acres out of L.P. E/LUBINU/1058 in place of the respondents.
3. That there be an order in form of an injunction restraining the respondents by themselves, their authorized agents, servants, assignees and/or anybody acting under their instructions from interfering with the applicant's peaceful utilization of the portion of land equivalent to two (2) acres in any manner whatsoever.
4. That the respondents be ordered to sub-divide the subject land and execute all the relevant transfer in favour of the applicant for land equivalent to two (2) acres failing to which an authorized officer of this court be empowered to execute the same in place of the respondents.
5. That this honourable court do grant such further orders or relief as it may deem fit and just to grant.

PW1 testified that he lived on the land from 1974 to 1986 when he moved away. The respondents stopped him from using the land in 2012. The late Wesala Webuti Lukandu was his uncle who gave him two acres. He died in 2006. He produced a search certificate dated 24th April 2012 stating that one Wesala Webuti Lukandu was the registered owner. The 1st and 2nd defendants are his widows. PW2 who is the brother to the deceased Wesala Webuti Lukandu states that the plaintiff is entitled to 2 acres. That he used the land until 2012.

This court has considered this case, the evidence and submissions herein. The originating summons is supported by the annexed sworn affidavit of Abdalla Makokha Kachisa and further other grounds and evidence to be adduced at the hearing and more particularly on the grounds that the occupation and possession of the suit land by the applicant has been continuous open and without any interruption for a period over 30 years. That the applicant has greatly developed the suit land and carried out extensive farming on it since 1974. That the applicant has land equivalent to two (2) acres out of L.P. No. E/W/LUBINU 1058 by way of adverse possession. That the 1st and 2nd respondents have life interest of the suit land. That the respondents jointly and severally have secretly taken out succession proceedings and they are threatening to evict the applicant. This court has perused the court file and find that indeed there succession proceedings of case cause No. 371 of 2008 Kakamega High Court and the plaintiff has placed a caution of the suit land. Before going into the merit of this case one needs to determine whether this matter is sub judice. It is not in dispute that there is a case involving the same land namely Succession Cause No. 371 of 2008 Kakamega High Court. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

“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.”

This case was filed during the pendency of the succession cause. I find that 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. I find that the suit or proceedings are pending in a court having jurisdiction in Kenya. This suit is sub judice and an abuse of the court process. The plaintiff should pursue his claim in that case as an objector as he has already placed a caution. For these reasons I strike out this suit with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY NOVEMBER, 2018.

N.A. MATHEKA

JUDGE