



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 75 OF 2009

DYPHINA M. KHAONJELI.....PLAINTIFF

VERSUS

1. WAZIRI ABUBAKARI ALI

2. ATHUMANI WESONGA WAZIRI

3. HANIFA NAFULA WAZIRI.....DEFENDANT

RULING

By a consent order dated 17th May 2016, this suit was consolidated with **BUNGOMA HIGH COURT CIVIL CASE NO 58 OF 2006 and BUNGOMA ELC CASE NO 217 OF 2013**. After hearing **DYPHINA M. KHAONJELI** the plaintiff and Applicant herein and **ALI WAZIRI ABUBAKAR** the 1st defendant/Respondent and who were the only witnesses who testified, the late **MUKUNYA – J** delivered a Judgment dated 22nd February 2018 in favour of the Applicant in which he found that the Applicant had been in adverse possession of a portion of land measuring 25 yards by 10 yards (the suit plot) out of the original land parcel **NO NDIVISI/MUCHI** and more specifically **NDIVISI/MUCHI/5169**. A decree was drawn in the following terms:-

1. That the Respondents' right over a portion measuring 25 yards x 10 yards out of the original land parcel NO NDIVISI/MUCHI/2120 and now subsequently sub-divided into new numbers as NDIVISI/MUCHI/2577 – 2578, NDIVISI/MUCHI/3271 – 3272, NDIVISI/MUCHI/4035 – 4037 and specifically NDIVISI/MUCHI 5169 has been extinguished by adverse possession. Upon expiry of twelve (12) years and the Applicant be and is hereby declared the absolute owner of the said portion measuring 25 yards by 10 yards.

2. An order be and is hereby issued cancelling all created new numbers namely NDIVISI/MUCHI/2577 – 2578, NDIVISI/MUCHI/3271 – 3272, NDIVISI/MUCHI/4035 – 4037, NDIVISI/MUCHI/5167 – 5169 and revert to the original number NDIVISI/MUCHI/2120.

3. That the Respondents and their servants agents and workers be perpetually barred and be restrained from interfering with the said portion measuring 25 yards by 10 yards.

4. That the Respondents do execute all relevant documents to facilitate registration of the said portion measuring 25 yards by 10 yards.

5. That costs of this Originating Summons be borne by the Respondents to plaintiff.

There is nothing to show that any appeal was preferred against that Judgment and decree. **MR. PAUL JUMA** counsel for the Applicant has submitted that the Respondents only filed Judicial Review at **KAKAMEGA** which was dismissed.

Emboldened by that decree, **DIPHINA KHAONJELI** the Applicant herein has now moved to this Court vide a Notice of Motion dated 6th September 2018 seeking the following orders:-

(a) Spent

(b) That the County Land Surveyor Bungoma County be ordered to visit, survey and sub-divide and consequently hive off a plot measuring 25 x 10 yards from land parcel NO NDIVISI/MUCHI/ 5169 to be registered in the names of **DIPHINA M. KHAONJELI** the plaintiff herein.

(c) The Deputy Registrar of this Honourable Court be authorized to sign all transfer documents and transfer and or cause to be transferred plot measuring 25 x 10 yards to **DIPHINA M. KHAONJELI** the plaintiff herein comprised in land parcel NO. NDIVISI MUCHI/5169 on behalf of the 2nd and 3rd Respondents the registered proprietors herein.

(d) That upon implementation of prayer (c) above, the original title deed in respect of land parcel number NDIVISI/MUCHI/ 5169 registered in the names of the 2nd and 3rd Respondents herein be deemed as cancelled.

(e) That the costs of this application be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of the Applicant **DIPHINA M. KHAONJELI**. The gravamen of the application is that **MUKUNYA J** having granted her the orders of adverse possession and a decree issued, she is entitled to orders that a portion measuring 25 yards x 10 yards be curved from land parcel **NO NDIVISI/MUCHI/5169** but despite being served with the said decree, the Respondents have declined to sign the relevant transfer documents.

In response to the said application, the Respondents filed a Notice of preliminary Objection raising only one issue which is that this suit and the application are res – judicata because of the Judgment in **BUNGOMA HIGH COURT CIVIL CASE NO 58 OF 2006** which involved the same parties and the same subject matter. Further, that there has been an appeal against the Judgment delivered herein by **MUKUNYA J**. I must at this point add that although a Notice of Appeal dated 6th March 2018 is annexed to the Preliminary Objection, it is not clear if any appeal was subsequently filed.

