



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELC. NO. 2 OF 2016

AMINA HERIS MOGHE.....PLAINTIFF

VERSUS

1. HASHIM ABDI OMAR

2. MOHAMMED TURKEY HASHIM ABDI.....DEFENDANTS

RULING

1. This is a ruling on a preliminary objection argued before me on 22nd June, 2016. Its notice had been filed on 26th January, 2016. The objection was to the effect that this matter is subjudice **BUSIA CMCC. NO. 1 OF 2016 – TURKEY MOHAMMED –VS- MOHAMMED HERSI MOGHE**. The properties in the two suits is said to be the same. The parties are also said to be the same.

2. During hearing, Ashioya for the defendant argued, inter alia that the property involved is the same and the parties are almost the same. The lower court case was said to have been filed earlier and, if decided, there will be no issue for this court to decide. Ownership is said to be the issue in both cases. The defendants want this case to be struck out.

3. Baraza M/S for the plaintiff argued that the properties are different and the parties are not the same. She further averred that this case was filed on the same day that the lower court case was filed. The issue of jurisdiction was also raised. According to plaintiff, the lower court lacks jurisdiction to handle land matters, that being the exclusive preserve of the environment and Land courts as set out under Article 161 (2) (b) of the Constitution read together with the provisions of Environment and Land court Act, 2011. The defendant's argument on the issue of jurisdiction was solely based on the issue of subjudice.

4. This is a simple and straight forward matter. The defendant argued that the properties in the two suits are the same. Are they? The property in this suit is **BUKHAYO/BUGENGI/3540**. The property in the lower court is **BUKHAYO/BUGENGI/3857**. So the properties are not the same and the defendant is wrong on this.

5. The other argument is that the parties are the same. Are they? Amina Hersi Moghe is the plaintiff in this case, she is not a party in lower court case, the parties in the lower court case being **MOHAMMED TURKEY HASHIM ABDI** as plaintiff while **MOHAMMED HERSI MOGHE** is the defendant. In this case too, **HASHIM ABDI OMAR** is the 1st defendant. He is not a party in the lower court case. On this issue too, the defendant is also wrong. The parties are not the same.

6. There is the issue of jurisdiction of the lower court to handle land matters. There was a ruling in

BEATRICE WAMBUI WARUI VS HON: ATTORNEY GENERAL & 2 OTHERS: MISC. ELC. J.R. No. 1 of 2016, KERUGOYA - availed to show that lower courts lack jurisdiction to handle land matters. I have read the ruling. The ruling shows my brother – **B. N. OLAO J**, - declining to express his position on the issue for the simple reason that the issue was still pending before another superior court.

7. In this matter too, I refuse to delve in to the issue of jurisdiction as raised by the plaintiff. The issue is still pending before another superior court. But the issue of jurisdiction as raised by the defendant is relevant one here. That issue is based on the subjudice rule. And the defendant sought to establish it by arguing that the litigating parties are the same and that the properties are the same. On these two scores, the defendant was wrong as it is already pointed out. The defendant objection therefore lacks merit. I therefore dismiss the objection with costs. I would like to add that even assuming the defendant's arguments had merits, the court would not strike out the case as the defendant is asking. The proper course of action is to stay the suit. The law on subjudice is to be found in Section 6 of Civil Procedure Act (Cap 21) and stay, rather than striking out, is what the provision envisages.

A. K . KANIARU,

JUDGE

18/8/2016

DATED AND DELIVERED ON 18TH DAY OF AUGUST, 2016

IN THE PRESENCE OF;

PLAINTIFF.....

1ST DEFENDANT.....

2ND DEFENDANT.....

COUNSEL.....ASHIOYA FOR DEFENDNAT

COUNSEL.....BARASA FOR PLAINTIFF

J U D G E