



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1294 of 2004

**MUNICIPAL COUNCIL OF GARISSA
PLAINTIFF**

- VERSUS -

**ADEN KEHIR ADEN1ST
DEFENDANT**

**MOHAMED MAHAT KUNOW SUNKURI2ND
DEFENDANT**

**ABDI HASSAN ABUBAKAR3RD
DEFENDANT**

R U L I N G

The Plaintiff instituted this suit by way of a Plaint dated the 19th November 2004 and filed on the 26th November 2004 in which the Plaintiff seeks orders against the Defendants for the following among other reliefs:-

“(i) A declaration that the subdivision, allocation and the issuance of certificates of lease to each and all the Defendants as the registered proprietors of L.R. Numbers Garissa Township/Block1/316 is fraudulent, unlawful and void *ab initio*.”

“(ii) A declaration that each and all the Defendants are not in law the registered proprietors of the Land L.R. Numbers Garissa Township/Block 1/314, Garissa Township/Block1/315 and Garissa Township/Block 1/316.”

“(iii) A permanent injunction against each and all the Defendants restraining them, whether by themselves or their agents, servants or employees from occupying, developing, fencing erecting structures or building on the land and/or interfering with the authorized use of the land as a bus park or the development of the land as a bus park.”

“(iv) General damages.”

“(v) Compensation for loss of income.”

Pending the hearing and determination of the suit, the Plaintiff made an application dated the 19th November 2004 under Order 39 rule 2 of the Civil Procedure Rules seeking, *inter alia*, that:

“The Defendants/Respondents, their agents and/or servants be restrained by way of an injunction

from occupying, developing, fencing or erecting structures or buildings on L.R. Numbers Garissa Township/Block 1/314, Garissa Township Block 1/315 and Garissa Township Block 1/316 and/or interfering with the authorized use of the land as a Bus Park or the development of the land as a Bus Park.”

The application is founded upon several grounds including that the suit premises, which were initially set aside for the development of a bus park in Garissa Municipality within the jurisdiction of the Plaintiff, have been illegally acquired and or grabbed and illegally sub-divided amongst the Defendants. In support of the application, Yusuf Ibrahim, the Clerk to the Plaintiff swore an affidavit on the 19th November 2004.

The Defendants oppose the application on several grounds as set out in the Grounds of Opposition dated the 9th December 2004 and in the replying affidavit of Mohamed Mahat Kuno Sunkuri, the 2nd Defendant, made on the 10th December, 2004 which he swore and filed on the 14th December 2004 on his own behalf and also on behalf of the 1st Defendant.

Before the hearing of the application, the 1st and 2nd Defendants took a preliminary point of law, the subject of this ruling, on the following grounds, namely:-

“1. In Light of Section 6 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, this Honourable Court has no jurisdiction to proceed, entertain or adjudicate over this suit as two suits between the parties to this suit, over the same subject matter, namely Senior Resident Magistrates Court at Garissa, suit number 17 and 18 of 2004 are still pending before the said court.”

“2. The suits filed at Garissa and the current one before this Honourable Court are between the same parties, and the subject matter is the same, and those suits are still pending.”

“4. That in light of the above the suit herein be struck off and the interim orders vacated.”

these Defendants having abandoned ground 3 of the Notice of a Preliminary Objection on a Point of Law dated and filed on the 14th December, 2004.

Learned Counsel for the 1st and 2nd Defendants was emphatic in his submissions that given that there are two suits still pending in the Senior Resident Magistrate’s Court at Garissa, namely Civil Suits Numbers 17 and 18 of 2004 respectively, this court has no jurisdiction whatsoever to proceed with in these proceedings by virtue of the express and mandatory provisions of Section 6 of the Civil Procedure Act [Cap. 21] which provides that:-

“6. 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 they 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.”

Mr. Ahmednasir for the 1st and 2nd Defendants contended that the matter in issue in this suit is also directly and substantially in issue in Garissa SRMCCC Numbers 17 and 18 of 2004 aforesaid which are between the same parties other than the 3rd Defendant who is not a party to the litigation in the lower court. Citing several judicial authorities including *In re Arbitration Between Mahmoud and Ispahani [1921]2 KB 716 at 725 and The Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd. [1989] KLR 1 at 14 and 15*, learned counsel urged that this suit be struck out with costs.

