

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Case 2 of 2007

ESTATE OF MOHAMED ISHAQ & 2 OTHERSPLAINTIFF

VERSUS

PASSAGLIA GUSEPPE & 2 OTHERSDEFENDANT

R U L I N G

By an application, by way of Notice of Motion, dated 19th October 2007, the applicant seeks orders:

1. That the hearing of the plaintiff's chamber summons herein, dated 7th day of February 2007 and in deed the entire suit, be stayed forthwith.
2. That the plaintiff be condemned to pay the costs of this application.

The application is based on the premise that the matters in issue in the aforesaid chamber summons, and in deed in the entire suit, filed in this court by the plaintiffs on or about the 7th day of February 2007, are also directly and substantially in issue in Malindi High Court Civil Case No. 53 of 2006 (O.S), which was filed in this court by the 4th defendant herein, against the very self same plaintiffs herein, on or about the 30th of March 2006 litigating under the same title and which suit is still pending.

The application is grounded on the express provisions of Section 6 of the Civil Procedure Act, [Cap 21] Laws of Kenya. It is supported by the annexed affidavit of **Rossaglia Giuseppa**, the first defendant/applicant herein, and by such further or other grounds as may be adduced at the hearing hereof.

On behalf of the applicant it was argued that issues raised in the present suit, and the Chamber summons filed on the 7th day of February 2007, are also directly and substantially in issue in Malindi High court Civil Case No. 53 of 206 (O.S), which was filed in this court by the 4th Defendant herein, against the very same plaintiffs herein, on or about the 30th day of March 2006. That this goes against the letter and spirit of Section 6 of the Civil Procedure Act.

Section 6 of the Civil Procedure Act provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

I have carefully analyzed the claim herein and the claim in Malindi Civil Case No. 53 of 2006 (O.S). Having done so, I am of the considered view that matters in issue in this suit are directly and substantially in issue Malindi High Court Civil Case No. 53 of 2006 (O.S). This goes against the letter and spirit of Section 6 of the Civil Procedure Act.

Accordingly I hereby order that there shall be a stay of this suit, and the Chamber Summons dated 7th February 2007 herein pending the hearing and determination of Malindi High Court Civil Case No. 53 of

2006 (O.S). Costs shall be in the cause.

Dated and delivered at Malindi this 27th day of February 2008.

N. R. O. Ombija

JUDGE