



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: KWACH, TUNOI & PALL, J.J.A.)

CIVIL APPEAL 169 OF 1996

LEONARD INDIAZI.....APPELLANT

AND

FILISTA OMUKAMAKAMI ATINGO.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kakamega (justice Tanui) dated
5th February, 1996

IN

H.C.C.C NO. 401 OF 1994

JUDGEMENT OF THE COURT

On the 15th August, 1984, Leonard Ojanjo (the appellant) filed a suit in the superior court at Kakamega against Filista Atingo (the respondent) seeking an order for her eviction from a parcel of land west Bunyore/ Ebusikhale/ 1986 (the suit land) and an injunction restraining her from trespassing on the same. The plaint was subsequently amended to add a prayer for recovery of arrears of rent amounting to Shs. 216,000/=. The appellant had earlier on been granted letters of administration (interstate) of the estate of his late father Henry Isiche who had died way back in February 1979. The grant was confirmed on 17th June, 1987. On the strength of that grant, the appellant and his brother had the suit land transferred to themselves and registered as proprietors. An application for the revocation of the grant was made by 3 persons including Ernest Atingo, the respondent's husband (now dead), but this was dismissed by Osiemo, J. on 21st November, 1990.

With regard to the suit filed by the appellant against the respondent, the latter filed a defence resisting the claim and also raised a counterclaim based on the assertion that here late husband, Ernest Atingo, had purchased the suit land from the appellant's father and paid the full purchase price. She also claimed title by adverse possession by reason of her having been quiet and continuous possession since 1973.

Instead of preparing the case for trial on the merits, the appellant chose to apply to have the respondent's defence and counterclaim struck out on the ground that the counter claim was res judicata as the claim by the late Ernest Atingo had been dealt with and finally determined in the succession cause. The judge rejected this submission and dismissed the appellant's application. That is the decision which has given

rise to the present appeal. There can be no doubt at all that the judge was right because the title of Ernest Atingo was not an issue in the succession cause nor, for that matter, the claim by the respondent based on adverse possession. And more specifically, the respondent was not a party to those proceedings.

We have carefully considered all the points raised by the appellant in his grounds of appeal, and in argument, but in the end we can find no substance in any of them. In the result, the appeal fails and it is dismissed with costs.

Dated and delivered at Kisumu this 22nd day of November, 1996.

R.O KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G.S PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR