



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1030 OF 2013

HAJI OMARI PLAINTIFF

(Suing for and on behalf of the estate of Tabu Binti Yusuf also known as Taabu Marigi-(deceased))

VERSUS

EDWARD NJUGUNA KANG'ETHE DEFENDANT

RULING

The Defendant/Applicant by a Notice of Motion application dated 23rd September 2013 seeks orders that:-

1. That the Honourable court be pleased to stay this suit pending the hearing and determination of **ELC CASE NO. 256 OF 2012** which is pending before this same court and instituted earlier.
2. That pending the hearing and determination of this application be pleased to direct and order that time for filing the statement of defence does not run, and is temporarily waived until further orders.
3. That cost of this application be borne by the plaintiff in any event

The application is premised on inter alia the following grounds set out on the face of the application.

- a. That **ELC Case NO. 256 of 2012** that is pending before this court raises issues which are also directly and substantially the issues raised in this fresh suit.
- b. That the parties in **ELC case NO. 256** are the Defendants/Applicant herein as the plaintiff and the plaintiff/Respondent as Defendant.
- c. That the cause of action in that suit is equally dispute in that suit is equally dispute over ownership of all that premises known as plot no. **36/1/133 Eastleigh** section 1, between the two parties.

The application is further supported on the grounds contained in the supporting affidavit and supplementary affidavit sworn by the Defendant, **Edward Njuguna Kangethe**.

The plaintiff opposes the application to stay the instant suit pending the hearing and determination of **ELC case NO. 256 OF 2012** and has sworn a replying affidavit dated 4th October 2013 in opposition thereto. In the replying affidavit the plaintiff avers that the defendant has never served upon him any summons to enter appearance in **ELC case NO. 256 of 2012** as by law required. The plaintiff avers that he only came to learn of the existence of **ELC case NO. 256 of 2012** sometimes in June 2012 when he got a copy of the plaint from his previous Advocates **Mr. Nganga Nyaga & company Advocates** whom

he had retained to act for him in another related matter **ELC case NO. 159 of 2011** but from whom he had withdrawn instructions in April 2012. The plaintiff states that the said Law Firm had no instructions to act for him in **ELC case NO. 256 of 2012** and any purported service of any court process upon the said Law Firm in regard to **ELC case NO. 256 of 2012** was ineffectual and could not satisfy the provisions of order 5 of the Civil Procedure Rules as regards the service of summons.

The plaintiff contends that the Defendant has not demonstrated that summons were indeed issued and served on the plaintiff within the period of one year from the date of issuance of the summons and avers that the Defendant's said suit has consequently abated as against the plaintiff for failure to lift and serve the summons as by law required. The plaintiff further points out that the interim order of injunction issued by the court in favour of the Defendant in **ELC case NO. 256 of 2012** exparte on 16th May 2012 have never been confirmed since the application has not been heard interpartes and have thus lapsed.

The plaintiff has further averred that his efforts to trace and access the court file in **ELC 256 of 2012** after learning of the existence of the suit have been unsuccessful as the file has been untraceable at the court's registry and that this prevented the plaintiff from filing his defence and counterclaim. The plaintiff states that he previously had to apply for the reconstruction of the court file in **ELC 159 OF 2011** where the Defendant is the plaintiff and the plaintiff herein had been ordered enjoined as an interested party. The plaintiff states that having not been served with the suit papers in **ELC case NO. 256 of 2012** he was not able to apply for the reconstruction of the court file and at any rate there was the question whether or not the suit had not abated for non observance of the provisions relating to service of summons. In the circumstances the plaintiff opted to file the present suit and urges the court not to order the same stayed as sought by the Defendant.

The Defendant in the supplementary affidavit sworn on 16th October 2013 in response to the plaintiff's replying affidavit did not directly respond to the issue of service of summons to enter appearance in **ELC Case NO. 256 of 2012** and omits to state upon whom the summons were served. In regard to the non availability of the court file at the court registry the Defendant contends no evidence of that has been availed and at any rate avers that there is a legal mechanism to reconstruct such a file if the same cannot be traced. The Defendant avers that the instant suit is filed by the plaintiff in abuse of the court process and that the same ought to be struck out.

In the cause of preparing this ruling I made the following **request to** the court's Executive Officer:- **" I am in the process of preparing a ruling in ELC NO. 1030 of 2013 where the Defendant who is the plaintiff in ELC NO. 256 of 2012 has applied to stay the suit pending hearing of the earlier suit. The plaintiff in ELC NO. 1030 of 2013 claims he had difficulties accessing ELC NO. 256 of 2012 and he opted the file the present suit.**

I would like to peruse ELC NO. 256 of 2012 before doing my ruling. Would you release the same to my clerk for that purpose".

