



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
LAND AND ENVIRONMENT DIVISION
CIVIL CASE NO.421 OF 2012

PAUL MATHEKA..... PLAINTIFF

VERSUS

KINYANJUI KALOKI & OTHERS DEFENDANT S

RULING

1. In a Complaint dated 7.11.2012 the Plaintiff sought orders to nullify title deed of Plots No. Donyo Sabuk/Komarock Block 1/24963, 24961, 24959, 21962, 24957, 24955, 24954, 24953 and 24952 all being sub divisions of Block 1/20033. Also the Plaintiff seek rectification of register and 1 acre be registered in his names amongst the principal prayers. The Complaint was filed on 9.11.2012. On 19.2.2013, the Plaintiff lodged Notice of Motion dated 18.2.2013 seeking injunctive reliefs against all the Defendants over the above mentioned suit plots.
2. The 1st Defendant responded by filing a preliminary point of law dated 24.5.2013 and a replying affidavit sworn by the 1st Defendant advocate Andrew Nduva Kitonga. In the Replying Affidavit the respondent No.1 annexed amended Complaint of CMCC No.297/2011 in which the Plaintiff Applicant sued the 1st and 2nd Defendant over the Mother title suit plots Block 1/20033 in which he seeks same to be nullified, title rectified to set 1 acre and injunctive relief against the 1st and 2nd Defendant herein.
3. In the Instant suit paragraph 14 the Plaintiff pleads that “there is no other suit pending in the Republic between parties over the same subject matter. The Plaintiff does not disclose the existence of the CMCC No.297/2011 neither in the Complaint or the Supporting Affidavit. When the Replying Affidavit was filed and the Preliminary Objection the Plaintiff did not put in a further Affidavit to respondent to the issues raised as pertaining to the breach of Section 6 of Civil Procedure Act.
4. The Plaintiff does not explain as to why he could not amend the Complaint in CMCC No.297/2011 to accommodate the subdivisions and the new owners of the created plots from the mother title Block 1/20033. The Defendants 2 – 8 have not filed appearance or Defence and this is a request for interlocutory judgment filed on 23.1.09.
5. The parties (Plaintiff and Defendants) opted to canvass the application via written submissions. The Applicant gives evidence in the submissions to the effect that CMCC No.297/2011 is not

pending since the court disqualified itself from hearing the same matters thus no competent suit before it for determination. The Applicant also demonstrates how he has met the threshold of conditions for grant of interim injunction as set out in the **GIELLA –VS- CASSMAN BROWN CASE**.

6. The Respondent No.1 reiterates the facts that there is a pending suit CMCC.297/2011 and thus the filing of the instant suit offends the provisions of Section 6 of Civil Procedure Act. Further the 1st Respondent argue that the Applicant having failed to annex any evidence in form of agreement of sale of the suit land, he has not established any of the ingredients for grant of interim injunctions set in **GIELLA CASE**.
7. Section 6 of Civil Procedure Act is to the effect that “No. court shall proceed with a trial of any suit or proceedings in which the matter in issue is also directly or 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 a suit or proceedings is pending in the same or any other competent court having jurisdiction in Kenya to grant the relief claimed.
8. The court notes that the CMCC No.297/2011 is replicated in the instant suit in body of Plaintiff and reliefs sought. The Applicant has refused to tender evidence either in replying affidavit or otherwise for the explanation as to why he has to file the instant suit. The only feeble explanation is in the submission alleging that the lower court has no jurisdiction to entertain the suit and thus it disqualified itself from hearing the suit. But the question is, was the solution to file the instant suit or to seek transfers?
9. The Applicant does not explain why a suit should continue to hang in the subordinate court since 2011 without any action on the same. The provisions of Section 6 Civil Procedure Act cover the situation of the 2 suits herein. The fact that the suit land was sub- divided and plots alienated to more individuals does not warrant filing more suits but amendment of the subsisting suit and Mutate the cause of action as circumstances change. The filing of this suit thus offends Section 6 of Civil Procedure Act Cap 21 and also Section 1A and 1B Civil Procedure Act on overriding objective and thus an abuse of court process and thus under Section 3A, Civil Procedure Act.
10. The court has to prevent the abuse of the court process by terminating the instant suit. The court thus makes the following orders:
 1. The Notice of Motion dated 18.2.2013 and the entire suit are struck out with costs to the 1st Defendant.

Dated and Delivered at Machakos, this 6th day of March, 2015.

CHARLES KARIUKI

JUDGE