In reply, Mr. Muli for the Plaintiff, in conceding that the parties to this suit are the same as those in Garissa SRMCCC Numbers 17 and 18 of 2004 (other than the 3rd Defendant as aforesaid) in which the Plaintiff herein is sued separately, by each of them by the 2nd and 1st Defendants herein respectively,

contended that while the matter in issue may not be substantially dissimilar, the reliefs sought in this suit as set out in the Plaint are materially different from the prayers made to the subordinate court and the declarations and damages sought herein cannot be made or granted by the lower court as the monetary value of the subject matter far exceeds the jurisdiction of the lower court.

Further, learned counsel submitted that in any event section 6 of the Civil Procedure Act is intended not for the striking out of a suit but rather for the staying of one or more of them where the court finds that two or more suits are in co-existence in the circumstances set forth in that section. Mr. Muli also invited the court to invoke its power under section 18 of the Act and order the transfer to this court of the two suits pending in the lower court for determination with this suit. He also submitted that sections 60(1) and 62(2) of the Constitution, the Judicature Act [Cap. 8] and sections 3 and 3A of the Civil Procedure Act respectively confer unlimited jurisdiction upon this court to try any and all suits and that such jurisdiction takes precedence over the lower courts.

I have carefully perused and considered the pleadings in this suit and in the two suits pending before the lower court in light of the submissions made by both learned counsel and I am not at all persuaded that the suits are between the same parties nor that the issues are directly and substantially the same within the meaning and for the purposes of section 6 of the Civil Procedure Act.

In **Jadva Karsan –v- Harnam Singh Bhogal** [1953] 20 EACA 74 at 76, Sir Newnham Worley commenting on a corresponding section observed:-

“Moreover, he does not appear to have taken into consideration the facts that the causes of action were separate and different in the two suits, that the amount claimed was different, being for the whole sum alleged due in the present suit, and that at least one new issue namely illegality, was raised on the pleadings in this suit.

The authorities are clear that “matter in issue” in section 6 of the Ordinance (which corresponds to section 10 of the Indian Civil Procedure Code) does not mean any matter in issue in the suit but has reference to the entire subject in controversy: it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa (see Sarkar’s Civil Practice (1949) 2nd Edition, page 13). These conditions are not met in the instant case and, in my view, section 6 was wrongly applied.”

Applying and adopting the principle as enunciated hereinabove by the learned Vice-President of the Court of Appeal for Eastern Africa to the present case, I find and hold that the conditions set out therein have not been met. Accordingly, section 6 aforesaid on which the 1st and 2nd Defendants rely does not apply to this suit and consequently, their preliminary objection as stated in the Notice dated the 14th December 2004 must, therefore, fail and it is ordered that the same be and is hereby dismissed with costs to the Plaintiff.

Having so ruled and ordered, and while it is not now necessary in light thereof to consider the section any further, I nonetheless entertain grave doubts that even where section 6 of the Civil Procedure Act does apply, it would be proper for the court to strike out a suit rather than stay it. In the English decision in **The Royal Bank of Scotland Ltd. –v- Citrusdal Investments Ltd.** [1971] 3A11 ER 558 the court held that:-

“Where matters involving substantially the same issues were raised in two different courts it was desirable that they should be debated in only one of those two courts...”

and proceeded to order a stay of one of the suits.

The marginal or side note to section 6 of the Civil Procedure Act refers to “**stay of suit**” and while the legal position still remains that one may not use a marginal note for the purpose of interpreting an Act of Parliament, the House of Lords made it clear in **Director of Public Prosecutions –v- Schildkamp** [1969] 3 A11ER 1640 that regard may be had to a marginal note, not to interpret the Act of Parliament, but as an

indication of the mischief with which the Act is dealing (per Lord Reid and Viscount Dilhorne, **Ibid.** at 1641 and 1650 respectively).

In light of this decision, which has been followed in subsequent judgments in the line of **R-v- Kelt** [1977] 3 A11ER 1099, it would seem to me that these two Defendants would not in any event have been entitled to an order pursuant to ground 4 of their said Notice of Preliminary Objection even if their objection had been upheld.

Dated and delivered at Nairobi this twenty-eight day of January 2005.

P. Kihara Kariuki

Judge