The Executive Officer's response was prompt and in the following terms:

"Your Lordship,

The file you have requested for is not traceable, we have requested the plaintiff to furnish us with copies for reconstruction".

Signed

J. Gatanke

20/3/2014

The plaintiff is thus vindicated that indeed file ELC case NO. 256 of 2012 has been unavailable at the court registry. The plaintiff claims not to have been served with the court papers and the summons to

enter appearance and thus it would be inappropriate to ask him to provide copies of the pleadings and documents of the suit which he may not have. In both **ELC NO. 256 of 2012** and in the instant suit there are pending applications for injunction by the plaintiffs in the respective suits. The subject matter in both suits is the ownership and proprietorship of **L.R. NO. 36/1/133 Eastleigh**. The plaintiff in **ELC NO. 256 of 2012** claims to be the owner of the property pursuant to a contract of sale resulting to a transfer and vesting of the property in the plaintiff. In the suit the plaintiff seeks a declaration that he is the legal owner of the suit property and that the Defendant is a trespasser against whom a permanent injunction restraining any interference by him or through his servants should be issued.

The plaintiff in the present suit claims the suit property was owned by his deceased mother, **Taabu Yusuf Marigi**, and that she has never sold the property to anybody and the purported sale to the Defendant could only be fraudulent and illegal. The plaintiff seeks a declaration that he as the beneficiary of his deceased mother is the lawful owner of the suit property and the Defendant is a trespasser who should be evicted.

I have reviewed and considered the Notice of Motion application by the Defendant dated 23rd September 2013, the affidavits sworn in support and in opposition and the submissions of the parties and the authorities referred to the court by the respective parties. There is no dispute that **ELC case NO. 256 of 2012** was filed by the Defendant against the plaintiff herein and the same relates to the same subject matter being **L.R. NO. 361/1/33 Eastleigh section 1** Nairobi Area which also is the subject matter in the present suit. The issues that stand to be determined in both suits are indeed common. It is however unclear whether the plaintiff in the instant case was appropriately served with the summons in the earlier suit and if the summons were served on a firm of Advocates whether that firm had instructions and/ or authority of the plaintiff to receive the summons and/or act for the plaintiff. The plaintiff states they did not have instructions to act for him and it is for the Defendant to show and demonstrate that the law firm had instructions if indeed they served summons to enter appearance on the firm instead of the plaintiff. The Defendant has not exhibited a copy of the filed return of service of the summons and the plaint which would have shown how and on whom the summons were served if at all the same were served. The court cannot verify the situation as it is indicated that the file in respect of **ELC case no. 256 of 2012** is not traceable in the court registry as per the statement of the court's Executive Officer referred to earlier on.

Under **sections 1A and 1B** of the Civil Procedure Act Cap 21 Laws of Kenya the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. In Particular Article 159 (2) (b) provides that Justice shall not be delayed while Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities. These Constitution provisions mirrored against sections 1A and 1B of the civil Procedure Act clearly enjoin the courts to endeavour to do substantive justice to the parties without necessarily being shackled by procedural technicalities. While in the present matter it is true **ELC case NO. 256 of 2012** was filed earlier than the present suit and involves the same subject matter I do not consider that given the circumstances of this matter any justice would be achieved by ordering the instant suit to be stayed to await the hearing and determination of the earlier suit.

I have considered the issues that arise in both matters and I am satisfied that the order that commends itself in the circumstances is that both suits should be ordered consolidated such that the two suits should be heard together. The plaint filed by the plaintiff in the present suit shall be treated as the defence and counter-claim to the plaintiff's plaint in **ELC NO. 256 of 2012** and the Defendant shall be granted leave to file a **reply and defence to the counter claim within the next 15 days from the date of this ruling**.

In the result therefore I decline to make an order staying **ELC case NO. 256 of 2012** and do in the interest of justice order that the two suits be consolidated and that the plaint filed by the plaintiff in the instant case be treated as a Defence and counter claim to the plaint filed by the Defendant in **ELC case NO. 256 of 2012**. The Defendant be and is hereby granted leave of 15 days from the date of this ruling to file his reply and defence to the counter claim.

That in view of the fact that the court registry has stated the earlier suit file is unavailable it is ordered that

the plaintiff in ELC case NO. 256 of 2012 do make copies of all the documents filed by them in the suit and avail the same to the plaintiff and the court registry for purposes of creating a file folder for incorporation with the present suit. That following the order of consolidation that I have given the suits will henceforth be continued with under this case file namely HC ELC NO. 1030 of 2013. The court orders that the consolidated suits be mentioned on 29th May 2014 for further directions on the further conduct of the suit.

That I direct that the costs of this application shall be in the cause.

Ruling dated signed and delivered at Nairobi this...27th day of March 2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant