



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 582 of 2007**

**ISAAC GATHUNGU WANJOHI.....1ST PLAINTIFF
ISIAH KIRINDI WAMBUGU MUTONYI.....2ND PLAINTIFF
VERSUS
MAGNATE VENTURES.....DEFENDANT/APPLICANT**

R U L I N G

1. By a chamber summons dated 19th February, 2008, the defendant in this case has sought to have the plaintiff's suit struck out, and or stayed pending the hearing and determination of HCCC No. 450 of 1995, Isaac G. Wanjohi and Isaiah Thiringi Wambugu Mutonyi vs Rosalia Macharia. The defendant/applicant contends that the plaintiffs' suit has been filed in contravention of Section 6 of the Civil Procedure Act. This is because the subject matter of the plaintiffs' suit is directly and substantially in issue in HCCC No.450 of 1995. The application is supported by an affidavit sworn by Stanley Kinyanjui, the managing director of the applicant.
2. In response to the application, Samuel Wamutu Waiganjo, who is a partner of the firm of lawyers representing the plaintiffs has sworn a replying affidavit contending that the application dated 19th February, 2008 is an abuse of the process of the court. Counsel argues that the application is misconceived as Section 6 of the Civil Procedure Act does not bar the institution of a suit on the ground that another suit involving the same parties and subject matter is pending. Counsel further contends that the parties in the earlier suit and the present suit are not the same nor are the issues the same. It is also maintained that the application is based upon false and misleading information.
3. Following an agreement by the parties, written submissions have been duly filed. I have carefully considered the application, the affidavit in support and in reply. I have also considered the written submissions and the authorities cited. For Section 6 of the Civil Procedure Act to apply:
 - (i) The matter in issue must be substantially in issue in a previous suit or proceeding, and
 - (ii) the previous suit or proceeding must involve either the same parties as the subsequent suit or parties under whom the parties in the subsequent suit or any of them claim, and
 - (iii) the parties must be litigating under the same title.
4. In this case, a comparison of the pleadings in regard to the two suits shows that the subject matter of the two suits is substantially the same. That is the parties' rights of possession and ownership of a plot known as LR.209/12052. Although the prayers are slightly worded differently, the bottom line is who has the right of possession and occupation of LR 209/12052 and whether an injunction should issue restraining the construction of any fences, buildings or erections of any structures on that property.
5. An examination of the pleadings also shows that the plaintiffs in the current suit are the plaintiffs in the previous suit. However, the defendant in the current suit is not the same as the defendant in the previous suit. It was deponed that the defendant in the current suit is a Tenant of the defendant in the previous suit. The source of that information has not been revealed. Nor has the applicant demonstrated that there is any connection between the defendant in the previous suit and the defendant in this suit. In that regard, Section 6 of the Civil Procedure Act will not be applicable.
6. In paragraph 8 of the plaint, the plaintiffs have deponed that there have been no previous proceedings in any court between the plaintiffs and the defendant in respect to the subject matter of the current suit. Since the defendant in the previous suit is not the same as the defendant in the current suit, the averments by the plaintiffs in the plaint cannot be faulted.
7. For the above reasons, I find no merit in the application dated 19th February, 2008. The application is accordingly dismissed.
Dated and delivered this 1st day of October, 2010

**H. M. OKWENGU
JUDGE**

In the presence of: -
Waiganjo for the plaintiffs
Havi for the defendant/applicant
Kosgei - Court clerk