



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1113 OF 2014

SARAH NANDACHA MAYEKU.....PLAINTIFF

-VERSUS-

ADEN NOOR ADEN.....1ST DEFENDANT

COUNTY LAND REGISTRAR, KAJIADO.....2ND DEFENDANT

RULING

1. The 1st Defendant seeks through an application dated 2nd October, 2014 the dismissal of the instant suit on the basis that there is already in existence a similar suit between the same parties before a court of competent jurisdiction. The other suit is stated to be Kajiado Principal Magistrate's Court case No. 94 of 2014. It was filed by the 1st Defendant prior to the Plaintiff filing the instant suit. Before the court below, the Plaintiff herein had raised issues concerning the jurisdiction of the court and through the doctrine of *Kompetenz – Kompetenz* the court had ruled that it had jurisdiction to adjudicate the matters before it.
2. It is consequently not in dispute that there exists a suit before a competent court between the same parties with the dispute being over the same subject matter being title No. Ngong Township/Block 2/376. Indeed at paragraph 15 of the plaint, the Plaintiff herein states as much.
3. Mr. Jibril who appeared for the 1st Defendant submitted that the filing of the instant suit amounts to an abuse of the process of the court and that further to the provisions of Section 6 of the Civil Procedure Act (Cap 21), the suit ought to be dismissed for being *subjudice*. He stated further that all the Plaintiff needed to do was to file a counter claim and that even though the pleadings have since closed, the Plaintiff could still seek the court's leave. The application was not contested. Neither a Replying Affidavit nor grounds of opposition was filed under **Order 51 Rule 14** of the **Civil Procedure Rules**. The Application which was urged orally was heard on 12th February, 2015 when Counsel for the Plaintiff did not appear but instead sent a representative who requested to file written submission after Mr. Jibril had concluded his submissions. The request was declined by the court as the case management strategy adopted by the court and the parties was to dispose of the application through oral submissions.
4. I have reviewed the documents on record as well as the law and come to the following short conclusions.

5. The two parties, namely the Plaintiff and the 1st Defendant are embroiled in a land dispute. In particular, both claim ownership of title No. Ngong Township/Block 2/376. The 1st Defendant had filed suit before the Principal Magistrate court in Kajiado. The suit property is situate within the geographical jurisdiction of the said Kajiado court. The Plaintiff raised an objection as to the court's competence and jurisdiction to adjudicate over the matter. The objection was dismissed. No appeal was preferred. As it were, two suits between the same parties over the same subject matter being ownership of Title No. Ngong Township/Block 2/376 exists. One before this court and another before the Principal Magistrate's court. Both are competent to adjudicate the dispute.

6. Section 6 of the Civil Procedure Act would thus come into play. The said section states as follows:

“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”

I have previously held in relation to the above section in the case of **Peter Munene Gathene –v- Michael Nthenge Nzioki ELC No. 1033 of 2014** that in appropriate circumstances where the ingredients of the Section are met the later suit need not be stayed but should be struck out for being an abuse of the process in view of the fact that the parties due to the existence of the former suit are not prejudiced in any way.

7. In my view the same position would apply to the instant case. Where there is an outright abuse of the process, the court ought to act decisively. I see no reason why the instant suit ought to survive. It ought to be struck out. I appreciate that the power to strike out to be exercised as much as possible in only extreme circumstances. It is said that it is a draconian act to strike out pleadings but in my view it is only draconian when there is an obvious abuse of process and further when the party most affected by the striking out has no alternative and immediate proportionate procedure by which his claim can be adjudicated upon. In the instant case the Plaintiff has an alternate forum in PMCC No. 94 of 2014 at Kajiado. All is not lost. The Plaintiff's rights can rightfully and with minimal costs be adjudicated before the magistrate's court.

8. The upshot of the above is that the application dated 2nd October, 2014 is allowed with the order that this suit is hereby struck out (not dismissed) with costs to the 1st Defendant.

9. Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiff/Applicant

..... for the Defendants/Respondent