



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.178 OF 2015

JAPHET KATANA PANDE.....PLAINTIFF

=VERSUS=

1. BENSON NYINGE

2. PAUL MAJIMBO.....DEFENDANTS

R U L I N G

1. The Application dated 30th October, 2015 by the Defendants/Applicants is seeking for the following orders:-

(a) THAT this Honourable Court be pleased to order that the names of the Defendants/Applicants herein be struck out as they have been improperly joined in the suit.

(b) THAT this Honourable Court be pleased to strike out the Plaintiff's/Respondent's application dated 28th September, 2015 as the said application and suit is an abuse of the court process and a waste of the Court's rather limited time as the same has been previously heard and determined EIGHT (8) years ago.

(c) THAT costs of this application be provided for.

The Defendants'/Applicants' case:

2. The 1st Defendant has deponed that he has been staying on plot number 404 which belongs to his deceased brother; that his deceased brother bought the land in the year 1998 from Devis Brown Ngala (deceased) and that in the year 2005, the Plaintiff filed a complaint at the Bahari Land Disputes Tribunal against his late brother Michael Chilyalya over the ownership of the land.

3. It is the 1st Defendant's deposition that the Tribunal made an award in favor of his late brother, which decision was adopted by the court.

4. The 1st Defendant deponed that they have been wrongly sued; that this matter has since been heard and determined and that the Application should be allowed.

The Plaintiff's/Respondent's case:

5. In his Response, the Plaintiff has deponed that although the Defendants are not the owners of the land, they have been trespassing on the suit property; that the dispute alluded to by the Defendants did not involve the suit property and that the Defendants have not shown the relationship between the alleged owner of the land in dispute one Mr. Michael Chilalya and Michael Mwakamushe.

6. The advocates for the parties filed their respective submissions in which they reiterated their client's depositions. I have considered those submissions.

7. The issues for determination in this matter is whether the Defendants have been wrongly sued and whether this suit is res judicata.

Analysis and findings:-

8. The Plaintiff's case is that he is the owner of the unregistered land known as Tezo Kakanjuni Plot 404 which he has developed.

9. The Plaintiff has averred in his Plaintiff that the Defendants have trespassed on his land. The Plaintiff is seeking for a permanent injunction.

10. The 1st Defendant deponed that the suit property belongs to the late Michael Chilyalya (deceased) and that he has been cultivating the land in his capacity as the brother of the deceased. The 2nd Defendant did not respond.

11. Having admitted that he is indeed cultivating the suit property, it follows that the 1st Defendant was sued properly by the Plaintiff for trespass. Whether his act of cultivating the suit property amounts to trespass can only be determined at trial.

12. Although the 1st Defendant deponed that the issues before this court were heard and determined on merit before the Bahari Land Disputes Tribunal, there is no evidence before me to show that the land that the Tribunal dealt with in case No.108 of 2005 is the same as the suit property.

13. It is only the objectors in land case no.108 of 2005 or their legal representatives who can rely on the award of the Tribunal and not the Defendants.

14. In the circumstances, I dismiss the Defendant's Application dated 30th October, 2015 with costs.

Dated, signed and delivered in Malindi this 22nd day of **September**, 2016.

O. A. Angote

Judge