



PETER OKOTH OMENOPLAINTIFF

VERSUS

AMBROSE OCHIDO ANDAJO1ST DEFENDANT

BENEDICT ODHIAMBO OKETCH2ND DEFENDANT

BONDO TOWN COUNCIL3RD DEFENDANT

RULING

The 1st defendant application dated 24th January 2012 prays that this suit be struck out with costs. The same is supported by the affidavit of the applicant dated 24th January 2012. His main point of contention is that there is a pending suit namely **Kisumu HCCC number 104 of 2004 (O.S)** touching on the same parcel of land namely **Bondo Market / 3**. He further argued that the issues raised therein are similar to those in the current suit.

As expected the plaintiff has opposed the same. The gist of the objection is that the suits although they relate to the same parcel of land are materially different.

I have perused the two files, and it’s instructive to note that this suit prays for the following reliefs:-

- (1) A declaration that land parcel number is being held by the defendant in trust for the plaintiff.**
- (2) An order compelling the defendant to execute documents transferring the title of land Bondo Market / 3 portion A and B to the plaintiff and in default then an order compelling the Deputy Registrar to execute the relevant documents transferring the land number Bondo Market / 3 to the plaintiff.**
- (3) Cost and interest of the suit**

Meanwhile suit number Kisumu HCCC Number 104 of 2004 prays for the relief of adverse possession to be declared in favour of the plaintiff. The other prayers remain the same as in the current suit. The parties also in HCCC Number 104 of 2004 are similar save for the 3rd defendant herein.

The applicants argument is that this suit ought to be struck out because it is similar to the HCCC Number 104 of 2004 earlier own stated.

I respectfully disagree. Whereas this case is composed of three (3) defendants’ case number HCC 104 of 2004 has only the 1st and 2nd defendant. There are allegation of fraud against the 3rd defendant herein which is missing in case number HCCC 104 of 2004.

Ordinarily, it is now a trite law that originating summons are meant only for matters which are simple and

not complex in nature. On the other hand a plaint is meant to cover such contentious matters that are complex in nature.

Further the question of adverse possession cannot be litigated via a plaint. As much as the issue of trust has been raised under HCCC 104 of 2004 (O.S) the same is not a substantive prayer. The substantive prayer under the said originating summons is adverse possession.

Striking out of suit is not only a draconian step but one which must be dealt with sparingly. Any suit whatever its worth, unless hopelessly grafted, such that no life can be breathed into ought to be sustained.

As was held in **DT. Dobie & Co (Kenya) Ltd =vs= Muchina 1982 KLR**, thus

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it be injected with relief life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

For the foregoing reasons I shall not allow the application and the same is dismissed. The costs shall abide the hearing of the substantive suits.

Dated, signed and delivered at Kisumu this 29th day of February 2012

H. K. CHEMITEI
JUDGE

In the presence of:

..... **Advocate for Applicant**

..... **Advocate for Respondents**

HKC/aao