



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**HC.CC.NO.63 OF 2004**

**ROBINSON CHESIBO NGEIYWA:.....1ST PLAINTIFF/APPLICANT**

**STANLOUS MUTAI KONES.....2ND PLAINTIFF/APPLICANT**

**(Suing herein as legal representatives of the deceased JOHN NDARA KONES)**

**VERSUS**

**BEN NICODEMUS OMAMBIA MOGAKA ..... 1ST DEFENDANT/RESPONDENT**

**AGRICULTURAL FINANCE CORPORATION:..2ND DEFENDANT/RESPONDENT**

**SIMPLEX KENYA LIMITED:.....3RD DEFENDANT/RESPONDENT**

**RULING**

At the hearing of the applicants' notice of motion dated 29th September 2013 a preliminary objection was taken on behalf of the 2nd and 3rd respondents on the ground that the filing of the motion was a flagrant abuse of the process of court in that there was a similar motion filed by the applicants which was still pending. The applicant herein had filed a motion dated 20.2.2013 seeking orders similar to the ones in the present motion. A consent was recorded in the earlier motion with one of the respondents in which injunction orders were granted by consent. The 2nd and 3rd respondents who were not party to the suit resulting in the motion where a consent was recorded, applied to have the injunction orders discharged on the ground that the same was fraudulently recorded.

The 2nd and 3rd respondents were allowed to be enjoined as parties to the suit and the injunction orders granted by consent were set aside. The court ordered that the motion dated 20.2.2013 be served upon the 2nd and 3rd respondents for hearing. Instead of the applicants serving the motion of 20.2.2013 upon the 2nd and 3rd respondents, they filed a fresh motion which the 2nd and 3rd respondents wants struck out.

The applicants opposed the preliminary objection on the ground that the current motion was filed under different circumstances and that the applicant's would not have amended the earlier motion as it was not a pleading. Counsel for both parties cited High Court decisions in support of their respective positions.

I have considered the arguments as well as the cases cited and I have now to determine whether the preliminary objection ought to be sustained or not. There is no contention that the applicants have filed two motions which are seeking similar orders. It amounts to an abuse of the process of court for a party or parties to file a fresh application when there is a previous one which

is still pending. If the applicants were serious about presenting the later motion they should have first sought to withdraw the earlier application before filing the present one. The cases cited by the applicants are not relevant to the issue at hand. The decisions were on whether there can be amendment to a notice of motion or chamber summons. The applicants had been directed to serve the motion of 20.2.213 upon the 2nd and 3rd respondents who had been made parties to the suit. If the applicants felt that the motion could not be amended, then they should have sought leave of court to withdraw it and file afresh motion but not to file a fresh motion when the former is still subsisting. I find that the filing of the present motion is an abuse of the process of court. The same is hereby struck out with costs to the 2nd and 3rd respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 16th day of January 2014.

**E. OBAGA**

**JUDGE**

Mr. Kiarie for 2nd and 3rd Defendants/Respondents -Present

M/S Nyakibia for Mr. Waweru for Plaintiff/Applicant – Present

C/C - Kassachoon.

**E. OBAGA**

**JUDGE**