



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ENVIRONMENT AND LAND CASE NO. 33 OF 2014.

DORCAS INDOMBI WASIKE alias

DORIKA INDOMBO WASIKE.....PLAINTIFF

VERSUS

BENSON WAMALWA KHISA

ERNEST MUTUNGA KUYA

JULIUS ASHIKANGA ALUTA

JOHN NALIANYA SANYA

JOHN NYONGESA NASIUMBA

ABDALLA MUSA ABDI.....DEFENDANTS

RULING

The History:

[1]. The plaintiffs are mother and son. The 1st plaintiff is the wife of Peter Wasike and the 2nd plaintiff is their son. The said Peter Wasike was the owner of LR Bungoma/Naitiri/83. Comprising of 17 hectares (42.5 acres). This land abutted Land Parcel Bungoma/Naitiri/79 comprising of 13.2 hectares (32.62 acres) registered in the name of Joanes Khisa. Benson Wamalwa Khisa and Risper Naliaka Khisa the son and wife of Joanes Khisa who was then deceased filed Kitale HCCC No. 17 of 1997 (originally Eldoret HCCC No. 27 of 1996) against Dorcas Indombi Wasike claiming 5.3 acres portion of the plaintiffs LR Bungoma/Naitiri/83.

[2]. A judgment was delivered on 6/7/99 in which it was ordered that 5.3 acres be excised from LR Bungoma/Naitiri/83 and the same be added to LR Bungoma/Naitiri/79. Pursuant to that judgment the land Register was rectified, the old titles were cancelled and the first defendant herein was registered as the owner of a new title LR Bungoma/Naitiri/118 comprising of 15.36 hectares (approximately 37.96 acres). This comprised of the 5.3 acres portion ordered by the court and the plaintiff was registered as owner of LR Bungoma/Naitiri/119 comprising of 14.84 hectares (approximately 36.67 acres).

[3]. The plaintiffs herein appealed to the court of Appeal vide *Nakuru Civil Appeal No. 87 of 2004 Dorcas Indombi Wasike Vs Benson Wamalwa Khisa and Risper Naliaka Khisa*. The court of Appeal set aside the High Court's Judgment and dismissed the case in the superior court with costs to the

plaintiff. While the appeal was pending for determination the 1st 2nd 3rd 4th 5th and 6th defendants entered and took possession of 5.3 acres that had been excised from LR No. Bungoma/Naitiri/83. They still remain in possession of that portion till now and that is the genesis of this case.

The Pleadings:

[4]. The plaintiff states that the entry and continued stay of the 1st 2nd 3rd 4th 5th and 6th on the 5.3 acres excised from Bungoma/Naitiri/83 was wrongful and unlawful and that it was not founded on any lawful sale, that there was no land control consent and further that there was no transfer that was signed by the owners. That by virtue of the court of Appeals decision as stated herein, the plaintiff is the owner of the said 5.3 acres and the continued occupation by the 1st – 6th defendants is unlawful and illegal. The plaintiffs claimed for mesne profits of Kshs.15,000/= per acre per year for the 5.3 acres for the period the defendants have been in occupation. The plaintiffs pray that the defendants be ordered to vacate the suit land and that title LR No. Bungoma/Naitiri/118 be cancelled and the same do revert to Bungoma Naitiri/83.

[5]. The defendants deny that one Peter Wasike was allocated 42.5 acres comprising LR Bungoma/Naitiri/83. They admit that Kitale HCCC No. 17/97 was filed. They admit that 5.3 acres was decreed to be excised from Bungoma/Naitiri/83 and the same be added to Bungoma/ Naitiri/79 and that the Land Register was rectified so that the new title to read LR Bungoma/Naitiri/118 and 119. The defendants deny any knowledge of court of Appeal Case No. 87 of 2004 in which the decision of Kitale HCC 17/97 was quashed and set aside. The defendants rely on the Kitale HCCC 17 OF 1997 for the legality of their ownership of the 5.3 acres aforesaid. They state that the matter is resjudicata.

The objection:

[6]. The defendants herein filed a notice of preliminary objection dated 3rd March, 2014. The preliminary objection is that this matter is resjudicata and that the same should be struck out with costs.

[7]. The issue for determination is whether this matter is resjudicata.

Analysis:

[8]. The plaintiffs in this case pray for

- (a) Orders against 1st – 6th defendants to vacate 5.3 acres originally part of LR Bungoma/Naitiri/83. Presently parcel 118
- (b) That if the 1st – 6th defendant refuse to vacate, the court bailiff with the assistance of the police officers of Police Division Bungoma to forcibly evict them.
- (c) That land titles LR Bungoma/Naitiri/118 be cancelled and the the same do revert to LR Bungoma/Naitiri/83.
- (d) That the 1st – 6th defendants do pay to the plaintiffs damages by way of mesne profits.
- (e) Costs of the suit.

[9]. What was decided by the court herein, in HCCC 17/2007?

5.3 acres were ordered excised from parcel 83 and was added to parcel 79. These parcels were later changed to 118 and 119 respectively.

[10]. The Court of Appeal on 12th November 2010 by a Judgment of Court of Appeal Judges S.E.O. Bosire E.M. Githinji and P.N. Waki which is signed by all the Judges and certified by the registrar of the

court and attached to these proceedings and is duly served on the defendants allowed the appeal, set aside the judgment of the trial court and ordered that the respondents suit in the high court be dismissed with costs in the court of Appeal and High Court.

[11]. Surely the defendants and their Counsels cannot continue feigning ignorance of that Judgment that binds this court.

The defendants reliance on Kitale High Court Civil Case No. 17 of 1997 which was set aside by the Court of Appeal as aforesaid, is misplaced and misconceived.

The orders:

[12]. The issues raised herein for vacation, eviction, cancellation of LR Bungoma/Naitiri/118, Mesne profits and costs are not resjudicata. The suit should be fixed down for hearing on those issues on merits.

The preliminary objection is dismissed as being without any merit and is dismissed with costs to the plaintiffs.

Ruling read in open Court before Mr. Murunga and Mr. Anwar.

DATED at BUNGOMA this 20th day of April, 2017.

S. MUKUNYA

JUDGE.

In the presence of:

Coram: Hon. S. Mukunya (Judge)

Mr. Murunga for Mr. Amolo for the Plaintiff

Mr. Anwar for Mr. Aseso for the the Defendant