



COPY

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 454 OF 2002**

**SELINA WEKESA ..... PLAINTIFF**

**- VERSUS -**

**GEORGE ELLAM WEKESA .... DEFENDANT**

**RULING**

[1] The applicant brings this application under Order 1A, 1B and 3A Section 5 and 6 of the Civil Procedure Rules. He prays that **Mombasa High Court Civil Case No. 260 of 2003 Sheikh Ali Taib versus George Ellam Wekesa and Seline Wekesa** is similar in every respect to this case, in that the parties are the same, the cause of action is the same and that they are litigating over the same title **Mombasa/Block X/97**. He further states that HCCC. 260 of 2003 was filed after this case and that there is a direct conflict with Section 6 of the Civil Procedure Act Cap. 21. Further that the continued pendency of two similar suits which are presently proceeding would lead to embarrassing the court should different and divergent decisions be arrived at.

[2] Counsel argued that High Court Civil Case No. 454 of 2002 was filed on 20th December 2002. That the originating summons was filed by Selina Wekesa against her husband George Wekesa. The respondent herein was added by an order of the Court on 23rd November 2003. The prayers in the Originating Summons were as follows:

(a) *All that piece or parcel of land known or registered as MOMBASA BLOCK X/SECTION 97 MOMBASA ISLAND, situated at Tudor area at Mombasa.*

(b) ...

(c) ...

(d) ...

[3] On 21st October 2003 the respondent herein filed Mombasa High Court Civil Case No. 260 of 2003 against George Ellam Wekesa claiming:-

(a) *Vacant possession of premises known as Mombasa/Block X/97.*

(b) *Specific performance of the agreement dated 14th November 2002.*

*(c) Costs of the suit*

[4] On 13th April 2004 Selina Wekesa was made a party to the suit the basis of her claim was that this was a matrimonial property. The applicant proposed that Mombasa HCCC. 260 of 2003 be stayed and the matter do proceed in this case.

Mr. Mkhan Learned Counsel for first defendant supported the application. He said that the entire application is based on Section 6 of the Civil Procedure Act. He argued that the suit filed later should be stayed. That the moment Sheikh Ali the respondent was joined as a party any issue that needed to be adjudicated should have been filed in that suit. That paragraph 7 of the plaint in HCCC. 260 of 2003 was erroneous and misleading. He argued that the law is clear that once parties are litigating on a similar matter the latter matter must be stayed.

[5] Mr. Taib Learned Counsel for the respondent opposed the application. He argued that HCCC. 260 of 2003 is not a previously instituted suit. He argued that Section 6 requires same parties not similar or alike. He argued that all parties must litigate under the same title. He stated that under HCCC. 260 of 2003 his client Sheikh Ali has the title. He argued that HCCC. 260 of 2003 is not pending and that it is concluded and judgment issued. That by use of multiple applications Selina and Kennedy Ellam Wekesa have successfully derailed the completing of the execution orders of the court. Mr. Mkhan in reply argued that the previous suit refers to the first filed suit and that the current suit refers to the latter suit. He opined that once a party has been joined by Court on his own motion or by the Court, he becomes a party. Further that when a party is deceased and another one is joined he takes over in all matters in the suit.

[6] There is no doubt that the subject matter in this suit is the same in both suits i.e land parcel in Mombasa Block X/97.

The parties in both suits are the same, since Kennedy Ellam Wekesa was substituted in HCCC NO. 260 to replace his deceased father after taking the letters of administration of his estate. There is no denying that these two cases are filed before the same Court.

The respondent cannot argue that he was unaware of the existence of this case since he was made a party on 23rd November 2003. There was really no need to proceed with Mombasa HCCC. No. 260 of 2003 filed on 21st October 2003. These matters should have been consolidated. They were not. They proceeded separately. Kennedy Ellan Wekesa has now filed an application in HCCC. 260 of 2003 arguing that no judgment was ever entered against the first defendant in HCCC.No. 260 of 2003, the ones entered thereon having been set aside on 30th July, 2004. He brings an interesting argument that this Court has never heard this case. He argues that there is no judgment against the first defendant though the plaintiff therein continue to execute against the first defendant as though there is a valid judgment. These are serious issues pending for determination in this Court. They cannot be wished away.

[7] Having perused the case herein in HCCC. NO. 454 of 2002 and HCCC. 260 of 2002 I am convinced beyond doubt that the parties are the same, the subject matter is the same and that the two cases are pending before the same Court.

I hold that the issues in Mombasa HCCC. 260 of 2003 is directly or substantially an issue in a previously instituted suit that is Mombasa HCCC. No. 454 of 2002 (OS) and is between the same parties who are litigating under the same title in the same court.

I further order HCCC. No. 260 of 2003 shall be held in abeyance until the determination of this case and should the parties in both cases agree the same should be consolidated and be heard under this case failing which HCCC. No. 260 of 2003 will have to await the determination of this case.

The upshot of the matter is that the application dated 12th November, 2012 is allowed as prayed.

**Dated and delivered in open Court at Mombasa this 23rd day of August, 2013.**

**S.N. MUKUNYA**

**JUDGE**

In the presence of:

Non appearance for the plaintiff

Mr. Okanga for the 2nd defendant

No appearance for interested  
party.