



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 16 OF 2010**

**RAPHAEL MLEWA MKARE & 515 OTHERS.....PLAINTIFFS/RESPONDENTS**

**=VERSUS=**

**AGRICULTURAL DEVELOPMENT CORPORATION.....DEFENDANT/APPLICANT**

**RULING**

1. On 15<sup>th</sup> April, 2016, this court dismissed the Plaintiffs' suit in which they had sought for a permanent injunction restraining the Defendant from interfering with their portion of land.
2. The Defendant has now filed an Application dated 4<sup>th</sup> May, 2016 in which it is seeking for the following orders:-
  - (a) **THAT an order to issue permanent injunction restraining (sic) the plaintiff whether by themselves their agents, servants, employees, or any other claiming through themselves from interference with the defendants occupation of the suit land and either by cultivating, encroaching or in any manner/in any dealing which would interfere with the defendant's peaceful enjoyment for the suit property.**
  - (b) **THAT an order of eviction be issued against the Plaintiff/or any other person in the defendant's suit land without the defendant' consent.**
  - (c) **THAT the County Commissioner to provide enough security personnels to supervise the eviction process.**
  - (d) **THAT the court bailiff to assist in eviction process.**
3. In the Affidavit in support of the Application, the Defendant's advocate has deponed that the Plaintiffs have kept on encroaching on the Defendant's property without leaving space for the Defendant's livestock to graze thus starving them to death.
4. According to the Defendant's advocate, to avoid further litigation, the orders that have been sought in the Application should be allowed.
5. In his Replying Affidavit, the Plaintiffs' advocate deponed that nothing has changed on the ground before or after the Judgment was delivered.

6. According to counsel, the Plaintiffs/Respondents have not moved even an inch from the area that they have always been in occupation and that the Defendant's/Applicant's animals have died due to diseases which had nothing to do with the Plaintiffs/Respondents.

7. The Plaintiffs'/Respondents' counsel deponed that this court is functus officio; that the Applicant can only institute a fresh suit and that the Plaintiffs have a right to be heard on the fresh suit.

8. One of the Respondents deponed that the Plaintiffs have instituted an appeal against the Judgment of the court; that that in any case, there is no clear boundary between the land that the Applicant is claiming and theirs and that the death of the Defendant's animals is due to gross neglect.

9. The advocates appeared before me and made oral submissions. I have considered the submissions and the authorities.

10. On 15<sup>th</sup> April, 2016, I dismissed the Plaintiffs'/Respondents suit because they had not proved their case on a balance of probabilities. In the same Judgment, I held as follows:-

**“140. As I had already stated above, the Defendant filed an Amended Defence and counter claim without the leave of the court. I shall therefore not consider the said Amended Defence and Counter-claim.”**

11. In the amended Defence and Counter-claim which this court declined to consider, the Defendant had sought for orders of eviction as against the Plaintiffs.

12. Indeed, the Defendant filed an Application dated 22<sup>nd</sup> October, 2013 for leave to amend the Defence and Counter-claim. That Application was however never prosecuted.

13. Having not considered the issue of evicting the Plaintiffs in its Judgment, the Defendant cannot move the court by way of an Application for the same order that the court had declined to consider in its Judgment.

14. If the Defendant's position is that the court erred in refusing to consider the amended Defence or counter-claim, then it should file an appeal on that issue.

15. Other than appealing against the decision of this court, the Defendant's only other option is to file a suit seeking for orders of eviction. This court cannot grant to the Applicant the orders of eviction by way of an Application, which is a mandatory injunction in nature, without a suit.

16. For those reasons, I dismiss the Defendant's Application dated 4<sup>th</sup> May, 2016 with costs.

Dated, signed and delivered in Malindi this 27<sup>th</sup> day of **May**, 2016.

**O. A. Angote**

**Judge**