



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**LAND CASE NO. 54 OF 2016**

**MBARAK AWADH SAID.....PLAINTIFF**

**-VERSUS-**

**SWAHIBA RASHID BASSAMY.....DEFENDNT**

**RULING**

1. The notice of motion dated 12<sup>th</sup> May 2016 was filed by the Plaintiff. It is brought under the provisions of Section 6, 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act seeking the following orders:

**a) Spent**

**b) That, the Honourable Court do make an order staying the proceedings in CMCC No. 731 of 2016, Mombasa pending hearing and determination of the suit/further orders of the Court and**

**or**

**the orders made in CMCC No. 731 of 2016 at Mombasa be discharged and or set aside ex debito justitiae.**

**c) That, the costs of the Application be provided for.**

2. The applicant avers that the filing of Mombasa CMCC No 731 of 2016 is an abuse of the Court process as it contravenes the provisions of section 6 of the Civil Procedure Act. The applicant also submitted that those proceedings contravenes the conservatory orders issued in Malindi Constitutional Petition No 3 of 2016.

3. The application is opposed by the defendant respondent who deposed that the subject matter in issue in MSA CMCC 731 of 2016 is a contract and therefore not a land issue.

4. There are two issues for determination. First is whether CMCC 731 of 2016 is subjudice this case and therefore should be stayed as provided for under section 6 of the Civil Procedure Act. The second issue is whether the Magistrate's Court has jurisdiction to entertain Suit No 731 of 2016.

5. On the issue of subjudice, this suit was filed on 4<sup>th</sup> April 2016. Mr Gichana submitted that the defendant was served on 8<sup>th</sup> April 2016. The plaint in CMCC No 731 of 2016 has Court received stamp

of 18<sup>th</sup> April 2016. Are the matters in issue the same? In this suit, the plaintiff sought for an order of permanent injunction to restrain the defendant herein from interfering with the tenants and rebuilding and renovation of the premises on account of her name being in the title and her minimal share or interest therein.

6. In the suit before the CMC's Court (CMCC 731/16) the plaintiff (read defendant herein) is seeking an order to compel the 1<sup>st</sup> defendant (read plaintiff herein) to give vacant possession of the property and to demolish permanent structure constructed thereon. She also sought an order restraining the 2<sup>nd</sup> – 10<sup>th</sup> defendants to cease any dealings on the suit property without her consent or approval. The 2<sup>nd</sup> – 10<sup>th</sup> defendants gave the plaintiff herein consent to carry on the constructions. The suit property in dispute in both suits is plot no 112/II/MN situated in Mwandoni area.

7. Section 6 provides that *“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 proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”*. From the facts set out in the pleadings in both suits, the parties are the same and in my opinion the subject matter in dispute is also the same. The two suits cannot therefore proceed in parallel as this would amount to a waste of judicial time and abuse of the Court process. Since this suit was filed first, it follows that it takes priority over CMCC 731 of 2016. Consequently I do make an order staying the suit filed in CMCC 731 of 2016. The effect of the stay order is that the injunctive reliefs obtained in that file are equally stayed.

8. The second issue is whether the proceedings in the CMC's are in contravention of the orders issued in Malindi Constitutional Petition No 3 of 2016. Those orders stayed the sections of the ELC Act and the Magistrate's Court Act which conferred jurisdiction on Magistrate to hear and determine environment and land matters. This suit was filed after the conservatory order was issued on 3.16. It is therefore a non – starter as long as those orders have not been set aside and any proceedings taken are a nullity obuntio. The issue of jurisdiction is everything as was held in the renowned case **of owners of motor vessel Lilian 'S' vs Caltex oil (1989) KLR 1** that

*“a question of jurisdiction may be raised by a party or by a Court on its own motion and decided forthwith on the evidence before the Court”*

9. The three Judge Bench in Malindi constitutional petition No 3 of 2016 has made a finding that the magistrates courts do not have jurisdiction to handle environment and land matters. Therefore whether the trial magistrate dismissed the preliminary objection on jurisdiction, he cannot confer upon himself that which the law has taken away. The orders of injunction he issued were thus issued without jurisdiction and should thus be set aside ex xibito justitiae. I proceed to exercise my supervisory powers and make an order discharging the orders issued in CMCC 731 of 2016. I will however not make an order to strike out that suit as the same was not prayed for in the application. In any event it would be in the interests of justice that the two suits be consolidated.

10. The application thus succeeds that an order be and hereby issued staying proceedings in CMCC 731 of 2016. Secondly the temporary orders of injunction issued in that suit are set aside. Costs of the application awarded to the applicant.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of November 2016.**

**A. OMOLLO**

**JUDGE**