



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 291 OF 2008

PETER KURIA KIMONDO.....PLAINTIFF

-VERSUS -

EDWARD M. M. TENGA.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENANT

RULING

1. This is the Notice of Motion dated 17th February 2020 brought under order 51 of the Civil Procedure Rules, Section 1A, 1B and Section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. That the honourable Justice Bor do conduct the hearing of the suit.

3. That costs be provided for.

3. The grounds are on the face of the application and are:-

a. The subject matter of this suit being Plot No. A Kahawa West was an amalgamation of Plot Nos S25, S26, S27 and S28 Kahawa West Phase II.

b. The said issue were before the said Judge in ELC Civil Suit No. 25 of 2007.

4. The application is supported by the affidavit of Edward M. Tenga, the 1st defendant/applicant herein sworn on the 17th February 2020.

5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 2nd September 2020.

6. On the 20th July 2020 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's Submissions

7. They are dated 2nd September 2020. Judgment in ELC 25 of 2017 was delivered by Honourable Lady Justice Bor on 19th April 2017. That court is *factus officio*. He has put forward the cases of **Telcom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former employees of Telcom Kenya Ltd [2014] eKLR; Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & Another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR; Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR.**

8. The present suit is significantly different from ELC 25 of 2017 for it involves different parties, particulars, different facts giving rise to the case as well as different evidence being furnished. The 1st defendant is engaging in forum shopping. He has put forward the case of **Invesco Assurance Co. Ltd vs Kinyanjui Njuguna & Co. Advocates & Another [2020] eKLR.**

9. The 1st defendant intent on frustrating the plaintiff in finalizing this suit. He has put forward the case of **Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others**.

10. The present suit is before competent Judge who can hear and determine this suit. The 1st defendant/applicant has failed to satisfy the court that there exists a basis to have this suit be heard and determined by Hon. Lady Justice Bor. He prays that the application be dismissed with costs to the plaintiff.

The 1st Defendant's Submissions

11. They are dated 12th August 2020. Hearing of this suit by a different judge other than Justice Bor could result into conflicting Judgments in the matter. He has relied on the case of **Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 others [2012] eKLR**.

12. Though the parties are different the subject matter is the same as on ELC 25 of 2017. It would serve the ends of justice if the suits are heard by the same judge so as not to embarrass the judicial process. He prays that the application be allowed.

The 2nd Defendant's Submissions

13. They are dated 13th August 2020. The application is an abuse of the court process. ELC 25 of 2017 has already been heard and determined as such the Honourable Lady Justice Bor became *fuctus officio* when she made her final determination in the said suit through the judgment delivered on 19th April 2018.

14. The 1st defendant/applicant herein is engaging in forum shopping which is an abuse of the court process. It has put forward the cases of **Esther Anyango Matete vs Eunice Shikaka Amwayi [2018] eKLR; Albert Chaurembo Mumba & 7 Others vs Maurice Munyao & 148 others [2019] eKLR**.

15. The order sought by the 1st defendant/applicant to have the matter heard by Honourable Lady Justice Bor is not one sought in good faith rather it is one that garners upon the applicant an unfair advantage seeing that a similar matter had previously been determined in his favour.

16. A judge to whom a case has been assigned has an obligation to hear and determine the said case to its finality save for when there is a good reason not to. It prays that the application be dismissed with costs to the 2nd defendant.

17. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

18. It is the 1st defendant's/applicant's case that this matter should be heard by Honourable Lady Justice Bor because she dealt with a similar matter being ELC 25 of 2017.

19. It is not in dispute that the said matter ELC 25 of 2017 has been heard and determined. Judgment was delivered on 19th April 2018. The said judgment is in favour of the 1st defendant/applicant. This is the only reason being advanced by the 1st defendant/applicant.

20. I would have considered transferring this suit if ELC 25 of 2017 was still pending.

21. Section 6 of the Civil Procedure Act does not apply as the plaintiff herein and the plaintiff in ELC 25 of 2017 are different. The plaintiff herein has testified and closed his case. What remains is for the defendants to tender their evidence.

22. I find no justifiable reason has been advanced to warrant this court to transfer the matter to another court. This application is an abuse of court process and seeks to delay the finalization of this matter.

23. I find no merit in this application and the same is dismissed with costs to the plaintiff and the 2nd defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY 2021

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Chacha for the 1st Defendant

Phyllis - Court Assistant