REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

ELC CASE NO. 309 OF 2014

TOROITICH MISOI MERENG.....PLAINTIFF

VERSUS

SIMEON KIPROTICH KATTAM.....DEFENDANT

RULING

[NOTICES OF MOTION DATED 19th MARCH 2021 AND 26th MARCH 2021]

1. That in the application dated the **19th March, 2019** the defendant seeks the following orders;

> ***"1. That the proceedings in Kitale Chief Magistrate' Court Land Case No.19 of 2020 be stayed pending the hearing and determination of the counterclaim in Eldoret Environment and Land Court Case No. 309 of 2014.***
>
> ***2. Costs of the application be borne by the plaintiff."***

The application is based on the four grounds on its face and is supported by the affidavit sworn by **Simon Kiprotich Katam**, the defendant, wherein he deponed that the plaintiff sued him in this matter and while it was pending, he has also gone ahead to sue him in **Kitale Chief Magistrate's Land Case No. 19 of 2020**, which suit raises similar issues. He averred that the law does not allow the concurrent hearing of matters, and prayed that the proceedings in **Kitale Land Case No. 19 of 2020** to be stayed.

2. In the application dated the **26th March, 2021**, the defendant seeks the following orders;

> ***"1. That the Officer Commanding Endebess Police Station do assist in the enforcement of the order of the honourable court issued on 16/11/2015 by ensuring that the defendant is not evicted from the suit parcel of land Trans Nzoia/Twiga Settlement Scheme/354.***
>
> ***2. Costs of the application be borne by the plaintiff."***

The application is based on the ten **(10)** grounds on its face and supported by the affidavit sworn by **Simon Kiprotich Kattam** on the 26th March 2021. He averred that the matter in issue in the **Chief Magistrate's Court Land Case No. 19 of 2020** that was filed when this suit was pending, is directly in issue in **Eldoret ELC No. 309 of 2014**. That this contravenes the provisions of **Section 6 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, which precludes the concurrent hearing of matters raising the same issues, between the same parties, before different Courts. That despite the dismissal of the Plaintiff's case, the issues raised in the Kitale case mirrored those in the defendant's counter claim that is still pending. That the Court had issued an order for maintenance of status quo on Land Reference Trans Nzoia/Twiga Settlement Scheme/354, the suit land, pending the hearing and determination of this suit. The copies of the status quo order, statement of defence and counter claim are annexed to the affidavit. That the *status quo* order is still in force despite the dismissal of the plaintiff's suit, the Defendant was confronted by hooligans when he went to till the suit land. That those people produced a lease agreement between them and the plaintiff, that was in contravention of the status quo court orders. That the defendant urged the Court to intervene and order the OCS Endebess to enforce the orders of the Court of 16th November, 2015 lest he suffers irreparable loss.

3. In response to the two applications the Plaintiff filed a replying affidavit sworn by Toroitich Misoi Mereng', on the 9th April, 2021. It is his case that the applications were bad in law, and founded on a non-existent suit, the same having been finalized through the dismissal order of 4th December 2017. That the motions are based on a callous attempt by the Defendant to reopen a suit without following the due process of the law. The Court Order purportedly issued on 16th November, 2015 was an interlocutory one whose subsistence and effectiveness was for the period of the pendency of the suit, which was dismissed on 4th December, 2017 for want of prosecution. That the order therefore became inoperative by operation of law, upon the dismissal of the suit and the Court is therefore, *functus officio* and without jurisdiction. That the defendant has not sought for re-instatement of the suit before lodging the applications. That the applications have no legal

underpinning. Further, this Court has on two previous occasions declined to reopen or reinstate the instant suit. That the defendant had opposed the plaintiff's applications seeking re-instatement and is therefore estopped from approbating and reprobating. That the plaintiff contented that the Defendant's Counter-claim was part of the instant suit that was dismissed through the ruling of 4th December, 2017. That the said ruling did not segregate between the plaintiff's suit and the defendants counterclaim. That since the suit was dismissed for non-attendance by both parties, none of the parties would be a beneficiary of their default. That further, the defendant in appreciating the suit had been determined, had proceeded to file his Bill of Costs on 22nd July, 2020 for taxation by this Court. That in respect to the application dated the 19th March, 2021, the plaintiff deponed that the defendant had filed an application seeking for stay of the proceedings in **Kitale CMC E & L No. 19 of 2020**. That the application has already been heard and the ruling of the court was pending to be delivered. That the parcel of land being **Trans Nzoia/Twiga Settlement Scheme/354** referred to by the defendant is non-existent, and the orders being sought will be in vain. He stated that he is the duly registered proprietor of land title number **Trans Nzoia/Chepchoina/Twiga/354**, and hence the orders being sought would amount to an affront on his proprietary rights.

