



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.434 OF 2010

STANLEY T. MUGACHA.....PLAINTIFF
VERSUS
JAMES MBUGUA KINYUA.....DEFENDANT

RULING

1. The defendant has raised a preliminary objection to the hearing of the chamber summons dated 17th September, 2010, on the ground that the suit as it stands offends Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya. The defendant submits that there is a case at the Senior Resident Magistrate's Court at Kiambu No.92 of 2004 where the defendant herein is the defendant, and the plaintiff is National Bank of Kenya Ltd. The plaintiff in the current suit has been enjoined in the Kiambu suit as an interested party. The defendant avers that the plaintiff in this suit is raising the same issues which he has raised in the Kiambu suit, and therefore the provisions of Section 6 and 7 of Civil Procedure Act are contravened as there is duplicity.
2. Further, the defendant submits that the present suit offends Order VII Rule 1(e) of the Civil Procedure Rules as amended by Legal Notice No.36 of 2000, as the court was not notified about the Kiambu suit. The defendant urges the court that this suit should be stayed or struck out because the affidavit sworn by the plaintiff in support of this application is fatally defective due to non-disclosure of material facts.
3. The plaintiff objects to the preliminary objection. He argues that a preliminary objection is one which raises a pure point of law and where facts do not need to be ascertained. The plaintiff submits that the court can only tell whether the alleged Kiambu suit exists by looking at the pleadings from the Kiambu case. Plaintiff further submits that the application should have been brought by way of a notice of motion under Section 7 of the Civil Procedure Act and Order VI Rule 13(1) of the Civil Procedure Rules.
4. The plaintiff has annexed copies of the pleadings in the Kiambu suit. The claim is for a liquidated demand. The plaintiff claims that the sale of land or validity of the Charge was not in issue. He argues that there was no counterclaim by the defendant. The plaintiff contends that Section 159 of the Registration of Lands Act, provides jurisdiction where value of land is over 500,000/= to the High Court. He submits that the Kiambu Resident Magistrate's Court would therefore not have jurisdiction to try the plaintiff's claim. Finally, the plaintiff urges the court to overrule the preliminary objection as

Sections 6 and 7 of the Civil Procedure Act have not been complied with.

5. I have given due consideration to the preliminary objection. I do note that the objection is not one based on pure law. The objection is based on facts, i.e. whether this suit raises substantially the same issues as Civil Suit No.92 of 2004 filed at the Principal Magistrate's court at Kiambu. And whether, the suits are between either the same parties or parties litigating under the same title. The annexures to the further affidavit sworn by the plaintiff show that the plaintiff is not a party to the Kiambu suit, and that the cause of action in the Kiambu suit is in fact recovery of a sum of Kshs.1,570,015.80, being a debt due from one Lucy W. Mbugua and the defendant in this suit to National Bank of Kenya Ltd. This suit on the other hand is over ownership of Limuru Bibilion/1405, recovery of possession and general damages.

6. Although the defendant has alleged that the plaintiff herein has been enjoined in the Kiambu suit, there is no such evidence before this court. I therefore find that the defendant has failed to satisfy this court that the provisions of Section 6 of the Civil Procedure Act are applicable to this case. Accordingly, I overrule the preliminary objection and order that a date be fixed for a hearing of the chamber summons dated 17th September, 2010.

Dated and delivered this 19th day of November, 2010

H. M. OKWENGU

JUDGE

In the presence of: -
Makumi for the plaintiff/respondent
Advocate for the defendant absent
B. Kosgei - Court clerk