



No. 158

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.76 OF 2012(O.S)

ESTHER BOCHERE ABUTA..... PLAINTIFF

VERSUS

1. TRUSCILLA BWARI OTONDI

2. NYANCHOKA NYANCHOKA

3. NYAMWEYA NYANCHOKA

4. OGAKI NYANCHOKA..... DEFENDANTS

RULING

1. The Plaintiff brought this suit by way of originating summons dated 12th January, 2012 seeking to be registered as the proprietor of a portion of all that parcel of land known as **LR. No. South Mugirango/Botabori South/166** (hereinafter referred to only as “**the suit property**”) through adverse possession. The Plaintiff has claimed in her originating summons that she has openly, peacefully and continuously occupied a portion of the suit property for a period exceeding 12 years and that the defendants’ title to that portion of the suit property has been extinguished. The defendants filed separate replying affidavits denying the Plaintiffs claim and contending that the Plaintiff has never been in possession of any portion of the suit property. When the originating summons came up for directions on 24th January, 2013, the defendants’ advocate notified the court that the defendants would wish to raise a preliminary objection to the Plaintiff’s suit. The court directed that the defendants’ preliminary objection be argued by way of written submission. The parties were each given 21 days to file their respective submissions. The defendants filed their written submissions on 19th April, 2013. The Plaintiff did not file any submission in reply.
2. The defendants’ preliminary objection to this suit is that the same is *res judicata*. In their submission, the defendants argued that the issues raised in this suit had been raised by the Plaintiff at Etogo Land Disputes Tribunal in Tribunal Case No. 25 of 2011 that was between the Plaintiff and the first defendant which case was heard and finally determined. The defendants argued that the said tribunal’s decision was adopted as a judgment of the court at the Principal Magistrate’s court, Ogembo in Misc. Civil Application No. 20 of 2011 and a decree issued. The defendants submitted that the said decree has not been varied or set aside through appeal or judicial review. The defendants argued that the suit that was before the tribunal was between the Plaintiff and the 1st defendant and it concerned the suit property. The defendants contended that the inclusion of the 2nd to 4th defendants as additional parties to this suit and the seeking of a new relief do not make this suit different from the one that was determined by the tribunal. The defendants annexed to

their submissions the decision of the tribunal and the decree issued by Ogembo Principal Magistrate's court.

3. I have considered the defendants' objection and the submissions made in support thereof. I have perused the tribunal's decision on which the defendants' objection is based. The claim before the tribunal was brought by the 1st defendant against the Plaintiff. The 1st defendant sought an order that the Plaintiff was not entitled to claim any portion of the suit property. The tribunal held that the Plaintiff had no valid claim over the suit property. At the tribunal, the Plaintiff had contended that she was entitled to a portion of the suit property by virtue of the fact that she was a widow of one, Nyanchoka Abuya who was the 1st defendant's father in law and the 2nd to 4th defendants' father. The tribunal rejected her claim because the tribunal found that she was legally divorced by Nyanchoka Abuya and as such she had no right over any portion of the suit property that was now registered in the names of Nyanchoka Abuya's children. The 2nd to 4th defendants were not parties to the case before the tribunal. The Plaintiff's claim before this court is based on adverse possession. The Plaintiff claims as I have stated above that she has occupied a portion of the suit property openly for uninterrupted period of over 12 years and as such she is entitled to be registered as the proprietor thereof. Her claim before this court is not mounted upon her marriage to Nyanchoka Abuya. The issue as to whether the Plaintiff is entitled to a portion of the suit property by adverse possession was not determined by the tribunal and in any event the tribunal did not have jurisdiction to determine such an issue.
4. Due to the foregoing, I am of the view that the defendants' preliminary objection has not been well taken. This suit is not *res judicata*. The defendants have failed to prove the ingredients of *res judicata* set of in section 7 of the Civil Procedure Act, Cap. 21 Laws of Kenya. The defendants' preliminary objection must also fail for another reason. The defendant's preliminary objection is not based on the defendants' pleadings. The objection was raised in vacuum. The replying affidavits filed by the defendants did not mention the tribunal case or the fact that the defendants intended to rely on the same in response to the Plaintiffs claim herein. I am of the view that *res judicata* is a matter which must be specifically pleaded under Order 2 rule 4 of the Civil Procedure Rules failure to which it cannot form a basis of preliminary objection. The upshot of the foregoing is that the defendants' preliminary objection has no merit. The same is hereby dismissed with costs to the Plaintiff.

Delivered, dated and signed at KISII this 22nd day of November 2013.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i h/b for Sagwe for plaintiff

Mr. Minda for defendants

Mobisa Court Clerk.

S. OKONG'O

JUDGE