



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 14 of 2007

MICHAEL KIMUTAI TILITEI ::::::::::::::: APPLICANT

=VERSUS=

MARKO KIPKORIR ::::::::::::::: RESPONDENT

RULING

The Plaintiff filed this Originating Summons dated 30th January, 2007 seeking the following Orders; that:-

1. Michael Kimutai Tilitei be registered as the proprietor of Land reference number Elgeyo/Marakwet/Anin/860 – in place of Marko Kipkorir Chebogiy who is the registered owner having acquired ownership of title through adverse possession.

The Originating Summons was filed on 13th February, 2007. The Respondent duly filed his Repling Affidavit on 12th April, 2007.

The Applicant has now filed the present application seeking Inter alia the following Orders:-

“1.

2. That the Honourable High Court be pleased to order that Civil Suit No. 1 of 2003 pending before the Resident Magistrate’s Court at Iten be stayed pending hearing and determination.

3. That the Honourable Court be pleased to order that Civil suit No. 1 of 2003 pending before the Resident Magistrate’s Court Iten be transferred to the High Court Eldoret for purposes of consolidation with the instant suit.

4. That the Honourable Court be pleased to order that the instant suit being HCCC. No. 14 of 2007 (O.S) between Michael Kimutai Tilitei versus Marko Kipkorir Chebogiy and HCCC. No. 15 of 2007 between Michael Kimutai Tilitei –V- Cosmas Toroitich Chemweno be consolidated with Iten RMCC. No. 1 of 2003 – Michael Kimutai Versus Cosmas Toroitich and Marko Kipkorir Chebogiy.”

The Applicant being the Plaintiff in the Iten Case withdrew the case. He had filed it on 19th February,

2003. The Respondent and his Co-Defendant were awarded the costs of the suit. However, a counterclaim filed by the Defendant and a Co-Defendant is now partly heard and pending before the Senior Resident Magistrate's Court at Iten.

The Applicant on 14.3.07 applied for stay of the hearing or proceedings in the Iten case but the same was disallowed with costs.

I have considered the application and the rival affidavits. I have also considered the submissions by Counsel. The Iten case was filed 5 years and 7 months ago and the Counter claim is new partly-heard. The said suit was filed on 13th February, 2003 which the Plaintiff withdrew. However, the Defendants filed a counter-claim which is now partly heard.

I think that it would be improper and un-procedural for this Court to interfere with the Senior Resident Magistrate's Court in discharging its functions under the Law. The said Court is seized of the case and the case is partly-heard. This Court ought not to interfere with the due process of the said Court.

The Plaintiff is the one who commenced the suit at Iten and later withdrew it. A Counter-claim having been filed, the Defendants and the Claimants in the Counterclaim are entitled to prosecute their case. Had the proceedings not started, it would have possibly been a different scenario.

In any case, the Counterclaim in the Iten Case relates to a Permanent Injunction. The suit was commenced by way of Plaint. The present case is for adverse possession commenced by way of Originating Summons. It may be difficult to consolidate the two cases.

Be that as it may, the main reason for this Court's reluctance to grant the orders is that the Counter-claim is partly heard and it would be improper and irregular for this Court to terminate the said proceedings. The Court must respect the trial Court which must complete the hearing. The Applicant is at liberty to move this Court after the conclusion of the case at Iten. This Court cannot undermine the functions of the Senior Resident Magistrate's Court. I find that the Applicant's application is pre-emptive and calculated to defeat the Respondent's case at Iten in an improper manner.

Regarding consolidation of this case and that HCCC No. 15 of 2007, I find that the subject matter is different i.e. a different property and the parties are not the same.

As a result, I do hereby dismiss the application with costs to both Respondents. Leave is granted to the Respondent from HCCC No. 15 of 2007 to tax his costs in this application.

DATED AND DELIVERED AT ELDORET ON THIS 23RD DAY OF JULY, 2008.

M. K. IBRAHIM'

JUDGE.