



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 14 of 2012**

**GRACE NANYAMA WAMALWA** [suing as the legal and personal representative of the estate of  
**JOSEPH WANAMBISI NALIAKHO .....DECEASED**

**VERSUS**

**PATRICK WAMUKOTA ..... DEFENDANT**

**RULING**

The defendant has raised a preliminary objection seeking the orders for striking out the suit as being an abuse of the court process. The P.O. is premised on the fact that the plaintiff filed the present suit when she knew the existence of the earlier suit Bungoma HCC no. 37 of 2010 (o.s).

The plaintiff has opposed the objection stating the defendant has not quoted any provision of the law which bars a party from filing suit while another is pending. They argued that under Sec. 1A and 1B the court can make an order for the two files to be consolidated. The defendant will not suffer any prejudice if one suit is stayed or if they are consolidated. Finally he argued that the O.S involves several other parties and the plaintiff is just one of them.

I have perused the pleadings in respect of HCC NO. 37 of 2010 (o.s) attached to the defence. It reveals the current plaintiff as the 4<sup>th</sup> defendant and present defendant as plaintiff.

The originating summons was filed by C.K. Areba advocate who is counsel for defendant in current suit. Mr. Onchiri who has filed present suit is acting for all the defendants in the originating summons. This infers that all the parties in present suit are aware of existence of originating summons no 37 of 2010. Mr. Onchiri has not denied this fact. His explanation is that no law bars a party from filing a suit while another is existing.

It is also admitted the subject matter being land parcel S. Malakisi/S. Kulisiru/452 is the same. In the O.S, the present defendant is claiming ownership by way of adverse possession. In current suit the plaintiff (4<sup>th</sup> defendant in the O.S) wants the defendant declared as trespassers on the said land and an order made to evict them (surrender cant possession).

Under Sec 6 of the Civil Procedure Act, the court is required to stay a suit where the matters in issue is directly and substantially the same as in the instant case. In the case of Chanan Agricultural Contractors VS. Mumias Agricultural Transport Ltd Civil Appeal no. 81 of 1991, the court of appeal overturned an earlier decision where high court struck out a suit as an abuse of the court process when a party filed suit similar to an existing one instead of filing a counter-claim. The court of appeal held that sec. 6 of the Civil Procedure Act does not empower a judge to strike out but only allows for stay.

Similarly in the case of Total Kenya Ltd. Vs. Fanana Investments Ltd. Nairobi HCC case no. 743 of 1999, Justice Waki said that where the issues in two suits are substantially the same, the law requires that the latter suit be stayed.

From the foregoing, although I agree with Mr. Areba's submissions that the plaintiff has abused this courts process by filing a similar suit to an existing one, the law only permits me to stay the later suit and not to strike it out.

This should will thus be stayed pending the determination of originating summons in case no. 37 of 2010.

These are the orders of the court.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 23<sup>th</sup> day of April 2013.

**A. OMOLLO**

**JUDGE.**