



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUSIA.

ENVIRONMENT LAND CASE NO. 31 OF 2012.

ATTORNEY GENERAL.....1ST PLAINTIFF/RESPONDENT

BUSIA DAIRY CO – OP SOCIETY LTD.....2ND PLAINTIFF/RESPONDENT

=VERSUS=

JAMES NDIRANGU NG'ANG'A.....DEFENDANT/APPLICANT.

R U L I N G

JAMES NDIRANGU NG'ANG'A, the Defendant and hereinafter referred to as the Applicant filed the Notice of Motion dated 19.09.2013 for the following orders;

“ a) That the plaint filed herein be and is hereby struck out.

b) The costs of this application and costs of the suit be provided for.”

The application is based on the ground that the suit is an abuse of the process of the court. The application is supported by the affidavit of the Applicant sworn on 19.9.2013 in which he depones to the following, among others:

1. That he is the registered proprietor of Busia Township/20 and has been paying the rates for the plot.
2. That he filed Busia PMCC. No. 229 of 2007 seeking vacant possession of the plot against Busia Dairy Farmers Co operative Society and got orders in his favour.
3. That Busia Dairy Farmers Co operative Society filed an appeal being Busia H.C.C.A No. 27 of 2008 which is still pending and that the filing of the plaint herein is an abuse of the court's process.

The heading of the application dated 19.09.2013 has only two parties, being the Attorney General as the plaintiff, and the Applicant herein as the Defendant. The Attorney General is therefore the Respondent in this application and will hereinafter be referred to as such.

The respondent opposes the application and filed a replying affidavit sworn by E.M.Wafula on 9.10.2013 in which he among others depones as follows:

1. That the suit is not an abuse of the court's process, and is not res judicata as the parties are different to those in Busia PMCC. No. 229 of 2007.

2. That the Respondent seeks to cancel lease issued to the Applicant for having been fraudulently obtained.

The Applicant filed a supplementary affidavit sworn on 23.10.2013 in which he among others, state that Busia Dairy Farmers Co operative Society was on 9th July, 2013 made a party in this suit.

Mr. Otanga and Mr. Onyiso advocates made verbal submission for the Applicant and Respondent respectively. Busia Dairy Farmers Co operative Society had on 9.7.2013 been enjoined as the 2nd Plaintiff following their application through J.V. Juma & company Advocates dated 6.6.2013. The current application was served on their advocate as confirmed through the affidavit of service of Richard Okello Mudibo sworn on 4.10.2013, but did not file any replying papers. A perusal of the record also shows that they are yet to comply with the order of 9.7.2013 to file and serve their papers in 21 days.

Having considered the submissions by counsel, the supporting, supplementary and replying affidavits, the court finds as follows:

1. That the Applicant had earlier, through his then counsel filed a notice of preliminary objection dated 8.1.2013 seeking to have the suit dismissed with costs on the ground that the matter was res judicata and an abuse of courts process among other grounds. The preliminary objection was heard together with an application by the Respondent dated 11.12.2012 on 21.01.2013 and a ruling dated 18.02.2013 delivered inter alia rejecting the preliminary objection and making a finding that the Respondent had the locus standi to initiate this case. The court's ruling of 18.02.2013 is yet to be reviewed and or successfully appealed against. The application dated 19.9.2013 seeks to attain what the preliminary objection had aimed to get, and that is dismissal and or striking out of the plaint with costs. This issue has already been dealt with by this court which pronounced it's position through its ruling of 18.2.2013. The Applicant's current counsel appear not to have been aware of their predecessor's preliminary objection and the court orders thereon. The application dated 19.09.2013 is therefore an abuse of the courts process as it raises the same issues the court has already made pronouncement on.
2. That the Respondent was not a party in Busia PMCC. No.229 of 2007 and is also not a party in Busia HCCA No.27 of 2008 Busia Dairy Farmers Co-operative Society who are parties in the two aforementioned matters were enjoined as 2nd plaintiff in this case on 9.7.2013 but are yet to file any pleadings.
3. That for reasons in 1 and 2 above the decisions in the Court of Appeal cases of *Nishith Togendra Patel –VS- Pascale Miregille Baksh & Anor Nairobi C.A.App No. 264 of 2007* and *Machanga Investments Ltd., -V- Safaris Vulimited (Africa) Ltd & 2 others, Nairobi C.A.C. A No.25 of 2002* are not relevant.

For reasons set out above the application dated 19.09.2013 is without merit and is dismissed with costs.

S.M. KIBUNJA,

JUDGE.

Dated, and delivered on.....12thof March, 2014.

In the presence of...Mr. Onyiso for 1st Plaintiff and Mr. Otanga for defendant.

S.M. KIBUNJA,

JUDGE.