4. The defendant's filed a supplementary affidavit sworn by **Elijah Momanyi Mogona Advocate**, in response to the plaintiff's replying affidavit. He deponed that the defendant's counter claim has never been dismissed, as it is only the Plaintiff's suit that was dismissed. That the counter claim ought to be set down for hearing. That the suit in Kitale court ought not to have been filed while the defendants counter claim was still pending. That since the issue in the counterclaim is the defendant's entitlement to the suit land, the hearing of the suit in the subordinate court ought to be stayed. It was further deponed that the interim order exists to date as the counterclaim is yet to be heard and determined. That the court is not *functus officio* and that the defendant's bill of costs is on the dismissed suit, and not the counter claim.

5. That the issues that commend themselves for determination are as follows;

i. Whether the counter claim in this case survived the dismissal of the suit order, and if so, whether the status quo order issued on 16th November 2015 is in force.

ii. Whether the Plaintiff's application of 26th March, 2021 is merited.

iii. Whether the proceedings in Kitale Land Case No. 19 of 2020 ought to be stayed.

iv. Who bears the costs.

6. That I have carefully considered the grounds on the two applications, the affidavit evidence, the record and come to the following determinations:

(a) That it is not in dispute that the suit was dismissed for non-attendance by this Court on 4th December, 2017. It is also not in dispute that after the dismissal of the suit, the Plaintiff unsuccessfully sought to have the suit re-instated through his applications dated the 6th December 2017 and 6th May 2019 that were dismissed through the rulings delivered on the 8th April, 2019 and 13th November, 2019 respectively, after they were heard on their merits. That during the hearing of the aforementioned applications, the defendant herein opposed the re-instatement of the suit. It is also clear that the defendant later proceeded to file his Bill of Costs which I take to be an indicator that he was satisfied that the suit had been determined and there was nothing pending before the court.

(b) That I do note that the defendant's advocate swore the supplementary affidavit in response to the plaintiff's replying affidavit. It has time and again been an established principle of law, that Advocates should not enter into the arena of dispute by swearing affidavits on contentious matters of facts, as by doing so an Advocate exposes himself or herself as a potential witness for cross-examination in the case he is handling as an agent, which is not only embarrassing but highly irregular. That in the case of **Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR**, the court held as follows:-

> **"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."**

That applying the foregoing findings to this matter, I find the affidavit sworn by the counsel on record for the defendant to be touching on contentious matters and it will not be given any weight.

(c) That on whether the counter claim survived the order of 4th December, 2017 that dismissed the suit for non-attendance, it is clear that upon the matter coming for hearing in the absence of both parties and their advocates, the case was dismissed for non-attendance. Whereas this Court appreciates that the Defendant's counterclaim is a separate suit from that of the plaintiff, it was also dismissed under the order of 4th December, 2017 due to the absence of both parties. That had the defendant attended or been represented on that date, probably his counterclaim would have survived the dismissal order depending on what he would have addressed the court in the matter.

(d) That **Order 12 Rule 1 of the Civil Procedure Rules, 2010** provides that if on the day fixed for hearing, and after the suit has been called out for hearing outside the Court, neither party attends, the Court may dismiss the suit. In this matter, there was no distinction in terms of whose suit was dismissed since both parties were absent. Further, the matter had been pending in Court for almost three years as at the time of dismissal, and the defendant had taken no step in the matter. That the defendant was thus equally

guilty of delay, and cannot come before this Court so late in the day, and claim to now have a haste to have the matter revived four years after the suit was dismissed. That I agree with the decision in the case of ***Maina Karanja v Maina Karanja [2014] eKLR***, cited by the plaintiff where the Court held as follows;

> ***"What of the counterclaim? Does it survive? The power to dismiss suits and for that matter counterclaims are derived from the inherent powers of the court. Like the plaintiff, a defendant with a counterclaim is also obliged to be vigilant. It certainly is not open to a defendant with a counterclaim to sit back and find reason in the delay on the part of the Plaintiff to ask the court to dismiss the suit. Survival of the counterclaim in such cases is likely to prejudice the plaintiff the same way the dormant suit would have prejudiced the defendant, unless the defendant shows that it had attempted to prosecute the counterclaim, for example by preparing documents for trial. In the instant case, the Defendant has not shown any such attempt. I hold the view that it would be an erroneous exercise of discretion if the counterclaim is also not dismissed vide the inherent powers of the court."***

That **Order 12 Rule 3 of the Civil Procedure Act** provides for instances where only the defendant attends and is to the effect that where such defendant attends and admits no part of the claim the suit shall be dismissed, and if the defendant has counter claimed, such defendant may prove his counterclaim so far as the burden of proof lies on him.

(e) That the order issued by the Court on 16th November, 2015 was an interlocutory one that where not otherwise ordered or extended, lapsed by effluxion of time on 16th November, 2016 by virtue of the provisions **of Order 40 of the Civil Procedure Rules, 2010**, which provides that the lifespan of an interlocutory order is 12 months. That in the case of **Erick Kimingichi Wapang'ana & Another v Equity Bank Limited & Another [2015] eKLR**, the Court of Appeal held as follows;

> ***"Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless," as the Rule further provides, "for any sufficient reason the court orders otherwise. In this case, there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction order therefore lapsed on 12th October 2012."***

The said order of 4th November, 2015 was not extended by the Court after the dismissal order of 4th November, 2017, or after the lapse of 12 months. That in the case of **Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another [2018] eKLR,** the Court held that;

> ***"As we have demonstrated the words" "pending the hearing and determination of this suit" could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. This is clearly a situation where the 1st respondent was content to rest on his laurels for more than three years, and made no attempt to have the injunction extended. Nor did he appear anxious to have the substantive suit expeditiously disposed of."***

(f) That the Court having made an order dismissing the suit on the 4th December 2017, and the said order having not been varied to date, then the Court is obviously *functus officio* with no locus to hear the two applications. That it goes without saying that the order of 16th November, 2015 having been an interlocutory order, it is no longer in existence by virtue of the above cited provisions. That it is worth noting that the defendant had actively opposed the plaintiff's applications to set aside the dismissal order. That his subsequent conduct of filing the Bill of Costs dated the 17th July 2020 which under items **3(a)** and **6(a)** includes payments for drawing and filing his counterclaim, demonstrated that he took the claims in the entire suit to have been finalized. That the defendant now appears to have abandoned that position and treats his counterclaim and the interlocutory order to be alive. That in the case of ***EVANS V BARTLAM (1937) 2 ALL ER 649*** at page 652, Lord Russel of Killowen said;

> ***"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."***

And in the case of ***BANQUE DE MOSCOU V KINDERSLEY (1950) 2 ALL EER 549*** Sir Evershed said of such conduct;

> ***"This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold."***

That in the case **of R V KENYA REVENUE AUTHORITY ex parte ABERDARE FREIGHT SERVICES LTD HDWC App. 9410/04**, the court held that an applicant could not be allowed to approbate and reprobate at the same time. The Court of Appeal in ***BEHAN & OKERO ADVOCATES V NATIONAL BANK OF KENYA (2007)*** was of the same view that a party cannot be allowed to blow hot and cold at the same time. That considering that the suit has already been dismissed and the subsequent applications to revive it have been unsuccessful, the defendant's applications have no merit as they have been brought and/or premised on a non-existent suit. That to proceed to consider the merits or otherwise of the two applications would thus amount to an academic exercise.

(g) That the defendant having failed in both applications should pay the plaintiffs costs.

7. That flowing from the foregoing the two applications by the defendant are without merit and are therefore struck out with costs.

Orders accordingly.

Delivered virtually and dated at Eldoret this 19th day of May, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Kenei for the Plaintiff.

Mr. Momanyi for the Defendant.

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.