It is that application that was placed before me on 11th October 2018 and the parties agreed that it be canvassed by way of written submissions. The submissions were subsequently filed by **MR PAUL JUMA ADVOCATE** for the Applicant and **MR. N. ATEYA ADVOCATE** for the Respondents.

I have considered the application, the Preliminary Objection and the submissions by Counsel.

As I have already indicated above, the Respondents have filed a Preliminary Objection that this suit is res judicata having been determined in **BUNGOMA HIGH COURT CIVIL CASE NO. 58 OF 2006** which involved the same parties and therefore this suit offends the mandatory provisions of Section 7 of the Civil Procedure Act. Secondly, that the Judgment by **MUKUNYA J** dated 22nd February 2018 was appealed by the Respondents and this suit and the application offend the provisions of Section 6 of the Civil Procedure Act.

Clearly, the issue being raised by the Respondents in their Preliminary Objection ought to have been raised long before the trial of this suit commenced before **MUKUNYA J** on 22nd November 2016. A Preliminary Objection based on res judicata should be raised at the earliest opportunity as it goes to the jurisdiction of the Court. That notwithstanding, I have considered the Preliminary Objection by the Respondents which is that this dispute was determined in **BUNGOMA HIGH COURT CIVIL CASE NO. 58 OF 2006** involving the same parties. I have perused the record in **BUNOMA HIGH COURT CIVIL CASE NO. 58 OF 2006** and indeed that case involved **BAKARI ORATA AMISI AND ATHUMAN WESONGA WAZIRI** the 2nd and 3rd Respondents herein (as plaintiffs) seeking the eviction of the Applicant herein (as defendant) from the land parcel **NO NDIVISI/MUCHI/5169**. In a Judgment signed by **MBOGHOLI MSAGHA J** but delivered by **F. MUCHEMI J** on 29th April 2009, the court ordered the eviction of the Applicant from the said parcel of land. However, the record also shows that on 8th March 2011, that judgment which had been obtained ex parte was, by consent of the parties, set aside by **F. MUCHEMI J** and the Applicant was allowed to enter appearance and file defence. Therefore, the case involving the Applicant and the 2nd and 3rd Respondents in **BUNOMA HIGH COURT CIVIL CAS NO 58 OF 2006** was not heard and determined and in the circumstances, the plea of res judicata raised by

counsel for the Respondents is not well taken. **Section 7 of the Civil Procedure Act** states as follows:-

“No Court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantively 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” Emphasis added.

BUNGOMA HIGH COURT CIVIL CASE NO 58 OF 2006 was never *“heard and finally decided”*. The plea of res judicata is dismissed.

Counsel for the Respondent has also submitted that this suit was caught up by the provisions of Section 6 of the Civil Procedure Act Court provides as follows:-

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”. Emphasis added.

MR. ATEYA has submitted in that regard that the Judgment of **MUKUNYA J** dated 22nd February 2018 has been appealed. There is no evidence that any appeal has actually been filed against that Judgment. A Notice of Appeal which is the only document that was filed is not an appeal. And even if any appeal was filed, which is not the case, there is no stay of proceedings. Clearly therefore, the Preliminary Objection citing res judicata and sub - judice are not well taken. In any event, **MR. ATEYA** was present in Court when these cases were consolidated on 17th May 2016 by consent of the parties. He cannot now be heard to raise the plea of res judicata and sub – judice. The Preliminary Objection is accordingly dismissed.

I shall now consider the Applicant’s Notice of Motion dated 6th April, 2018 on it’s merits.

It is clear from the said application that it seeks to enforce the decree arising out of the Judgment issued by **MUKUNYA J** on 22nd February 2018. That Judgment has not been appealed or reviewed. The Applicant has deponed in paragraph five (5) of her supporting affidavit that the Respondents, despite having been served with the said decree, have refused to sign the relevant documents to facilitate the transfer of the suit plot to the Applicant. If that refusal persists, the Applicant will not be able to enjoy the fruits of the Judgment in her favour. Apart from the Preliminary Objection, the Respondents have not rebutted the averment that they have refused to sign the relevant documents to transfer the suit plot to the Applicant. Courts should not be seen to be acting in vain and I am satisfied that the orders sought by the Applicant in the said Notice of Motion are well merited.

The up-shot of the above is that the Notice of Motion dated 6th September 2018 is allowed as prayed.

Boaz N. Olao.

JUDGE

27th March 2019.

Ruling dated, delivered and signed in open Court this 27th day of March 2019 at Bungoma.

Mr. Ateya for Respondent present

Ms Natwati for Mr. Juma for the Applicant present

Boaz N. Olao.

JUDGE

27th March 2019.



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