



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
ELC CASE NO.78 OF 2015

DOMINIC NYAORI MBOGO..... APPLICANT

VERSUS

FRANCISCA SENA MBOGO..... RESPONDENT

RULING

1. By notice dated 11th September 2015 counsel for the Defendant, **Francisca Sena Mbogo**, raised a preliminary objection to the notice of motion dated 7th September 2015 on two grounds of jurisdiction and locus standi. In the application dated 7th September 2015,, the Applicant, **Dominic Nyaori Mbogo** prays for the following:

- a) Certification of the application as urgent.
- b) Temporary injunction against Defendant over parcels **Kisumu/Pandpieri/395** and **393** pending the hearing and determination of his application.
- c) Temporary injunction against the Defendant over the two parcels of land pending the hearing and determination of this suit.
- d) Restriction order on **Kisumu Pandpieri/395**.
- e) Leave to amend plaint.
- f) Amended plaint annexed be deemed as duly filed and served.
- g) Defendant be at liberty to reply to the amended plaint.
- h) Costs of the application.

2. When the preliminary objection came up for hearing on the 12th November 2015, Mr Paskal Odhiambo and Mr Odingo advocates for the Defendant and Plaintiff respectively made their submissions which are as summarized herein below;

a) **DEFENDANT'S COUNSEL'S SUBMISSIONS;**

That counsel had abandoned the grounds of locus standi and would only pursue the grounds of jurisdiction. The counsel submitted that the issue over land parcel **Kisumu/Pandpieri.395** was dealt with

in the lower court in Miscellaneous Application No.45 of 2011 in which the Defendant herein was the Applicant and the Plaintiff the Respondent. That both parties participated in the proceedings in the lower court and the order dated 3rd September 2015 that was extracted has been annexed in this proceedings. That the parties then had a consent not to extract the order for 30 days during which time the Plaintiff then filed this suit instead of complying with the order or filing an appeal. That the suit should therefore be dismissed with costs as the court has no original jurisdiction and its appellate jurisdiction has not been invoked.

b) PLAINTIFF'S COUNSEL'S SUBMISSIONS:

The counsel submitted that the issues raised in the lower court matter were of a different nature from the issues before this court. That **Article 162 (b) of the Constitution and Section 13 of the Environment and Land Court Act** gives this court jurisdiction to deal with issues over land all over the Country and prayed that the preliminary objection be dismissed with costs.

3. That from the submissions by both counsel the parties main contention is whether the issues raised in this suit are res judicata in view of the determinations in **Kisumu CM. MISC. APP.No.45 OF 2014**. The court has carefully considered the pleadings filed and the submissions by counsel and come to the following findings:

a) That though the notice dated 11th September 2015 filed by the Defendant's counsel had clearly indicated that the preliminary objection would be raised in respect of the "**hearing of the Applicant's Notice of Motion application dated the 07/09/2015**", the submission by counsel was to "**ask the court to strike out the suit in its entirety**". The counsel for the plaintiff did not raise any objection to that line of submission and as a preliminary objection on a point of law can be raised by any party at any stage the court ruling will therefore be in respect of the suit.

b) That the plaintiff commenced this suit through the plaint dated 20th March 2015 praying for a declaratory order that he owns **Kisumu/Padpieri/393**, permanent injunction against Defendant on **Kisumu/Padpieri/393**, general damages for wrongful demolition and costs. The submission by the Defendant's counsel is primarily that the issues raised in this suit had been determined in CM MISC. App. No.45 of 2014 between the same parties and subject matter. The plaintiff had

annexed two copies of court orders dated 29th October 2014 and 28th November 2014, issued in CM MISC. App. No.45 of 2014. The Defendant also annexed one order dated 3rd September 2015 issued in the same Miscellaneous application in which the Plaintiff herein was ordered to demolish the structures illegally and unlawfully erected on parcel number **Kisumu/Padpieri/395**. In the earlier order of 7th October 2014 and issued on 29th October 2014, it required the Plaintiff herein to enforce the family decision of 4th October 2013 to have the houses built by the Defendant herein on parcels **Kisumu/Pandpier/393** and **395** demolished. The parties did not annex the pleadings and the ruling in **Kisumu CM MISC.App. No.45 of 2011** to this proceedings and this court is not in a position to conclusively appreciate all the issues that were determined in that case so as to make a finding as to whether they are similar to the issues raised in this suit. The court can only conclude from the copies of the three orders issued in CM MISC. App. No.45 of 2014 that were availed that the matter was about executing a family decision that had been reached on demolishing some houses before the filing of the Miscellaneous application. One of the prayers in the current suit is about damages occasioned from demolition of houses other than those authorized, and was not dealt with in the lower court matter. The lower court proceedings had been commenced through a Miscellaneous application and therefore has limitation on the extent of the nature of pleadings to be filed and evidence to be taken. The other prayers in this suit are about declaratory and permanent injunction orders which were not considered in the lower court matter as confirmed by the three copies of the orders issued by the lower court that were availed to this court. This court therefore find that the materials and evidence presented so far do not show that the issues determined in Kisumu CM Miscellaneous Application No.45 of 2014, though between the same parties herein, were similar to the issues in this case. This suit is therefore not res judicata.

c. That in view of the findings above this suit do not amount to a contravention of Section 7 of the Civil Procedure Act and this court has Jurisdiction to hear and determine the same.

4. That the Defendant's counsel preliminary objection is without merit and is rejected with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2016

In presence of;

PLAINTIFF Absent

DEFENDANT Present

COUNSEL Mr Omondi for M/S Otieno for Plaintiff

Mr Odhiambo for the Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

9/3/2016

S.M. Kibunja J

Court Assistant Oyugi

Mr Psaskal Odhiambo for Defendant

Mr Omondi T for M/S Otoeno for the Plaintiff

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

Court: Ruling delivered in open court in presence of the Defendant, Mr Odhiambo for the Defendant and Mr Omondi for M/S Otieno for plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016