

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 39 OF 2011

FANUEL KALUGA MWANURI.....PLAINTIFF

VERSUS

GLADYS IJAI.....DEFENDANT

RULING

The application by way of Notice of Motion dated 8th August, 2011 seeks orders that the plaintiff's suit be struck out and/or dismissed. The application is based on the grounds stated on the face of the application and is supported by the affidavit of GLADYS IJAI, the Defendant/Applicant. According to the said affidavit, it is the applicant's case that the Respondent instituted this case against her while a similar suit is pending between the two involving the same subject matter in Vihiga Senior Resident Magistrate's Court, Civil Case No. 103 of 2006 was still pending. That this court made a ruling on 23.6.11 that the instant suit is improperly before court and cannot be maintained while the suit in the lower court is pending.

The application is opposed to as per the replying affidavit by the Plaintiff/Respondent, GANUEL KALUGA dated 25.1.12. According to the Respondent, the instant suit and the lower court suit can be consolidated so that all the issues can be canvassed. That although the matters in both suits are in respect of the same land, the prayer in the respective plaints are different.

The Notice of Motion application dated 15.1.12 filed by the Plaintiff/Applicant seeks orders that the Vihiga Senior Resident Magistrate's Court, Civil Case No. 103 of 2006 be transferred to this court for trial and disposal or in the alternative that this case be transferred to Vihiga Senior Resident Magistrate's Court for trial and disposal.

Secondly, the Plaintiff/Applicant seeks orders that this case be consolidated with Vihiga Senior Resident Magistrate's Court, Civil Case No. 103 of 2006.

In the affidavit in support of the application sworn on 5.1.12, the applicant asserts that the Respondent obtained the title Deeds to land parcel No. North Maragoli/Mbale/1572 and 1573 fraudulently. That in the instant case the applicant's prayer is for an order of cancellation and revocation of the title deeds obtained by the Respondent.

Mr. Makale Advocate appeared for the Plaintiff and Mr. Musiega Advocate appeared for the Defendant. The counsels made oral submissions which this court has considered.

I have also considered the ruling herein by Kimaru, J. dated 7.4.11. It was the court's conclusion in the said ruling that the issues that the Plaintiff seeks to canvass in this suit are issues that can competently be ventilated before the Vihiga SRM's Court. The said ruling still stands. The plaintiff must therefore ventilate his case before the Vihiga SRM's Court Civil Case No. 103 of 2006.

Consequently, the application dated 15.1.12 for a transfer of the Vihiga SRM's Court, Civil Case No. 103 of 2003 to this court or alternatively the transfer of this case to Vihiga SRM's court must therefore fail and is dismissed with costs.

The Application dated 8.8.2011 is successful and the suit herein is hereby struck off. Costs of the application and the suit to the Defendant/Applicant.

Delivered, dated and signed at Kakamega this 24th day of May, 2012

B. THURANIRA JADEN

J U D G E