



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 313 OF 2017

ISMAEL TETE KEYA.....PLAINTIFF

VERSUS

JOSEPH MASINDE JUMA

REHEMA MEUNUNA JUMA

SAINA NASIMIYU JUMA

SAIDA NECHESA JUMA.....DEFENDANTS

JUDGEMENT

The defendants trespassed and entered land parcel number NORTH WANGA/KHALABA/1145 which belonged to the late father of the plaintiff, the late Keya Mutinyi Watako who died on 1st July, 2016. The defendants have built on the land four semi-permanent houses and are now residing on the said land. When the defendants buried the remains of the late Ibrahim Juma Mukamo alias Chuma Mukamo they had no court order authorizing them to bury. The plaintiff's claim against the defendants jointly and severally is therefore for the defendants to vacate land parcel NO. NORTH WANGA/KHALABA/1145 until original land case being Environment and Land Case No. 228 of 2013 which is still pending before the High Court at Kakamega is heard and determined. The plaintiff prays for judgment against the defendants jointly and severally for:-

- a. The defendants to vacate land parcel NO. NORTH WANGA/KHALABA/1145
- b. Costs of this suit and interest.
- c. Any other relief this honourable court deems fit and just to grant.

The defendants aver that the land belongs to their deceased father Ibrahim Juma Mukamo and for that matter they have every right to bury their father on the land with or without court orders. Further the defendants aver that they have every right to build on land belonging to their deceased father Ibrahim Juma Mukamo. The defendants are aware that the plaintiff has no right to the suit land and for that matter the plaintiff has no right to deny the defendants access to the land that belongs to them. The defendants further aver that there is a similar suit pending in this court and for that matter this suit must be defeated in the first instance without the necessity of a hearing. The defendants pray that this suit be dismissed with costs to the defendants. Alternatively the defendants pray that this suit be struck out with costs for want of cause of action against them and for violating mandatory provisions of the law.

This court has considered the evidence and the submissions herein. In their submissions the defendants raised the issue of sub judice and submitted that this suit was totally unnecessary as there was a similar suit ELC case No. 228 of 2013 which is still pending. One wonders why the defendant never raised this as a preliminary objection but instead had the court go through the entire hearing. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection and should have been raised as such to save the courts time. Be that as it may, the court will consider the said point of law. 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.”

The plaintiff in paragraph 7 of his plaint admits that there is a similar suit ELC case No. 228 of 2013 which is still pending. The litigants testified as such and the issue of the existence of that case is not in dispute. I find the current case a total waste of the courts time. This suit is sub judice as the suit ELC case No. 228 of 2013 which is still pending. I find this suit is not merited and I strike it out with cost to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH MAY 2019.

N.A. MATHEKA

JUDGE