



REPUBLIC OF KENYA

IN THE LAND AND ENVIROMENT COURT

AT MAKUENI

ELC NO. E020 0F 2021

DICKSON MUOKI MUTUKU.....1ST PLAINTIFF

STEPHEN MUTUKU MUTISO.....2ND PLAINTIFF

JACKSON MUSEMBIMURTUKU.....3RD PLAINTIFF

VERSUS

JAMES MUTUKU KIMEU.....1ST DEFENDANT

ANGELINA MUTHEU KIMAILE.....2ND DEFENDANT

MUTUKU WAMBUA.....3RD DEFENDANT

JEFFENARIS MUTIE WAMBUA.....4TH DEFENDANT

JOHN MUEMA KILOKWE.....5TH DEFENDANT

MUSOMBA NDUNGI.....6TH DEFENDANT

TOM MUSYOKA.....7TH DEFENDANT

TITUS M. KIOKO.....8TH DEFENDANT

ROBERT MUTHENYA NGOLANIE.....9TH DEFENDANT

GABRIEL MUOKI MUTISO.....10TH DEFENDANT

JACKSON MUTEVU MUTUKU.....11TH DEFENDANT

WILFRED MAKAU MUTUKU.....12TH DEFENDANT

MUINDE MUTUKU.....13TH DEFENDANT

TIMOTHY WAITA MUTUKU.....14TH DEFENDANT

RULING

1. The Plaintiffs initiated this suit against the Defendants on the 12th of July 2021 and sought for the following orders: -

a) A Permanent and Perpetual Injunction against the 12th to 14th Defendants themselves, their servants, assigns and/or agents from selling, leasing, cutting trees of any species and/or disposing of the land belonging to the estate of their late father Benjamin Mutuku Mutiso.

b) An order directing the 1st to the 7th Defendants to forthwith vacate the suit land belonging to the estate of their late father Benjamin Mutuku Mutiso.

c) A Permanent and Perpetual Injunction against the 1st to 14th Defendants to cease logging of trees of any species grown on the land of their late father Benjamin Mutuku Mutiso.

d) An Order directing the 1st to the 11th Defendants to immediately demolish at their cost all structures that they had erected on Plot NO Kilungu/Wautu3048 belonging to the Estate of their late father Benjamin Mutuku Mutiso failure to which the Plaintiffs would be at liberty to demolish the same at the cost of the 1st to the 11th Defendants.

e) An Order directing the 1st to the 11th Defendants to uproot all crops which they had illegally plant on the land of their late father Benjamin Mutuku Mutiso.

f) Costs of the suit.

g) Any other remedy that the court may find just to grant.

2. The Plaintiff filed a Notice of Withdrawal of Suit dated 8th of September 2021 and filed in Court on the same day.

3. The issue for determination is whether the Defendants are entitled to costs.

4. When this matter came for mention on the 5th of October 2021, Counsel for the Plaintiffs applied to withdraw the suit against the Defendants with no orders as to costs. The Defence did not oppose the application to withdraw the suit subject to payment of their costs. The Plaintiffs contends that the Defendants are not entitled to costs as they had not filed a Statement of Defence.

5. Section of the 27(1) of the Civil Procedure Act provides as follows;

Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and give all the necessary direction for the purposes aforesaid and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise direct.

6. In Cecilia Karuru Ngayu -Vs- Barclays Bank of Kenya & Another (2016) eKLR the court held that;

“In determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances that led to the institution of the proceedings, (iv) the events which eventually led to the termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) of the constitution.”

7. In tracing the steps taken by the parties in this suit, I note from the proceedings that the Plaintiffs initiated this suit against the Defendants and sought for prayers as stated in the Plaint. Upon service of Summons to Enter Appearance the 7th, 8th, 10th, 11th, 12th and 14th filed their Memorandum of Appearance and a Notice of Preliminary Objection on the 26th of July 2020 through the firm of SKM Advocates. The 1st, 2nd and 4th Defendants equally filed their Memorandum of Appearance in person. Although none of the Defendants filed a Defence the fact they filed the Memorandum of Appearance and a Notice of Preliminary Objection was an important step towards defending the suit. The Court finds that the filing of the Memorandum of Appearance and a Notice of Preliminary Objection is an event within the phrase ‘costs follow the event’. The Defendants incurred costs in carrying out the above exercises and are therefore entitled to costs. The Plaintiffs have not given any sufficient reason why the Defendants should not be awarded costs. This court will therefore in exercise of its discretion award the Defendants costs for the withdrawal of the suit.

8. In the end I make the following orders;

1) The Plaintiffs suit is withdrawn as prayed.

2) The Plaintiffs to pay costs of the suit to be agreed upon by the parties or the taxing master of this court.

RULING DELIVERED VIRTUALLY THIS 12TH DAY OF OCTOBER 2021.

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HON LADY JUSTICE T. MURIGI

IN THE PRESENCE OF: -

Mr. Kioko for the 7th to 14th Respondents.

Ms Ong'onga holding brief for Ms Kemunto for the Plaintiff.

Kwemboi - Court Assistant.