



**Simiyu v Mukenya & 3 others (Environment and Land Case
E002 of 2023) [2025] KEELC 4930 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE E002 OF 2023**

EC CHERONO, J

JUNE 24, 2025

BETWEEN

ELVIS SIMIYU APPLICANT

AND

FANUEL WEKESA MUKENYA 1ST RESPONDENT

MARGARET NANJALA WEKESA 2ND RESPONDENT

ALICE NASIMIYU WANDIOSI 3RD RESPONDENT

AGNES NANJALA WEKESA 4TH RESPONDENT

JUDGMENT

1. The Applicant, Elvis Simiyu moved this Honourable Court vide a plaint dated 18th January, 2023 seeking for inter alia an order of injunction restraining the defendants, their servants, workmen, and agents from entering on and /or erecting or causing to be erected thereon any structures, or from in any way interfering with the plaintiff's use and enjoyment of his late father's land parcel No. Bokoli/Bokoli/621 pending conclusion of civil and criminal investigations and legal processes as to ownership entitlement. This suit was filed contemporaneously with a Notice of Motion application under certificate of urgency.
2. By a Notice of Appointment of Advocates dated 2nd June 2023, the Defendants engaged the Firm of M/S BS Advocates to act for them. On 20th June 2023, the 2nd, 3rd and 4th Defendants filed a joint statement of Defence dated 15th June 2023 denying the plaintiffs' claim. Thereafter, the parties filed witness statements and compliance documents. On 13/12/2023, this matter came up for directions and the parties confirmed compliance and by consent fixed the matter for hearing on 19/03/2024. On the hearing date, M/S Khaminwa was said to have fallen sick and counsel holding her brief sought for an adjournment which was not opposed by Counsel for the Respondents. The court allowed the application and the matter was fixed for hearing but was also adjourned at the instance of the plaintiff.



When the Matter came for hearing on 12/03/2025, M/S Khaminwa for the plaintiff informed the court that they had filed a Notice to withdraw the suit dated 5th February 2025 and sought to have the same adopted as an order of this Honourable court. Mr Kapten, Counsel for the 2nd, 3rd and 4th Defendant stated that he had no objection save for costs. M/S Khaminwa for the plaintiff sought for more time to explore an amicable settlement on costs. Despite several adjournments, no amicable settlement was reached and the parties requested this Honourable Court to make a decision on the same.

3. I have looked at the pleadings, proceedings and the applicable law. Section 27 of *Civil Procedure Act* which deals with costs provides as follows;

- (1) 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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge 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 reason otherwise order.”

4. The plaintiff initiated this suit alleging that the defendants trespassed onto the suit property LR No. Bokoli/Bokoli/621 belonging to the estate of his late father, one Dr. Charles Dickens Maloba. The defendants engaged the present firm of advocates to defend the suit who filed pleadings and other court processes and attended court in defence of the suit. The parties filed their compliance documents pursuant to Order 3, 7 and 11 of the *Civil Procedure Rules*. When this case came up for pre-trial conference on 13/12/2023, the parties confirmed that they had fully complied and this Honourable Court directed that the case was ripe for hearing and a hearing date was taken by consent. No explanation has been given by the plaintiff for withdrawing this case after the same came up for hearing on numerous occasions and adjourned at the instance of the plaintiff. It is trite that the costs of any action, cause or any matter including withdrawal of a suit shall follow the even unless the court shall, for good reasons order otherwise. Though an order as to the payment of costs is a discretionary power, the same must be exercised judicially and not whimsically or capriciously. The plaintiff has not given this court any reasons or explanation for withdrawing this suit when the same had come up for hearing severally and adjourned at his instance. A party cannot file a suit claiming that his rights had been violated but fail to prosecute the same on numerous occasions. In the absence of any good reason, the plaintiff shall bear the costs of this suit which has since been withdrawn.

5. For all the aforesaid reasons, the plaintiff is hereby ordered to pay the costs of this suit plus interest at court rates from 12th March 2025 until payment in full.

It is so ordered.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 24TH DAY OF JUNE, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Kapten for the 2nd, 3rd and 4th Respondents.



2. Petitioner/Advocate-absent.

3. Bett C/A.

