

REPUBLIC OF KENYA.

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC NO. 16 OF 2009

ELIAB MUSHA IMBIAKHA.....PLAINTIFF/RESPONDENT

VERSUS

RODGERS ORATE KWEYU.....DEFENDANT/APPLICANT

RULING

The application is dated 23rd June 2016 and is brought under section 3A, 6 & 7 of the Civil Procedure Act and Order 11 Rule 3 (1) (h) of the Civil Procedure Rules seeking the following orders;

1. THAT this application be heard on priority basis.
2. THAT the honourable court be pleased to consolidate this suit with Kakamega HCC No. 337 of 2013 for hearing and final disposal.
3. THAT after consolidation, both suits be struck out for being res judicata.
4. THAT the status quo prevailing after the implementation of the orders issued in Misc. Award No. 214 of 2007 as adopted by the subordinate court be resorted to.

The application is based on the following grounds; this suit and Kakamega HCC No. 337 of 2013 involves the same parties with similar issues. Both suits are res judicata in view of Kakamega HCC No. 235 of 1999 and Kakamega CM Misc. Award No. 214 of 2007, which were both heard and determined regarding the same cause of action. That the respondent is using these suits to frustrate the applicant and has in fact blocked the applicant's road of access using orders subsequently obtained. The respondent demolished the applicant's property and cut down his trees in a premature bid to implement orders illegally obtained in these suits.

The defendant/applicant submitted that he has been having unending land disputes with the respondent herein. He purchased his land parcel NO. BUTSOTSO/SHIKOTI/5147 from one ALEXANDER KHAINGA MUTSEMBI. (Annexed and marked "RK-1" is a copy of the green card). He took possession of the said parcel of land and established his homestead thereon. The respondent then moved and blocked his road of access leaving him landlocked. He filed a dispute with the Lurambi Land disputes Tribunal which had both sides, visited the ground and made a decision ordering the Land Registrar and district Surveyor to visit and reinstate the road of access. Annexed hereto and marked "RK-2" is a copy of the proceedings and decision of the tribunal. The said decision was adopted as an order of the court and duly executed by the Land Registrar and district Surveyor. (Annexed and marked "RK-3" is a copy of the order). The respondent was then represented by the firm of M/s. J.J. MUKAVALE & COMPANY ADVOCATES. The respondent did not appeal against the said decision. That sometimes later, the respondent moved and filed Kakamega HCC NO. 16 OF 2009 which concerns the same dispute. The applicant filed an application to strike out the suit but unfortunately the application has not been argued (Annexed and marked "RK-4" is a copy of the application). The respondent then moved and obtained an order authorizing the District Land Registrar, Kakamega and Western provincial Land Surveyor to visit land parcel NO. BUTSOTSO/SHIKOTI/1814 and 5147 and demarcate the boundary in compliance with the orders of Justice B.K. Tanui issued on 14th April, 2000 (Annexed and marked "RK-5" is the said order). The respondent then influenced the said officers by insisting to them where he thought the boundary should be. The applicant was then negatively affected by the said order for the following

reasons: he had not been a party to the case before Justice B.K. Tanui, the previous owner of the land had not been a party to the case and the said order had expired after 12 years. That using the said order, the applicant reduced the respondent's land, blocked his road of access and extensively damaged his property. The respondent then moved and filed Kakamega No. 337 of 2013 seeking orders for the Kakamega Land Registrar and District Surveyor to visit the suit land and re-instate the road connecting parcels No. BUTSOTSO/SHIOKOTI/1814, 5146, 5147 and 1767 into its original position as on the diagram No. 11 of Survey of Kenya of 1968. The respondent filed case No. 337 of 2013 against some parties who do not even share a common boundary with him. (Annexed and marked "RK-6" is a copy of the letter issued by the respondent's Advocate dated 22/6/1999.). That going by the suits aforesaid the respondent is abusing court processes and these two suits are res judicata and should be struck out with costs.

