



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 40 OF 2019**

**ANNAH KIMITEI & 11 OTHERS.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**ERICK KIBIWOTT TARUS & 51 OTHERS.....DEFENDANT/APPLICANT**

**RULING**

This ruling is in respect of an application dated 23<sup>rd</sup> September 2019 by the defendant/applicants seeking for orders that the instant suit be struck out with costs to the defendants.

Counsel agreed to canvass the application vide written submissions which were duly filed.

**DEFENANT/APPLICANTS' CASE**

It was counsel's submission that the applicants contend that on 1<sup>st</sup> March 2019 the defendants filed a Constitutional Petition No. 3 of 2019 in the High Court at Eldoret and served the plaintiff with the petition where the 1<sup>st</sup> plaintiff is the 3<sup>rd</sup> respondent in the Constitutional Petition. After filing her response to the Petition, the plaintiff then filed the present petition. The subject matter of both cases is Sergoit River Farm LR NO. 9723 also known as KIPLOMBE/KIPLOMBE/BLOCK 11.

Counsel submitted that the issues canvassed in the instant suit are identical to the issues in the petition as the suits seek similar orders. That the filing of the suit amounts to a waste of judicial time and may delay the fair trial of the older Constitutional petition. Counsel submitted that in the event of both matters proceed in both courts it will result in serious embarrassment to the court should 2 conflicting determinations emanate from both courts?

Further that the plaintiffs filed the suit on the misapprehension that the constitutional court lacks the jurisdiction to hear and determine the matters raised and canvassed by the older petition as it is a preserve of the ELC court. The applicants cited Article 162(2) of the Constitution and submitted that there is no provision that the ELC court shall reserve exclusive jurisdiction on environment and land matters.

Counsel submitted that the respondent cited sections 13(1) and (2) of the ELC Act and submitted that it does not grant exclusive jurisdiction to the court to determine matters relating to environment and land. Counsel further submitted that the suit should be struck out with costs to the defendants.

**PLAINTIFF/RESPONDENTS' CASE**

The respondents relied on article 162(2) of the Constitution and submitted that the general jurisdiction of the ELC is set out in section 13 of the ELC Act. Further, they relied on article 165(5) of the Constitution and submitted that it expressly bars the High Court from hearing and determining disputes that fall within the jurisdiction of courts contemplated in Article 162(2) of the Constitution. They also notified the court that they have filed a preliminary objection in the Constitutional petition. They maintained that the High Court has no jurisdiction to entertain petition no. 3 of 2019.

Counsel submitted that the plaintiffs have legally ventilated their proprietary rights in the proper court with relevant jurisdiction and further that it is on record that the applicants having filed a suit by way of Originating Summons in Nairobi, it was transferred to the Eldoret ELC court but they filed a notice of withdrawal of the suit on 28<sup>th</sup> February 2019 which was adopted as an order of the court on 5<sup>th</sup> March 2019. The petitioners filed their Constitutional Petition No. 3 of 2019 on 1<sup>st</sup> March 2019.

Counsel submitted that the applicants have filed several suits in respect of the suit land herein which is an abuse of the court process by filing one suit after the other which suits include:

a) NAIROBI HCCC NO. 90 OF 2004

b) NAIROBI COURT JR NO. 89 OF 2014

c) ELDORET ELC NO. 47 OF 2017

d) ELDORET HCC PETITION NO, 3 OF 2019.

Counsel urged the court to invoke article 159 of the Constitution and dismiss the orders being sought with costs to the respondents.

### **ANALYSIS AND DETERMINATION**

While writing this ruling it came to the court's attention that a ruling had been delivered in the High Court in respect of the **Eldoret Constitutional Petition No 3 of 2019** which was the subject matter of this application.

The ruling was delivered by **Justice Githinji on 3<sup>rd</sup> March 2020** and held as follows:

*'In light of the foregoing, I do find that it is only the Environment and Land Court that is clothed with the jurisdiction to hear and determine land matters relating to the use, occupation of and title to land. Hence the petition herein which is about ownership, occupation, dispossession, and adverse possession is a preserve of the Environment and land court and not this Honourable court (High Court) The current petition is therefore defective and untenable in law. It is struck out with cost.'*

The petition in question having been struck out by the above ruling, it therefore follows that this is the proper court to deal with the suit land. There is now no obstacle to hear and determine this case.

Further the application as it is cannot succeed as there was no case that had been heard and determined by a competent court making the issue of res judicata to arise.

Striking out of suits is a draconian measure that courts should use or apply sparingly but this does not mean that parties can abuse the court process and expect to escape the application of this measure.

In the case of **D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR** Madan J (as he then was) stated:

*"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*

I therefore find that the application lacks merit and is dismissed with costs to the plaintiffs. Parties to comply with order 11 and fix the matter for hearing.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

**M. A. ODENY**

**JUDGE**