

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 170 OF 2013

KAZUNGU BURASHI BAYA.....PLAINTIFFS/ RESPONDENT

=VERSUS=

ALPHONCE VICTOR GAMBO MAROPIA.....DEFENDANT/ APPLICANT

R U L I N G

1. The Plaintiff commenced this suit by way of a Plaint dated 27th September 2013 and filed on 30th September 2013. On the same day, The Plaintiff filed an Application seeking for interim orders of injunction pending the hearing and determination of the suit.
2. On 4th November 2013, the Defendant filed a Notice of Preliminary Objection and averred that the suit is an abuse of the court process as it is *Res Judicata*.
3. According to the Defendant, there was and has been Senior Resident Magistrates Civil case No. 144 of 2011 at Kilifi between the Plaintiff and the Defendant over the same subject matter and that the said SRMCC No. 144 of 2011 at Kilifi was heard and determined. The Defendant raised the same objection in his Defence.
4. The Plaintiff responded to the said Preliminary Objection and stated that the Defendant herein filed Kilifi SRMCC. No. 144 of 2011 when the said court did not have jurisdiction; that the Defendant herein failed to serve the Plaintiff with a hearing notice in that suit even after the Plaintiff filed a Memorandum of Appearance and that the Defendant produced as Exhibit number 1 the power of attorney in the lower court which is not amongst the documents produced in this case.
5. The parties agreed to dispose of the Preliminary Objection by way of written submissions. The Plaintiff's/Respondent's advocate adopted the averments in his reply to the Preliminary Objection. The Defendant/Applicant did not file any submissions.
6. The Plaintiff has prayed in his Plaint for a permanent injunction restraining the Defendant from trespassing onto his land number Kilifi/Roka/1169 and for declaratory orders that he is the lawful owner of Kilifi/Roka/1169.
7. The Defendant has annexed on his Replying Affidavit the Judgment in SRMCC No. 144 of 2011. In the said judgment, the Plaintiff in the current suit was the Defendant while the Defendant was the Plaintiff. The one paged Judgment is bereft of details. It is not clear what the dispute was all about or even the suit property. The Defendant/Applicant did not annexed on the Replying Affidavit the Plaint in the lower court to enable this court to determine whether the issues before this court and the issues in the lower court were the same and whether the lower court determined those issues on merit.
8. In the circumstances, I shall not address my mind on the said preliminary objection. The objection was argued prematurely and should await the hearing of the main suit.
9. Having disregarded the objection for lack of sufficient information, I direct that the Plaintiff's Application dated 27th September 2013 be set down for hearing. Each party shall bear his own costs.

Dated and delivered in Malindi this **8th** day of **May**, 2014.

O. A. Angote

Judge