



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

MISC. CIVIL APPL. NO. 28 OF 2017

ISMAEL TETE KEYA.....PLAINTIFF

VERSUS

JOSEPH MASINDE JUMA.....1STDEFENDANT

REHEMA NEUNUNA JUMA.....2NDDEFENDANT

SAINA NASIMIYU JUMA.....3RDDEFENDANT

SAIDA NECHESA JUMA.....4THDEFENDANT

R U L I N G

1. The Notice of Motion application dated **15/8/2017** seeks the following orders:-

(a).....spent

(b) That the defendants/respondents by themselves, their agents and or servants or any other person authorized by them be restrained from burying the remains of the deceased **IBRAHIM JUMA MUKAMO a.k.a. CHUMA MUKAMO** on the land **N.WANGA/KHALABA/1145** pending the hearing and determination of this application

(c) That the orders above prayed when granted by the honourable court be enforced or effected by the O.C.S. Harambee Police Station.

2. The application is supported by the affidavit of Ismael Tete Keya sworn on **14/8/2017**. The grounds upon which the application is made are that the respondents wish to bury the deceased **Ibrahim Juma Mukamo a.k.a. Chuma Mukamo**, who was the plaintiff in **Kakamega ELC Case No. 228/2013**, on **Land Reference No. North Wanga/Khalaba/1145** and that the applicant herein stands to suffer irreparable loss and damage. It is prayed that the status quo should be maintained until the end of the suit **ELC No. 228/2013** at Kakamega. It is alleged that the applicant's father purchased the land from the deceased.

3. I have considered the application and the replying affidavit. From the records before me, the deceased raised a dispute vide Kakamega ELC No. 228/2013 before he died. It is not the deceased's children who commenced Kakamega ELC No. 228/2013 against the applicant. The land in question is said to have been ancestral land to the deceased and his family, which had been handed down from generation to generation. In **2011**, the replying affidavit reads, the applicant and his father evicted the respondents from the suit land. I therefore find that the parties and the cause of action, in these proceedings, if any cause of

action can be made out at all, are totally different. Reliance cannot be laid on that suit.

4. The Notice of Motion is brought under **Order 40 Rule 1(a) and (b) of the Civil Procedure Rules**. **Order 40 Rule 1(a) and (b)** provides as follows:-

1. Where in any suit it is proved by affidavit or otherwise-

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

4. The main issue to be determined in the current application is whether the applicant has made out a **prima facie** case and whether he will suffer irreparable loss or damage if the orders that he seeks are not granted. A prima facie case is can be deciphered from pleadings in a suit.

5. In view of the provisions of the order quoted by the applicant, the question arising here is whether there is a suit in these proceedings. To answer this question, there is need to examine the various ways of commencing a suit. **Order VI Rule 1** which prescribes the manner of commencing a suit, which rule provides that:

‘Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed’”

There is no Plaint filed. There is therefore need to first find out if a notice of motion falls into the description of **“such other manner as may be prescribed”**

6. **“Pleading”** is defined in **Section 2** of the **Civil Procedure Act** as follows:-

“.....includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any defence or counterclaim of the defendant.”

7. **Order 3 Rule 1 (1)** of the **Civil Procedure Rules, 2010** provides:-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed”.

8. In the case of **Jecinta Wanjiru Muiruri V Jane Wangare Mwangi & Another [2006] eKLR**, the

court had this to say:-

“Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made thereunder.”

9. In the case of **Simon Njoroge Thuo v Joseph Mwangi Waweru [2017] Eklr** the court stated as follows:

“For the court to perform the above duties there must be a suit before it. If there is no suit then the court’s hands are tied. In the context of an application for an interlocutory injunction under Order 40 rule 1, if there is no suit then the application has no legs to stand on. It is therefore not necessary for the court to embark on considering the merits of the application.”

10. As I have said before, there is no plaint or other kind of pleading filed prior to this application. The proceedings have not been commenced by way of any of the recognized modes of instituting proceedings. The provisions of **Order 40 Rule 1 and 2** are applicable where a suit has been filed. Those provisions are inapplicable in these proceedings and they cannot avail the applicant any help.

11. This court cannot make out any cause of action against the respondents herein in the absence of a proper pleading from which the application dated **15/8/2017** should have sprung. The current proceedings hang in the air, so to speak. By extension, in the absence of any pleading that lays out a proper claim against the respondents, it is not possible to assess the merits of the application before the court.

12. I therefore find that the application dated **15/8/2017** has no merit. I therefore dismiss the application with costs to the respondents.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/08/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Ateya for the Applicant

Ms. Mufutu for Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/08/2017