The plaintiff/ respondent submitted that the 1st defendant/applicant bought his land Butsotso/Shikoti Parcel No. 5147 from Alexander Khainga the year 2005 there was the original boundary between Butsotso/Shikoti No. 1814 and 5147 the Boundary was already fixed by the Kakamega District Land Registrar and the Kakamega Land Surveyor under the Kakamega High Court Civil Suit Case No. 235 of 1999 Court order. The 1st defendant/applicant used the Lurambi Land Dispute Tribunal Claim No. 089 of 2007 and the Resident Magistrate's court at Kakamega MISC. Award No. 214 of 2007 court order to move the original boundary from its position up to the respondents Butsotso/Shikoti Parcel No. 1814. That respondent filed the civil suit case No. 16 of 2009 in the High Court at Kakamega and the case was heard and a court order issued to direct the District Land Registrar Kakamega and Western provincial Land Surveyor to visit L.R. NO. Butsotso/Shikoti/1814 and 5147 and demarcate the boundary in compliance with the orders of Justice B.K. Tanui issued on 14th April 2000. The District Land Registrar Kakamega and Western Provincial Land surveyor plus the Kakamega Land Surveyor visited the site and solved the boundary land dispute problem their report is in the court file together with the Civil Suit Case No. 337 of 2013 of which was heard in the High Court at Kakamega under Justice Kibunja. The court order issued directed the County Land Registrar and Kakamega District Land to visit Land surveyor accompanied by Provincial surveyors confirm the boundary of Butsotso/Shikoti/1814/5147, 5146 and 1767. The defendant/applicant's application should therefore be dismissed.

This court has considered both the applicant's and respondent's submissions. The provisions of proving res judicata are clearly spelt out in section 7 of the Civil Procedure Act as follows;

"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 suitor the suit in which such issue has been subsequently raised, and has been heard and subsequently decided by such court".

This court has perused the court files in Kakamega HCC No. 235 of 1999 and Kakamega CM Misc. Award No. 214 of 2007 Kakamega HCC No. 16 of 2009 and Kakamega HCC No. 337 of 2013 and it appears all involve the same parties with similar issues. The suits relate to land parcels No. BUTSOTSO/SHIOKOTI/1814 and BUTSOTSO/SHIKOTI/5147 belonging to the plaintiff/respondent and the defendant/applicant respectively.

The defendant/applicant submitted that he has been having unending land disputes with the respondent herein. He purchased his land parcel No. BUTSOTSO/SHIKOTI/5147 from one Alexander Khainga Mutsembi. He took possession of the said parcel of land and established his homestead thereon. The respondent then moved and blocked his road of access leaving him landlocked. He filed a dispute with the Lurambi Land disputes Tribunal which had both sides, visited the ground and made a decision ordering the Land Registrar and district Surveyor to visit and reinstate the road of access. The said decision was adopted as an order of the court and duly executed by the Land Registrar and district Surveyor. The respondent did not appeal against the said decision. That sometimes later, the respondent moved and filed Kakamega HCC No. 16 OF 2009 which concerns the same dispute. The respondent then moved and obtained order authorizing the District Land Registrar, Kakamega and Western provincial Land surveyor to visit land parcel No. BUTSOTSO/SHIKOTI/1814 and 5147 and demarcate the boundary in compliance

with the orders of Justice B.K. Tanui issued on 14th April, 2000 That using the said order, the applicant reduced the respondent's land, blocked his road of access and extensively damaged his property. The respondent then moved and filed Kakamega No. 337 of 2013 seeking orders for Kakamega Land Registrar and District Surveyor to visit the suit land and re-instate the road connecting parcels No. BUTSOTSO/SHIOKOTI/1814, 5146, 5147 and 1767 into its original position as on the diagram No. 11 of Survey of Kenya of 1968. This court has perused the court files in Kakamega HCC No. 16 of 2009 and Kakamega HCC No. 337 of 2013 and it appears all involve the same parties with similar issues and ought to be consolidated. Be that as it may, it appears that the award in Kakamega HCC No. 235 of 1999 and Kakamega CM Misc. Award No. 214 of 2007 and the report from Kakamega HCC No. 16 OF 2009 which concerns the same dispute. demarcate the boundary in compliance with the orders of Justice B.K. Tanui issued on 14th April, 2000 is at variance as it now reduced the respondent's land. I find that the matter is not res judicata as it involves other parcels namely land parcels No. BUTSOTSO/SHIOKOTI/1814, 5146, 5147 and 1767. For these reasons I grant prayer 2 of the application dated 23rd June 2016 only and costs to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE