



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ENVIRONMENT AND LAND CASE NO. 18 OF 2020**

**BENSON NG'ANG'A NDIRANGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ECOBANK KENYA LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. For determination is the notice of motion application dated 18<sup>th</sup> August 2020 filed on the same day and is brought under the provisions of section 1A, 3 and 3A of the Civil Procedure Act & Order 2, Rule 15(b) and (d) and Order 50 rule 1 of the Civil Procedure Rules. The applicant prays for orders;

**a) That this Honourable Court be and is hereby pleased to strike out the suit for being scandalous, frivolous and vexatious and an abuse of court process.**

**b) That the plaintiff/respondent to bear the costs of this application.**

2. The application is supported by several grounds listed on its face *inter alia*;

*(a) The possession of the said certificate of lease was directly and substantially in issue in Busia ELC 7 of 2014; Samuel Wainaina Tiras Vs Ng'ang'a Ndirangu & Kisumu Civil Appeal No. 135 of 2017 Benard Ng'ang'a Ndirangu Vs Samuel Wainaina Tiras.*

*(b) In the above cited cases, the Environment and Land Court made the following findings;*

*(i) The plaintiff in this case sold the said property L.R No. Busia Municipality Block 530 to one Samuel Wainaina Tiras.*

*(ii) Samuel Wainaina Tiras paid the deposit of the purchase price upon execution of the agreement.*

*(iii) At the time of the sale, the property was still charged to Ecobank Kenya Limited to secure a loan advanced to the plaintiff in this case;*

*(iv) Samuel Wainaina Tiras cleared the outstanding loan owed by the plaintiff in this case to Ecobank Kenya Limited which amount was used as the balance for purchase price under the agreement between the plaintiff in this case and Samuel Wainaina Tiras.*

*(v) Ecobank Kenya Limited delivered the original certificate of lease to the Samuel Wainaina Tiras with the full knowledge and consent of the plaintiff in this case.*

*(c) The issue was adjudicated upon by two superior courts of competent jurisdiction to wit the Environment and Land Court and the Court of Appeal.*

*(d) Despite the plaintiff being aware of the above facts, he has feigned amnesia and represented to this court that he surrendered the original certificate of lease to the defendant as a precondition in a lease and he is now claiming a return of the same.*

*(e) It is therefore apparent that the plaintiff has resorted to using the court process to vex the defendant repeatedly and this suit is therefore a blatant abuse of court process.*

3. The application is further supported by the affidavits of Olive Chege sworn on 18/8/2020 and 9<sup>th</sup> October 2020. Mr Chege deposed that the possession of the certificate of lease was directly and substantially in issue in Busia ELCC 7 of 2014 and Kisumu Civil Appeal No. 135 of 2017 whose judgements he annexed herein. That the plaintiff/respondent is inviting this court to make a finding that will be at odds with

the findings in the previous suit. Further that the respondent has sued the defendant in Busia HCCC No. 10 of 2013 for damages for breach of contract arising from a loan agreement secured by a charge over the suit property as shown in the pleadings annexed as “OC-3”.

4. The plaintiff/respondent filed a replying affidavit dated 22<sup>nd</sup> September 2020 in opposition to the orders sought. He deposed that the application is premature and misleading as it imports words and phrases into the two judgements. That he was not aware from the reading of the two judgements that the applicant no longer holds the certificate of title to the suit land. The respondent deposes that the prayers in this suit are totally different from the issues litigated in Busia ELCC 7 of 2014.

5. The plaintiff deposes that the defendant was also not a party to the proceedings in ELCC 7 of 2014. That as at 27<sup>th</sup> June 2013, he owed the Defendant Kshs.9,048,983.83 and as such it defeats logic for the defendant to receive from a 3<sup>rd</sup> party Kshs.12,948,913 allegedly to clear a loan of Kshs.9,048,983.83 as shown in annexed the bank statements marked **BNN 2(a) & (b)**. That the respondent entered into a ploy to fraudulently try to dispose of his property as the alleged sum of Kshs.12,938,913 was not reflected in his statement (annexture **BNN2 (a)**) since the loan due remained at Kshs.9,048,983.83 as of 30/6/2013 which was three days after the alleged payment. That if indeed the 3<sup>rd</sup> party settled the loan, how come the defendant continued to defray the same by monthly instalments as aforesaid till 11/4/2020? It is his case that the matter should be allowed to proceed on merit.

6. The applicant joined issues raised in the replying affidavit by filing a further affidavit. That the matters raised in paragraph 12 and 13 of the respondents’ affidavit are the subject matter in BSA HCCC No. 10 of 2013 Benson Ng’ang’a Ndirangu Vs Eco Bank Limited. That the plaintiff herein is seeking reliefs that cannot be granted and whose issues have already been litigated and determined by courts of competent jurisdiction thus the suit ought to be struck out.

7. The counsels for the parties agreed to argue the application by filing of written submissions. The applicant filed hers on 19/10/2020. The respondent was extended for time of one month from 26/11/2020 to file his but as at the date of writing this ruling on 5<sup>th</sup> Feb 2021 had not done so. The applicant urged the court to strike out this suit for being an abuse of the court process as the issues raised herein are similar to the issues that were raised in Busia ELCC No. 7 of 2014. The applicant cited several court decisions in support of her submissions for striking out a suit under Order 2. Among the cases referred to is *County Council of Nandi Vs Ezekiel Kibet Rutto & 6 Others (2013) eKLR* where the court described what a frivolous and vexatious pleading is as; “**The word frivolous is described as something lacking a legal basis or legal merit; not serious; not reasonably purposeful. [7]**

**As to the word vex, the same means to harass, disquiet and annoy. Vexatious is taken to refer to conduct, which is without reasonable or probable cause or excuse; harassing; annoying. [8]”.**

8. The issues have been brought out in the pleadings filed. The question for this court to determine is whether this suit is an abuse of the court process for bringing out issues that were already litigated through a new suit. In the present suit, the respondent pleaded that he surrendered his original certificate of lease to the applicant as security for leasehold agreement in respect of the suit property. That the suit is filed for an order to compel the applicant to release the said original title for Busia Municipal Block/530. In Busia ELCC No. 7 of 2014, this plaintiff had been sued by Samuel Wainaina Tiras for a claim of breach of contract of sale between them concerning L.R No. BSA MUN BLOCK/530.

9. One of the prayers sought in BSA ELCC No. 7 of 2014 and which was granted was “**an order of specific performance do issue against the defendant that he execute the transfer documents and obtain all the necessary completion documents within fifteen (15) days of the order of the honourable court failure whereof the deputy registrar of the High Court at Busia do execute the transfer in place of the defendant and the Land Registrar, Busia do effect the transfer of land title number BUSIA/MUNICIPALITY/530 in favour of the plaintiff.**”

10. The respondent deposed that the matters in issue herein is different since in this case he is seeking release of the title which was in the custody of the applicant pursuant to the lease agreement. In the said judgment at paragraph 15, the trial judge summarized the case before him thus; “**The date of 26/2/2013 came and passed. The defendant had not yet honoured his side of bargain. He explained that he could not present a clean title as he had not yet cleared his loan with the lending bank. The lending bank was ECO Bank. Then ECO Bank was approached. It confirmed the defendant’s indebtedness to it. It was then agreed that the plaintiff could make arrangements to clear the loan. Arrangements were then made to clear the loan. The plaintiff borrowed 14 million shillings from Family Bank which he used to clear the defendants loan with ECO Bank amounting to over Kshs.12 million shillings.**”

11. It is clear from the proceedings in the previous case and annexure OC3(a) & (b) being the charge document and page 3 of the title showing registration of the charge that the certificate of title was in possession of the defendant/applicant not because of the lease but pursuant to a charge. The plaintiff does deny taking a loan from the applicant using the suit title as the security. He proceeded to annex what he referred to as his loan repayment schedule and deposing that the monthly instalments were to be defrayed from rents owed to him by the defendant. The plaintiff cannot feign ignorance that at the time of filing this suit that there is an order of the court for transfer of the suit title Block/530 to a 3<sup>rd</sup> party. This is so because the order required him to execute transfer documents in respect of the certificate of title he now wants the defendant to release to him. The order issued in BSA ELCC 7 of 2014 and upheld in Kisumu Civil Appeal No. 135 of 2017 has dispossessed him of rights over the title which forms the subject matter in this claim. In the circumstances it’s my opinion, that filing the current suit amounts to abuse of court process in so far as it relates to ownership of the suit title which was already determined by a court of competent jurisdiction.

12. In paragraph 10 – 14 of the replying affidavit, the plaintiff raised issues which digressed from what he pleaded in the plaint. He stated that as at 27<sup>th</sup> June 2013, he owed the defendant/applicant Kshs.9,048,983.83 and therefore it defeated logic for the applicant to receive Kshs.12,948,913 to clear the loan. He also wondered why the defendant/applicant still used rental income to continue defraying the loan which had been paid. The plaintiff is indeed entitled to challenge the bank in the manner it handled his debt/contract between themselves. He did so by filing BSA HCCC No. 10 of 2012 (annex OC-3). In that suit, it is pleaded at paragraph 8 and 9 of the plaint thus;

**“8. The plaintiff states that the defendant has been in active occupation of his premise plot No. Busia Municipality/530, for 26 months since agreement at a rent of Kshs.200,000 per month payable quarterly in advance and hence a total of Kshs.5,440,000 should be factored in settlement of loan agreement dated 21<sup>st</sup> March 2011.”**

**“9. The plaintiff claims that, by the breach of agreement, the defendant has placed him in financial embarrassment and prays for an order directing the defendant to honour terms of agreement dated 21<sup>st</sup> March 2011 and factor in a sum of Kshs.5,440,000 rents due to him on the balance on loan account.”**

13. The plaintiff/respondent prayed in BSA HCCC 10 of 2013 for;

**(a) A declaratory order be made that the defendant has breached terms of agreement dated 21<sup>st</sup> March 2011 between him and the plaintiff as per paragraph (10) of the plaint.**

**(b) General damages arising from the breach of contract as prayed in paragraph (13) of the plaint.**

**(c) Cost of suit and interest on (a, b) above.**

14. It is not explained why the plaintiff chose to file a fresh suit instead of amending the existing plaint to include any prayer for release of the certificate of lease now being claimed since it relates to the same subject matter and between the same parties. The filing of a duplex suit on the face of it amounts to waste of judicial time and vexing the opponent to incur unnecessary legal costs. The court when called upon like in this case can exercise its discretion under section 1A, 3, 3A to stop parties from such blatant abuse of court process. In the case of *Abud Abdalla Omar & 28 others Vs Kenya Ports Authority & Ano, MSA CIV APPEAL NO 99 of 2017*, the Court of Appeal at paragraph 14 of their judgement stated thus, **“Instituting two suits over the same cause of action indeed and duplicating some of the litigants cannot be judicious use of court time. We reiterate that it is an abuse of the process of the court which must be frowned upon. Whether the earlier suit was a representative suit or not was peripheral and neither here nor there; What matters is that none of the parties with a grievance was going to be shout out of the justice system by the striking out of the suit. Their interests were catered for in 572 of 2017.”**

15. For the reasons given, I find merit in the defendant’s/applicant’s motion dated 18/8/2020 and hereby issue the orders sought. The plaintiff’s suit dated 22<sup>nd</sup> June 2020 and filed on 23/6/2020 be and is hereby struck out with costs. The defendant/applicant is also awarded costs of this application.

**Dated and signed at BUSIA this 10<sup>th</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**