



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**LAND AND ENVIRONMENT CASE NO. 92 OF 2013**

**ALEX SIMIYU KIBETI.....PLAINTIFF**

**VERSUS**

**TIMOTEO WAFULA SITUMA.....DEFENDANT**

**RULING**

1. The application dated 27th April 2014 brought under section 1A, 1B, 3 and 6 of the Civil Procedure Act is commenced by the defendant seeking to stay the present suit, pending the hearing and determination of Bungoma HCCC suit no. 41 of 2003. The reasons for the application are contained on the grounds listed on the face of it and the supporting affidavit sworn by Timothy Wafula Situma. The core reason is that the subject parcel no. Kimilili/Kamukuywa/799 is the same subject matter in Bungoma HCCC no. 41 of 2003. According to the applicant, unless this suit is stayed, the earlier case will be rendered nugatory.

2. The application is opposed by the plaintiff/respondent. In his replying affidavit, the respondent says he is not a party in Bungoma HCCC no. 41 of 2003. The orders sought if granted will greatly affect him denying him the opportunity to enjoy his investment. He deposed further that the applicant acting as guarantor ought to have known the consequences of default on the part of the principal loanee.

3. Section 6 of the Civil Procedure Act provides that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or parties under whom they claim. In the civil claim no. 41 of 2003 whose plaint is annexed, this applicant was the plaintiff. He sued three (3) defendants and the subject matter was L.R. Kimilili/Kamukuywa/1779 which the plaintiff in the current suit is claiming. The plaintiff herein was not a party to Bungoma HCCC no. 41 of 2003. The defendant/applicant has however made an application to join him in that suit. That application is yet to be fixed for hearing. Although the subject matter is the same, the parties are not. The current plaintiff/respondent is a purchaser and cannot claim through the existing defendants in Bungoma HCCC no 41 of 2003. Until he is made a party in that suit, I find that provisions of section 6 do not apply to his case. Without prejudicing the outcome of Bungoma 41 of 2003, I also find the applicant has not given any explanation why that suit has not been concluded or what stage the proceedings have reached.

4. For a suit to be stayed under section 6 of the Civil Procedure Act the subject matter must be the same and the parties litigating must be the same or has some link to claim through any of the parties litigating. In the instant application, I agree as a matter of fact that the subject matter is the same. However, the parties are not the same nor the cause of action. The current plaintiff is a purchaser in a public auction of the suit property who has no nexus to litigate through any of the 3 defendants in Bungoma 41 of 2003. The current plaintiff did not have any cause of action capable of being litigated when Bungoma HCCC 41 of 2003 was filed or anytime before the auction took place. It is my finding that unless and until he is made a party in Bungoma 41 of 2003 as it is intended in the application annexed as TWS-4, seeking to stay this suit is premature. The applicant is attempting to put the cart before the horse in giving this application priority over application to join the respondent in the earlier suit.

5. Consequently, taking all issues into account, I find this application as premature and order it dismissed

with costs to the respondent.

**DATED, SIGNED and DELIVERED** this **23<sup>rd</sup>** day of **Sept.** 2014

**A. OMOLLO**

**JUDGE.**