

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 221 OF 2017

JOEL EREGWA KIDIVAPLAINTIFF

VERSUS

JOHN MUDASIA MUGADIA.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the registered owner of land parcel No. Nyang'ori/Banja/146 to which he holds a title deed. The plaintiff avers that the defendant has without any colour of right trespassed onto a portion of the suit land and is wasting it. The plaintiff prays for damages for the wrongful entry of the defendants onto the plaintiff's said parcel and for injunction restraining the defendant, their servants, workmen and agents from entering the plaintiff's said property or from in any way interfering with the plaintiff, use and enjoyment of the said property. Despite demands made and intentions to sue intimated, the defendant have failed, neglected and/or refused to cease interfering with the plaintiff's said property. The plaintiff prays for judgment to be entered against the defendant for:-

- (a) An order of eviction from land parcel No. Nyang'ori/Banja/146.
- (b) An order of injunction restraining the defendants, his servants, workmen and plaintiff's use and enjoyment of the plaintiff's property.
- (c) Costs of this suit.
- (d) Any other relief the court deems fit to grant.

The defendant avers that he has beneficial interest in the parcel of land better known as L.R. No. Nyang'ori/Banja/146 having bought a portion belonging to one Zakaria A. Mathayo. By a written and signed agreement made on diverse dates between 7th day of January, 2006 and 27th day of September, 2009, the defendant entered into a land sale agreement with one Zakaria A. Mathayo purchasing apportion of land from land parcel better known as L.R. NO. Nyang'ori/Banja/146 at a consideration of Ksh. 62,500 which was fully acknowledgement by the said Zakaria A. Mathayo upon signing the agreement. The defendant avers that the said Zakaria A. Mathayo is a brother to the plaintiff and had beneficial interest in the aforesaid parcel of land better known as L.R. No. Nyang'ori/Banja/146, which interest he sold to the defendant. The defendant avers that upon signing the initiated agreement made on 7th day of January, 2006 he immediately took possession and has remained in occupation to date.

This court has considered the evidence and the submissions therein. The defendant in his defence paragraph 8 raised a preliminary point of law, that the plaintiff's suit is a duplicity as there is Hamisi SRMCC No. 45 of 2015 which is still pending determination. The issue as to whether or not this suit is res judicata or sub judice is therefore a preliminary issue to be determined even before going into the merits and the demerits of the case. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I have perused the court file and find that the proceeding of Hamisi SRMCC No. 45 of 2015 have been annexed to the statement of defence. Indeed the parties are similar and so is the subject matter. I find that this matter is sub judice Hamisi SRMCC No. 45 of 2015. This suit is struck off with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE