



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 39 OF 2011

FANUEL KALUGA

MWAMIRI.....PLAINTIFF

V E R S U S

GLADYS

IJAI.....DEFENDANT

R U L I N G

The plaintiff filed suit seeking judgment to be entered in his favour as against the defendant for the order that entries No.3 & 4 in register in respect of parcel No. N/Maragoli/Mbale/1572 and entries No.2 & 3 in respect of the register of parcel No. N/Maragoli/Mbale/1573 (the suit properties) be cancelled. Contemporaneous with filing suit, the plaintiff filed a notice of motion pursuant to the provisions of **Sections 3 and 3A** of the **Civil Procedure Act** and **Order 38** of the **Civil Procedure Rules** (the particular rule was not mentioned) seeking orders of this court to stay further proceedings in **Vihiga SRM CCC No. 103 of 2006** between **Gladys Ijai and Fanuel Kaluga** pending the hearing and determination of this case. The grounds in support of the application are stated on the face of the application. In essence, the plaintiff contends that the defendant had fraudulently obtained titles in respect of the suit land which the plaintiff is in actual occupation of. The plaintiff complained that the defendant had used the fraudulently obtained titles to file a case before Vihiga Senior Resident Magistrate's Court seeking general damages for trespass and forceful detainer. The plaintiff was of the view that if the proceeding before the said subordinate court is not stayed he would suffer prejudice because he and other members of his family would be rendered destitute and homeless should the said court find in the defendant's favour. The plaintiff urged the court to grant the orders sought staying proceedings of the subordinate court pending hearing and determination of this case. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The defendant filed grounds in opposition to the application. Essentially, the

defendant argued that the plaintiff ought to ventilate any issue in respect to the determination of the ownership of the suit properties before the same subordinate court instead of filing another suit before another court. The defendant was of the view that the plaintiff was abusing the due process of the court by seeking to circumvent orders that were issued in his favour by the Vihiga subordinate court, which orders were in the nature of an injunction. The defendant urged the court to refer the plaintiff back to the Vihiga subordinate court to ventilate any issue that he has in respect of the suit properties.

At the hearing of the application, this court heard oral submission made by Mr. Mukabi for the plaintiff and by Mr. Musiega for the defendant. This court has carefully considered the said submissions. It has also considered the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff made a case for this court to stay proceedings that are ongoing before the Vihiga Senior Resident Magistrate's Court in regard to the ownership of the suit properties. It was clear to the court that the plaintiff is abusing the due process of the court by filing a suit in regard to the ownership of the suit properties when the same is still pending determination before a court which has jurisdiction to hear it. In his plaint, the plaintiff disclosed that there exists another suit between himself and the defendant concerning the same subject matter. This court perused copies of the plaint and the defence that were filed in the subordinate court. It was clear to the court that the issues that the plaintiff is seeking canvass in this suit are issues which he can competently ventilate before the Vihiga Senior Resident Magistrate's Court. By purporting to file the present suit before this court when another suit of a similar nature is pending before the Vihiga subordinate court, the plaintiff is in fact engaging in forum shopping.

Where there is a pending case before a subordinate court, the only way that a party can file a case before this court over the same subject matter is by way of an appeal or by way of Judicial Review or by way of a Constitutional Reference. The present suit is neither. There is no procedure provided in the **Civil Procedure Act** and the **Rules** made thereunder for a party to intercept proceedings before a subordinate court by filing a similar suit before the High Court. This court agrees with the defendant that if the plaintiff wishes to ventilate any issue relating to the ownership of the suit properties he must do so before the Vihiga Senior Resident Magistrate's Court in Civil Case No. 103 of 2006.

The application filed by the plaintiff on 7th April 2011 is unmeritorious and is hereby dismissed with costs.

DATED AT KAKAMEGA THIS 23RD DAY OF JUNE 2011

L. KIMARU

J U D G E