



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA AT KAPSABET**

**ENVIRONMENT AND LAND CASE NO.107 OF 2021**

**(FORMERLY ELDORET ELC CASE NO 116. OF 2020)**

**JOHN KIPROTICH SAINA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BARNABA KIPKEMBOI SAINA.....DEFENDANT/ APPLICANT**

**RULING**

1.This Ruling relates to the Notice of Motion application dated 15.2.2021 by the Defendant/Applicant seeking orders;

1. The suit be struck out for being an abuse of the Court process;

2. In the alternative the proceedings in this matter be stayed pending the hearing and determination of Kapsabet Senior Principal Magistrates Court land case No 73 of 2019.

3. Costs of the application.

2. On 29.9.2021 this matter came up before Court for a mention and directions, the Respondent's Counsel Mr. Kipkorir sought and was granted leave to file a Replying Affidavit within two weeks from the said date.

3. Further directions were issued for the parties to file written submission in respect of the Application within two weeks and a mention for compliance was slated for 15.11.2021.

4. On 15.11.2021 none of the parties appeared and none had filed the submissions and the Respondent had not filed the replying affidavit that he had sought leave to file either and the Court directed the registry to serve the parties with a mention notice for 15.12.2021.

5. On 15.12.2021 the Applicant Counsel Mr. Momanyi appeared in Court but the Respondent Advocate was absent. The Applicant Counsel had filed their submission but the Respondent had not filed their submission and there was no replying affidavit on record either.

6. The Application was therefore deemed as unopposed as no Grounds of Opposition nor a Replying Affidavit had been filed and no submissions had been filed too. As the Applicant has filed elaborate submission notwithstanding that the application is unopposed the Court shall nonetheless consider the applications on its merits.

7. The Motion is brought under Section 6 of the Civil Procedure Act and is grounded on grounds interalia that there is pending for hearing and determination before the Senior Principal Magistrates Court at Kapsabet Land Case no. 73 of 2019, and that the law does not allow the Plaintiff to pursue the same cause of action in two separate Courts or separate causes of action.

8. The Application is supported by the supporting affidavit of the Applicant who depones that there exists a similar suit before the Senior Principal Magistrates Court at Kapsabet and has annexed the plaint thereof as well as an application for injunction and a ruling thereof.

9 The Plaint in the Kapsabet Senior Principal Magistrates Court No. 73 of 2019 was filed on 12.9.2019 through the firm of Kipkosgei Choge and it relates to parcel of land known as **Nandi/Ndulele/985** and seeks declaratory orders as well as injunctive orders.

10.The suit herein seeks similar orders in that it seeks a declaratory order and rectification of the title number **Nandi/Ndulele/985**. In a nutshell whatever relief's, the plaintiff is seeking in the 73 of 2019 and this suit are similar as they are all geared towards and are related to the Respondents alleged half share in **Nandi/Ndulele /985**.

11. Section 6 of the Civil Procedure Act relates to *subjudice*. It is to be noted that *subjudice* is a General Principle of law and therefore the applicant has brought the motion subsumption.

12. It is the Applicant's submission that this suit offends the *subjudice* rule and it ought to be dismissed for being an abuse of the court process. In support of his submission the Applicant cites the decision in **Republic Vs Paul Kihara Kariuki, Attorney General And 2 Others Exparte Law Society Of Kenya 2020 Eklr.** In the said decision the court analyzed the concept of *subjudice* which in Latin means "under judgment". The concept denotes that a matter is being considered in court or by a judge.

13. As observed the application has been brought a General Principle of law as it is expressed to be brought under Section 6 of the Civil Procedure Act; the said principle bars the trial of a suit or proceeding in which the matter in issue is also directly in issue in a previously instituted suit or proceeding between the same 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.

14. The Courts have pronounced themselves aptly on the issue of *subjudice* and the decisions are best summarized in the decision in **Thiba Min Hydro Ltd vs Josphat Karu Ndwiga** which held inter alia 'that it is not the form in which suit is framed that determines whether it is *subjudice*, rather it is the substance of the suit and that there can be no justification in having the two cases being heard parallel to each other'

15. In the instance suit the parties are the same, the reliefs sought are equally the same and the suit is before a Court with jurisdiction to hear and determine the same. I find that the suit is therefore *subjudice*.

16. The Applicant has sought a dismissal of the same on grounds of it being an abuse of the Court process. The Plaintiff/Respondent did swear a verifying affidavit confirming the averments of the Plaintiff, at paragraph 11 of his plaint, the Plaintiff/Respondent had averred that "there is no pending proceeding between him and the Defendant concerning the same subject in any Court" yet he had filed another suit whose injunction application had been dismissed. That is indeed an abuse of the Court process as it amounts to forum shopping.

17. I find and hold that the suit is not only *Sub judice* but also an abuse of the Court process and I grant this application with costs and dismiss the suit with costs to the Defendant.

18. Orders accordingly.

**DATED AT KAPSABET THIS 31<sup>ST</sup> DAY OF JANUARY 2022.**

**HON. JUSTICE M.N. MWANYALE**

**JUDGE.**

**IN THE PRESENCE OF;**

**MR. KIPKORIR FOR THE PLAINTIFF/RESPONDENT**

**MR. ROTICH HOLDING BRIEF MR. MOMANYI FOR DEFENDANT/APPLICANT**