



REPUBLIC OF KENYA

THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO 16 OF 2017

MWANZIA KIMWELE.....PLAINTIFF

VERSUS

KITHOME KUBORA.....1ST DEFENDANT

IBRAHIM MUSINGA.....2ND DEFENDANT

RULING

The application before me is the notice of motion dated 6th December, 2017 brought under Section 1A, 1B, 3A and 63E CPA and order 40 and 51 CPR. The applicant is seeking the following orders:

- 1. THAT this matter be certified urgent and be heard in the first instance in the absence of the respondent.**
- 2. THAT pending the hearing and determination of this application, this honourable court do issue temporary orders restraining the plaintiff/respondent his agents and/or any other person acting under his authority from interfering the remains of MWENDE MWANZIA KIMWELE on the suit property.**
- 3. Pending the hearing and determination of this suit as above.**
- 4. THAT the costs be in the cause.**

That application is supported by grounds shown on the face of the said application and the supporting affidavit of Ibrahim Musinga the 2nd defendant/ respondent herein.

That application is opposed with a replying affidavit sworn by Kithome Kubora, the 1st respondent herein on 17/11/2017. In his affidavit in support of this application, the applicant states that the subject matter of this suit is a land dispute which can be heard by the ELC Court with competent jurisdiction. He contends that Kyuso Law Courts has been gazette to hear and determine land related disputes and that it would fair and just to transfer the case to the said court. The applicant has further deponed that the subject which is land is situated within the jurisdiction of Kyuso Law Courts and that all the witnesses come from Kyuso sub-county. Finally, the applicant avers that it would be expensive to transport witnesses to Garissa for the hearing of the case.

In opposition to that application the 2nd defendant through the firm of Garane & Associates filed a replying affidavit sworn on 20th November, 2017. In that replying affidavit the 2nd defendant/respondent stated that the plaintiff had sued him in Kyuso Civil Case no. 69 of 2013 which for some reasons could not proceed for a long time.

On several occasions, he made attempts to have the case transferred to the ELC Garissa Court for hearing and disposal. On 10th March, 2017, they filed a consent letter to transfer the case to the ELC Court, Garissa which consent was adopted by the court on 13th March, 2017. The 2nd defendant believes that this application is made in bad faith and only meant to delay the hearing of this suit and take him in / while utilizing the suit land.

I have heard the arguments raised by the parties through their legal representatives and their legal submissions. The plaintiff/appellant had initially filed Civil Suit No. 69/2013 (Kyuso) between him and the defendants in this case. That case could not proceed to full hearing for a long time. Sometime in 2017, the 2nd defendant filed a Miscellaneous application No. 6 of 2017 seeking orders to transfer the said suit from the said suit from Kyuso Law Courts to the ELC Court Garissa for hearing and disposal. That application was served upon the plaintiff's advocate but during the hearing of the said application, the parties filed a consent to transfer the case from Kyuso Law Courts to ELC Court

for hearing and determination. That consent order was adopted as an order of this Honourable Court. The order was then served upon the Executive Officer, Kyuso Law Courts who forwarded the original court file to the ELC Court, Garissa for hearing and disposal.

There is nobody who has challenged the said consent order transferring that case file from Kyuso to the ELC Court in Garissa. If any party was aggrieved by the consent order which was adopted by this court they should have challenged the same by way of Review. I find the application by the plaintiff/applicant / and scandalous and the same is hereby dismissed with costs to the respondents.

Read, delivered and signed in the open court this 25th January, 2018.

E. C Cherono (Mr.)

ELC Judge

In the presence of:

1. Mr. Nzili holding brief for Mbaluka for plaintiff.
2. M/s Hassan holding brief for Faruq for respondent