

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 186 OF 2014

EVANS ADAM PESSA MULUKA.....PLAINTIFF

VERSUS

DORCAS CHRISTINE SANDE.....DEFENDANT

JUDGEMENT

The plaintiff avers that on or about the 23rd of February, 2012, the defendant without consent of the said Eric Mwenda Muluka, unlawfully and without permission made entry into Eric Mwenda Muluka's property known as L.R. No. Kakamega Town Block 111/Plot 140 and took possession of it. The plaintiff avers that the said acts amounted to a trespass onto Eric Mwenda Muluka's property by the defendant and the trespass is continuing. By reason of the defendant's trespass, Erick Mwenda Muluka has been deprived of the use and the enjoyment of the said property and has thereby suffered loss and damage. The defendant since then has failed, neglected and or refused to adhere to the wishes of Eric Mwenda Muluka to vacate the premises illegally occupied by her. Despite demand and notice to vacate Eric Mwenda Muluka's premises by Eric Mwenda Muluka through his advocates, the defendant has refused, failed and/or neglected to vacate the said premises. Eric Mwenda Muluka prays for judgment against the defendant for:-

- (a) Vacant possession of Eric Mwenda Muluka's property.
- (b) Damages for trespass at the rate of Ksh. 45,000/= per month from February, 2012 to date of judgment.
- (c) Costs of this suit.
- (d) Interest in (b) and (c) above.

That the defendant denies that one Eric Mwendwa was the registered owner of property known as No. Kakamega town Block 111/Plot 140 at all material times or at all and further denies that she without the consent of the said Eric Mwendwa, unlawfully and without permission made entry into Eric Mwenda's property. The defendant avers that she is the lawful wife of the plaintiff and that she lawfully entered property known as No. Kakamega Town Block 111/Plot 140 on or about 23rd February, 2012 in the company of and with authority of the plaintiff, who was the lawful registered owner and who personally allowed defendant to reside therein as her matrimonial home and that defendant subsequently registered a restriction on the title to that effect. The defendant further avers that plaintiff appears to be changing his mind and his affection to her and has been engaging in various illegal actions against defendant, to wit to mention only a few, subjecting defendant to plaintiff is being dishonest in falsely swearing in the verifying affidavit that there is no other suit pending in this court or at all, and that there have been no previous proceedings in any court on the same subject matter, involving the same parties herein when he knows that he, plaintiff filed High Court Civil Suit No. 11 of 2013 against the defendant and he, plaintiff knows very well that there is pending in Kakamega CMCC No. 365 of 2013 in which defendant has suit the said Eric Mwendwa for illegally sending Auctioneers to proclaim moveable property in the same parcel No. Kakamega Town/Plot 111/140 where Eric's title to the subject land has been challenged. 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 proceedings and pleadings of the above mentioned cases filed in court and indeed find that the parties are similar and so is the subject matter. I find that this matter is sub judice and/or res judicata Kakamega CMCC No. 365 of 2013. This suit is struck off with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE