

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO. 70 OF 2011

JUMA MAFWABI MUREFU.....PLAINTIFF

V E R S U S

BOAZ KITUYI.....1ST DEFENDANT

TERESA NABUBWAYA.....2ND DEFENDANT

RULING

1. This suit was commenced by Juma Mafwabi Murefu against Boaz Kituyi and Reresia Nabwaya on 22nd July 2011. by his plaint he sought declaratory orders and a permanent injunction as against the defendants jointly and severally. He also prayed for costs of the suit.
2. On 3rd March 2014, the hearing of the suit began with the plaintiff giving his testimony. After the end of testimony of the plaintiff parties agreed to send the District Land Registrar on site to determine the sizes of the entitlements of the parties on the ground. The District Land Registrar did make the visit on 24.3.014 and filed his report in Court. On receipt of the report, the parties agreed and a consent judgement was entered in terms recorded. What they failed to agree on is who should pay the costs of the suit hence this ruling.
3. Section 27 of the Civil Procedure Act gives the Court or Judge discretion to determine by whom and out of what property and to what extent such costs are to be paid. Provided also that costs of any action shall follow the event unless the Court or Judge for good reason otherwise order. Mr. Murunga submitted the defendants should pay costs as they were interfering with the plaintiff's portion of land.
4. The land was jointly owned between the plaintiff and his brother with no demarcation on the ground. The defendants purchased his brother's share. He has incurred costs to file suit and travel hence ought to be awarded costs. Ms. Nanzushi for the defendants submits it is the plaintiff who should pay them costs. That the plaintiff failed to consult a Surveyor to confirm whether he had six(6) acres or not. The plaintiff also claimed the defendants had only leased the land.

Mr. Murunga in reply submitted that the survey was not done due to the tribal clashes.
5. Before the suit was set down for hearing, parties filed and exchanged documents as required under Order eleven (11) of the Civil Procedure Rules. In the Plaint, the Plaintiff did not specify the extent of encroachment by the defendants. Instead he sought "a permanent order restraining the defendants from entering into the suit land ploughing or in any other manner whatsoever using the same". The defendants served the plaintiff with their list of documents which included sale agreement for part of the suit land. In the statement of defence the defendants were also specific on the portion of land they were using and also claiming.
6. The parties had a dispute referred to the tribunal regarding the same subject matter. In those proceedings which were quashed. In those proceedings the 1st defendant is said to have entered and occupied 5 acres for agricultural purposes. The plaintiff in my view was aware therefore on what basis the defendants were on this land. His view is that the defendants were in possession illegally. It is clear in my view that the plaintiff was unhappy with the sale done by his brother Jason Bisaule to the defendants not so much of the defendants' trespassing on his share of the land. He became aware of the sale

transaction before the commencement of this suit. I hold that he is the one who should pay the defendants costs of the suit given the circumstances. However on the basis of the consent judgment entered before the suit was fully heard, I order that he pays half costs of the suit to the defendants.

Dated, Signed and Delivered in Bungoma this 17th day of July, 2014.

A. OMOLLO

JUDGE