



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.324 of 2013

CHRISTOPHER AGUNDA OTUOMA.....PLAINTIFF

Versus

SUMEYO ODHIAMBO KOYO.....DEFENDANT

RULING

1. The Defendant, **Sumeyo Odhiambo Koyo**, seeks for temporary injunction to restrain the Plaintiff, **Christopher Ogunda Otuoma**, from continuing with this suit or seeking an order of eviction against him. He also prays for stay of proceedings and costs. The application is based on one ground that the suit land, **Kisumu/Dago/1119** is the Defendant's ancestral land and has lived on it since 1978. That application is supported by a document headed "statements" dated 27th June 2016 and affidavit sworn on the same date by the Defendant.

2. The application is opposed by the plaintiff through grounds of opposition dated 8th July 2016 and replying affidavit sworn on the 31st March 2017.

3. The application came up for hearing on the 5th October 2017 when the court heard the defendant in person, and Mr. Baganda for Kowinoh for the plaintiff.

4. The following are the issues for determination by the court;

- a) Whether stay of proceedings order should be issued.
- b) Whether the Plaintiff should be restrained from prosecuting this case.
- c) Who pays the costs.

5. The court has after considering the single ground on the notice of motion, grounds of opposition, affidavit evidence, submissions tendered by both sides come to the following determinations;

- a) That this suit was filed through the plaint dated 26th July 2016. The Plaintiff seeks to have the Defendant evicted from Kisumu/Dago/1119, permanent injunction, costs and interests.
- b) That the Defendant, who is acting in person, filed the notice of motion dated 27th June 2016, and from what the court is able to gather from the documents filed and his submissions in court, he seeks for an order staying the proceedings pending the hearing and determination of the suit he had

filed earlier against the Plaintiff to wit Kisumu H.C.C. No.242 of 2013.

c) That the Defendant has annexed a copy of notice of motion dated 19th September 2013, certificate of urgency dated 18th September 2013, hearing notices dated 11th December 2013, and 7th February of undisclosed year, receipt No.5451077 dated 19th September 2013 all in respect of Kisumu HCC No. 242 of 2013 confirming that the Plaintiff herein is indeed the Defendant in that case.

d) That the Defendant's contention that Kisumu HCC No.242 of 2013 was filed before the current suit, that it is over the same land and between the same parties has not been controverted by the Plaintiff in their replying papers or submissions.

e) That in view of the findings in (d) above, then the averments of the Plaintiff in paragraph 6 of the plaint filed herein, dated 26th July 2013 is to say the least untrue and misleading.

f) That the fact that this suit reference is No.324 of 2013 confirms that it was filed after the one by the Defendant being No. 242 of 2013 as between them there are about 82 files which could not have been filed on the same date.

g) That the foregoing notwithstanding, the Plaintiff has attacked the Defendant's application on the basis that it is bad in law, incompetent, devoid of merit, and contrary to public policy and law. That were one to take it on the face value that the Defendant was seeking the Plaintiff to be stopped from seeking his eviction or generally prosecuting the case, then the claim could have some basis. That however what the court discerns from the papers filed by the Defendant and his submissions is that he seeks to have the Plaintiff's suit stayed to enable the one he had filed earlier, being H.C.C.C No.242 of 2013, heard and determined first. The deficiencies that the Defendant's application has in form do not in any way stop the Plaintiff from appreciating what the Defendant was seeking. This is born out by the fact that the Plaintiff in their submissions sought to have the two matters consolidated for hearing and determination, which proposal was objected to by the Defendant. That **Article 159 of the constitution 2010** obligates this court to do substantive justice without undue regard to technicalities and this is one instance where the failure to comply with form should not be allowed to hinder the court from doing substantial justice.

h) That the filing of this suit by the Plaintiff against the Defendant over the land parcel **Kisumu/Dago/1119**, while Kisumu H.C.C.C No. 242 of 2013 earlier filed by the Defendant as the Plaintiff against the Defendant was contrary to the specific provision of **Section 6 of the Civil Procedure Act Chapter 21 of Laws of Kenya** which states as follows;

"6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

That accordingly the suit that should be heard first is HCCC No.242 of 2013 and this matter should therefore be stayed.

6. That flowing from the foregoing the court find that the Defendant's notice of motion dated 27th June 2016 has merit and is allowed in the following terms;

a) That this suit be and is hereby stayed pending the hearing and determination of Kisumu HCCC No.242 of 2013.

b) That the Plaintiff do pay the Defendant's costs of the application.

c) That the Defendant herein, who is the Plaintiff in Kisumu HCCC No.242 of 2013, do take steps towards prosecuting that case in 90 (ninety) days and in default the Plaintiff, who is the Defendant in that case, be at liberty to do so.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Odeny for Kowino for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/12/2017

13/12/2017

S.M. Kibunja J.

Joane/Oyugi court assistant

Mr. Odeny for Kowino for the Plaintiff.

The Defendant is in person.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/12/2017