



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 6 OF 2020

JOHN MUTUMA M'IKIAO.....PLAINTIFF/RESPONDENT

VERSUS

ISAYA M'KIRERA M'KIAMBATI.....1ST DEFENDANT/APPLICANT

DANIEL KIUNGA M'KIAMBATI.....2ND DEFENDANT/APPLICANT

RULING

1. The plaintiff sued the two defendants Isaya M'Kirera M'Kiambati and Daniel Kiunga M'Kiambati vide a plaint filed on 5.2.2020 where plaintiff is inter-alia challenging the commencement and prosecution of the suit Meru CMC ELC No. 37 of 2014. He desired that the name of Isaya M'Kirera M'Kiambati reflected in the parcel Abothuguchi/Katheri/1195 (suit land) be canceled to be replaced with his (plaintiffs) name.

2. Isaya M'Kirera entered appearance, filed a statement of defence, a counter-claim and also filed an application dated 16.11.2020 seeking permanent injunctive orders against the plaintiff in so far as the use and occupation of the suit land is concerned. He also seeks orders that the evidence of 1st defendant be heard de benese, of which these orders were allowed by Judge Njoroge of Chuka ELC.

3. When the matter came before me on 19.1.2021, the court was informed that 2nd defendant is dead.

4. Counsel for the 1st defendant avers that the matter should proceed even though 2nd defendant is dead because it is not in dispute that the suit land is in the name of 1st defendant who has a counter claim against the plaintiff. It is further averred that the application filed by the 1st defendant dated 16.11.2020 has not been opposed, and that the issue of substitution is being used to delay the matter.

5. In rejoinder counsel for the plaintiff avers that the two defendants defrauded the plaintiff, hence it is not true that the plaintiff has no claim against the 2nd defendant. He desires that no steps should be taken before substitution is done but status quo can be maintained.

6. I have considered all the issues raised herein. I find that the order in prayer no. 3 in the application dated 16.11.2020 was allowed by Judge Njoroge on 2.12.2020 and a review of the said order has not been sought. This court will therefore proceed to take the evidence of 1st defendant de benese.

7. However, I disagree with the averments of the counsel for 1st defendant that the matter should proceed without substitution of the 2nd defendant. This is because a suit belongs to litigants and such litigants cannot be directed on whom to sue and whom not to sue. Further, this court is well aware of the checkered history of the dispute as manifested in at least three suits before me namely:

- Meru ELC appeal 34 of 2017.
- Meru ELC JR No. 10 of 2019.
- Meru ELC 302 of 2017.

There is also (or there was) a suit in the magistrate's court at Meru, the same being CMCC No. 37 of 2014. The said 2nd defendant was involved in some of the mentioned suits.

8. It is only fair and just that the issue of substitution be dealt with before other steps are taken in the matter save the taking of the evidence de benese.

Final orders:

(1) The evidence of 1st defendant shall be heard de benesse.

(2) The prosecution of the other prayers in the application dated 16.11.2020 are put on hold until substitution of 2nd defendant is done or untill further orders are given by the court.

(3) Status quo to be maintained.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties in open court on 26.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE