



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 479 OF 2017**

**(Formerly Kisii Elcc No. 437 of 2014)**

**MELLEN KWAMBOKA OCHENGE.....PLAINTIFF**

**VERSUS**

**YAHYA HASSAN ALI.....DEFENDANT**

**RULING**

**A. Introduction :**

1. On 27<sup>th</sup> June 2018, the defendant **YAHAYA HASSAN ALI** through Kerario and Company Advocates and now represented by learned counsel, Mr. Edward Kisia of E. Kisia and Associates Advocates filed a preliminary objection dated 26<sup>th</sup> June 2018 to the instant suit. The grounds thereof are as follows:-

*a) That the suit is sub judice.*

*b) That the same is band in law and is otherwise an abuse of the process of the Honourable court.*

*c) That the same is frivolous and fatally defective.*

*d) Further grounds to be stated.*

2. The plaintiff, **MELLEN KWAMBOKA OCHENGE** who was originally represented by Nyatundo and Company Advocates then by B.N. Ogari and Company Advocates and presently by M/s. Abisai and Company Advocates, mounted this suit on 11<sup>th</sup> November 2014 by way of a plaint dated evenly. She is seeking the following reliefs:-

*i. Eviction*

*ii. A permanent injunction restraining the defendant, his agents, servants, assigns and/or heirs from trespassing upon occupying or in any manner whatsoever, interfering with the plaintiff's ownership and/or peaceful possession and/or enjoyment of the plaintiff's land registered as title number Suna East/Wasweta 1/399.*

*iii. Costs and interests.*

3. The gist of the plaintiff's case is that she is the sole registered absolute proprietor of the suit land LR number Suna East/Wasweta1/399 measuring approximately, 1.0hectares in area having acquired the same as a bonafide purchaser for value in 1982. That in the year 2013, the defendant trespassed into the suit land and erected a brick walled dwelling house thereon causing gross detriment, loss, injustice and prejudice to the plaintiff thus provoking the instant suit.

4. In his statement of defence dated 10<sup>th</sup> December 2014 and filed in court on 11<sup>th</sup> December 2014, through his counsel Ms. Kerario Marwa and Company Advocates, the defendant denied the plaintiff's claim and sought dismissal of the same with costs. The defendant stated inter alia, that there is a claim for adverse possession filed by way of an originating summons in 314 of 2014 between the same parties and over the suit land. That the instant suit is frivolous, vexatious and an abuse of the process of this Honourable court.

5. On 4<sup>th</sup> February, 2019, this court directed that the preliminary objection be canvassed by way of written submission between the parties herein.

6. Notably, this court granted the plaintiff extended timelines on 4<sup>th</sup> April, 2019 and 3<sup>rd</sup> February 2019 to file and serve submissions. However, the plaintiff's counsel failed to honour the said extension or at all.

7. By his submissions dated 11<sup>th</sup> February 2019 and filed on 12<sup>th</sup> February 2019, learned counsel for the defendant made reference to the grounds of the objection and Kisii ELC case number 314 of 2014, the defendant –vs- the plaintiff herein. Counsel relied on **section 6 of the Civil Procedure Act (Cap 21)** and the decision in **Republic –vs- Chairman District Alcoholic Drinks Regulations Committee and 4 others and 2 others exparte Datlef Heier and another (2013) eKLR** on sub judice principle hence sought dismissal of the suit with costs to the defendant.

8. I have thoroughly considered the plaint, the statement of defence, the preliminary objection and rival submissions including authorities cited therein. So, is the defendant's preliminary objection to the instant suit merited?

9. On 10<sup>th</sup> January 2020, learned counsel for the plaintiff filed submissions dated 16<sup>th</sup> December 2019. Counsel gave brief fact of the case and analysed issues for determination namely whether this suit is subjudice and whether it should be struck out in favour of the plaintiff. To buttress his submissions, counsel relied on **sections 24 (a), 25 and 26 of the Land Registration Act 2016,2012, Article 40 of the Constitution of Kenya 2010** and urged this court to order either consolidation of the two suits or stay the instant suit.

10. Notably, the plaintiff stated at paragraph 7 of the plaint that :-

***a) There is no suit; past or present, in any court between these same parties over these same subject matter.***

11. On his part, the defendant termed the suit frivolous, vexatious and an abuse of the process of this honourable court at paragraph 6 of his statement of defence. At paragraph 6, he stated;

***i. That the defendant avers that there is a claim for adverse possession filed vide originating summons No. 314 of 2014 between the same parties and over the suit premises.***

12. The plaintiff did not reply to the statement of defence or at all. Thus, the contents of paragraphs 6 and 7 of the statement of defence stand uncontroverted.

13. In view of the foregoing, is the instant suit, sub judice? The **Black's Law Dictionary 10<sup>th</sup> Edition** defines the term "Sub judice" as:-

***"Before the court or Judge for determination."***

14. Similarly, according to the **Concise Oxford English Dictionary 12<sup>th</sup> Edition** "Sub judice" means:-

***"Under judicial consideration and therefore prohibited from public discussion elsewhere."***

15. **Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya** provides for stay of suit and it reads:-

***"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 proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

16. Admittedly, learned counsel for the plaintiff submitted that Kisii ELC case No. 314 of 2014 was filed prior to the instant suit. That both suits concern the same parties and the same subject matter, LR number Suna East/Wasweta 1/1399. To that end, it is common ground that this suit is sub judice.

17. This court is aware of the **audi alteram partem rule** (right to be heard) as noted by Simpson and Chesoni J J in **Re- Hebtullah Properties Ltd (1976-80) 1 KLR 1195 at 1209** which I endorse unreservedly; see **also Article 50 (1) of the Constitution of Kenya,2010**.

18. In the circumstances, the ends of justice are bound to be attained if the parties are granted an opportunity to ventilate their issues before Kisii ELC case No. 314 of 2014 before any adverse orders are made against either party. The bottom line is that the right to be heard is fundamental and permeates our entire justice system as held by the Court of Appeal in the case of **James Kanyiita Nderitu and another – vs- Mario Sphilota Ghikas and another (2016) eKLR**.

19. The upshot is that since this suit is sub judice pursuant to **section 6 (supra)**, it is hereby stayed accordingly.

20. Costs herein reserved.

21. It is so ordered.

**DATED, SIGNED and DELIVERED at MIGORI this 29<sup>th</sup> day of JANUARY 2020.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Ms. Okota learned counsel for the defendant

Mr. Odhiambo Kanyangi holding brief for E. Kisia learned counsel for the plaintiff.

Court Assistant – Tom Maurice