



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 159 OF 2015 (O.S.)

DAVID KIPKOECH KOGOPLAINTIFF

VERSUS

ESTHER CHESAINA BEDFORD PIMDEFENDANT

RULING

1. The Applicant herein is the son of the Respondent. The Applicant filed an Originating Summons against the Respondent in which he seeks orders to the effect that he has acquired **98.5 acres** out of **LR No. 6133** by adverse possession. The Applicant contemporaneously filed a Notice of Motion seeking injunctive orders as well as inhibitory orders in respect of **LR No. 6133**.
2. The Respondent is the registered owner of **LR No. 6133** and another Parcel known as **LR No. 6150/1** which is not a subject of this suit. At the hearing of the Applicant's application, Mr Yano for the Respondent indicated that he had a Preliminary Objection to raise against the application as well as the entire suit. Mr Yano however proposed to let the Applicant who appears in person to argue his application so that he could raise his Preliminary Objection during his response to the applicant's application.
3. The Applicant argued that he has been in occupation of **98.5 acres** comprised in title **No. 6133** for a period of 12 years and that therefore he has acquired that portion by adverse possession. He argued that if injunction and prohibitory orders are not given, this will interfere with his rights of prescription which have crystallised. He contends that there was an attempt to settle this case through Kitale Environment Land case **No. 25 of 2014** between him and the Respondent, but that that attempted settlement is invalid as there was no consent of the Land Control Board obtained and therefore the same became null and void and that besides this, the consent entered in that case was never recorded.
4. In answer to the Applicant's submissions, Mr Yano for the Respondent argued that the application as well as the entire suit are an abuse of the process of court and the Originating Summons is res judicata as the dispute in this case is the same as the dispute in kitale **ELC No. 25 of 2014** which was compromised vide a consent recorded by the parties therein which consent was duly adopted as order of the court. Mr Yano argued that the parties in the present suit are the same as in the previous suit. The subject matter in the previous suit as in the present suit is the same i.e **LR No 6133**.
5. I have considered the arguments raised by the Applicant herein and the counsel for the Respondent. It was agreed from the outset that what was being raised was a Preliminary Objection which was contained in the pleadings. Mr Yano allowed the Applicant to argue his application so that he could raise the Preliminary Objection in the reply. He did this as the Applicant is appearing in person. However when the Applicant started arguing his application, it

became apparent that he was aware of the Preliminary Objection and actually addressed it in both his submissions in support of his application as well as his reply to Mr Yano's response which contained the Preliminary Objection.

6. The issue for determination in this matter is therefore whether the Originating Summons herein is res judicata and if the current application is an abuse of the process of the court. It is not in dispute that **Environment Land Case No. 25 of 2014** was between the same parties as in this suit. The subject matter of that suit was **LR No 6133** which is the same as in the present case.
7. The Respondent in the present suit is the one who had sued the Applicant in **Environment Land Case No 25 of 2014**. The Respondent was seeking to restrain the Applicant from occupying any part of **LR No. 6133** and **6150/1** other than the **70 acres** which she had given to the Applicant. The Applicant in that case was represented by an advocate. A consent was recorded which settled the case. The Respondent gave the Applicant **70 acres** which was to be registered in the Applicant's name at his own cost. It was agreed in that consent that the Applicant was to remove his structures lying on **LR No 6133** and **6150/1** and confine himself to the **70 acres** which had been given to him. It was further agreed that the Applicant was to pay costs of **Kshs 75,000/=** within 60 days.
8. The consent was duly endorsed as order of the court. The Applicant also paid costs as per the consent. The Applicant seems to argue that the consent settling **Environment Land Case No. 25 of 2014** was rendered invalid due to lack of consent of the Land Control Board. This is not true. Before **Environment Land Case No 25 of 2014** was filed, the Respondent had started the process of sub division of her parcels which included **LR No. 6133** and **6150/1**. She had obtained consent to sub divide the same on 15/2/2012. There was no need for her to obtain any further consent to sub divide following the consent recorded in **Environment Land Case No. 25 of 2014**. Even if any further consent was to be required, there is no indication that the same cannot be obtained to give effect to the decree of the court resulting from the consent. It is therefore not right for the Applicant to argue that the consent recorded has been rendered invalid for lack of consent of the Land Control Board.
9. The doctrine of res judicata was put in place to ensure that there is an end to litigation. The parties herein settled their claims in **Environment Land Case 25 of 2014**. The settlement was by way of consent. The consent was adopted as order of the court. Once this was done, the rights of the parties were finally settled by a competent court. To bring another suit based on the same facts is clearly going against the doctrine of res judicata. I find that the Applicant's Originating Summons is res judicata. This is enough to dispose of the application as well as the entire Originating Summons but since I am not the final court this case might go on appeal and I should say whether the Applicant's application for injunction and prohibitory orders should have been allowed.
10. As I said herein above, the Applicant is the son of the Respondent. The Applicant is seeking an injunction on the basis that he has acquired a portion of **98.5 acres** out of **LR No. 6133** by way of adverse possession. Before such application can be allowed, the Applicant must demonstrate that he has a prima facie case with probability of success. Secondly that he will suffer irreparable loss which will not be compensated in damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. These are the principles which were set down in the case of ***Giella – Vs – Cassman Brown 1973 EA 358***.
11. In the instant case, I do not find that the Applicant has a prima facie case with probability of success. The Applicant has been on **LR No 6133** by virtue of being a son to the Respondent. In other words he is a licensee and a licensee cannot bring up a claim for adverse possession as long as he is on the suitland as such. There is no time a child can cease to be a parent's child and acquire a different status as to allow him to mount a claim for adverse possession. One remains a child in the African context in as long as the parents are alive however old one maybe. That child cannot be legally allowed to lay claim to a parent's land by way of adverse possession except through succession upon the demise of a parent or through any other lawful means such as

consensual distribution by a parent to his children during his lifetime.

12. The Applicant has already been given **70 acres** out of **LR No 6133** and **6150/1**. There is therefore no loss he would have suffered even if an injunction will not have been allowed. I therefore find that the Preliminary Objection raised by the Respondent is sustainable. The upshot of this is that the Originating Summons as well as the application filed thereunder are hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of April 2016.

E. OBAGA

JUDGE

In the presence of Plaintiff who appears in person and Mr Yano for the Defendant.

Court Assistant – Isabellah

E. OBAGA

JUDGE

19/4/16