



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.50 OF 2018

ROSE MWONGELI WAMBUA.....PLAINTIFF/RESPONDENT

VERSUS

JOHN KILUNGU MBONDO.....DEFENDANT/APPLICANT

R U L I N G

1. What is before this court for ruling is the Defendant's/Applicant's Notice of Motion Application expressed to be brought under Order 1A, 1B, 3, 3A and 7 of the Civil Procedure Act, Order 2 Rule 15(1)(b) and (d), Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law for orders: -

1. THAT the Plaintiffs/Respondents suit filed in court on 17/5/2018 be dismissed and/or struck out for the following reasons.

- a. That the same is res-judicata.**
- b. It is scandalous, frivolous and vexatious.**
- c. It is otherwise an abuse of the court process.**

2. THAT the costs of the application and the suit be borne by the Plaintiff/Respondent.

2. The application is dated 22nd July, 2019 and was filed in court on 23rd July, 2019 and is predicated on the five (5) grounds on its face and supported by the affidavit of John Kilungu Mbondo, the Defendant/Applicant herein sworn at Machakos on 22nd July, 2019.

3. The Plaintiff/Respondent has opposed the application vide her replying affidavit sworn at Machakos on 01st August, 2019 and filed in court on 08th August, 2018.

4. In grounds 1 to 5 the Defendant/Applicant states that the Plaintiff/Respondent had instituted a similar suit being Makueni ELC Case No.202 of 2017. That she failed to prosecute it, applied for adjournment on several occasions, that after several adjournments, the suit was dismissed by the Court on 16th May, 2018 in the presence of the Plaintiff's/Respondent's Advocate with costs to the Defendant/Applicant, that the Plaintiff/Respondent is yet to pay costs of the dismissed suit to the Defendant/Applicant and that the suit is therefore an abuse of the court process.

5. In his supporting affidavit, the Defendant/Applicant has deposed in paragraphs 2 and 3 that the Plaintiff/Respondent first sued him in Machakos ELC No.237 of 2015 seeking orders of injunction and shares in agricultural plot No.432 and commercial plot No.840 as per the plaint and his defence annexed as JKM-1 and that the suit was later transferred to this court and assigned the number Makueni ELC No.202 of 2017.

6. In her replying affidavit, the Plaintiff/Respondent has deposed in paragraphs 3, 4, 5 and 7 that she filed suit No.237 of 2015 in Machakos which later became 202 of 2017 Makueni, that the suit was dismissed for want of attendance on the hearing date as she was sick and that the suit was never heard on merit and further that the Defendant/Applicant is at liberty to execute against her for his costs if he has the courage.

7. The Application was disposed off by way of written submissions. It was submitted on behalf of the Defendant/Applicant that a cursory glance of the instant suit will reveal that it is exact replica of Makueni ELC No.202 of 2017 which was dismissed by this court on 16th May, 2018. It was further submitted that the Plaintiff/Respondent never appealed against the order of dismissal nor applied to set aside the said orders or to have them reviewed and as such, this suit is res judicata, frivolous, vexatious and an abuse of the court process.

8. On the other hand, the Counsel for the Plaintiff/Respondent submitted that the issues in ELC No.202/2017 though substantially the same with the issues in the instant suit were never determined and thus they remain open for canvassing. It was also submitted that arising from the above, section 7 of the Civil Procedure Act does not apply as the suit is not res judicata nor is the court barred from trying the suit.

9. Section 7 of the Civil Procedure provides as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former between the same parties, or between parties under whom they or any of them claim, litigating under the same title in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

10. It is common ground that ELC No.202 of 2017 involving the parties herein was dismissed on 16th May 2018 for want of prosecution. It follows therefore that the issues in the said suit were not substantially heard and determined. The instant suit cannot therefore be res judicata notwithstanding the fact the Plaintiff/Respondent is said not to have paid the costs of the previous suit to the Defendant/Applicant. I hasten to add that there is no evidence to show that the costs, if any, have been taxed.

11. The upshot of the foregoing is that the instant suit is neither scandalous, vexatious or an abuse of the court process. The application must therefore fail as it lacks merit. In the circumstances, I hereby proceed to dismiss it with costs to the Plaintiff/Respondent.

Signed, dated and delivered at Makueni via email this 22nd day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi