



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 11 OF 2020

MUSA SAID..... APPLICANT

VERSUS

MIRAJI MUSTAFA

SWALEH MUSTAFA

AHMED MUSTAFA

HUSSEIN MUSTAFA

KULTHUM MUSTAFA.....RESPONDENTS

RULING

The application is dated 18th May 2020 seeking the following orders;

1. That this application be certified as urgent and the service of the same upon the respondent be dispensed with in the first instance.
2. That this honourable court be pleased to withdraw the Kakamega Kadhi's court Miscellaneous Application No. 3 of 2020 (Miraji Mustafa, Swale Mustafa Ahmed Mustafa, Hussein Mustafa and Kulthum M. Mustafa vs. Musa Said) for disposal or dismissal for want of jurisdiction.
3. That the court be pleased to dismiss or strike out the application.
4. That pending the hearing and disposal of prayer No. 2 herein this honourable court be pleased to order the stay of further or any other proceedings in the Kakamega Kadhi's courts Miscellaneous Application No. 3 of 2020 (Miraji Mustafa, Swaleh Mustafa Ahmed Mustafa, Hussein Mustafa and Kulthum M. Mustafa vs. Musa Said).
5. That the respondents do pay the costs of this application to the applicant.

It is based on the grounds that the applicant lodged cautions against all those pieces of land known as Nandi/Kamobo/5275 and Nandi/Kamobo/4393 on the 2nd day of October, 2018. That the cautions are still subsisting and in particular Nandi/Kamobo/5275 as Entry No. 5 of the Land Register. That to date neither the proprietor of the said pieces of land nor the Land Registrar have given Notice to the Cautioner to remove the same. That on the 26th day of February, 2020 the respondents purported to serve the applicant with Summons to Enter Appearance of a non-existent plaint together with a chamber summons application supported by joint affidavit of the respondents. That on the 9th day of March, 2020 the applicant filed his replying affidavit raising principally the issue of jurisdiction on the part of the Kakamega Kadhi, the Honourable Zaharan Mohamed Omar to entertain disputes relating to cautions in view of the provisions of Section 101 of the Land Registration Act which vest jurisdiction exclusively in this court. That the jurisdiction of the Kadhi Court is limited to questions of Muslim Law on personal status, marriage, divorce and inheritance as per section 5 of the Kadhi's Court Act and Article 170 (5) of the Constitution. That the Kadhi Court and others are prohibited by law from entering disputes that include the removal of cautions over a registered land. That the honourable A. Zaharan Mohamed Omar, Kadhi, acted in excess of or ultra vires his jurisdiction by arrogating to himself jurisdiction to deal with disputes outside his statutory mandate. That the said Nandi/Kamobo/5275 is situated barely 200 m from the Kapsabet Senior Principal Magistrate Court which is some 60 m from the Land Registry within the local limits of the subject matter as per Section 12 of the Civil Procedure Act and also within the territorial area of the jurisdiction of the Eldoret Environment and Land Court. That the respondents and the honourable Kadhi Zaharan Mohamed Omar are abusing the process of the court by filing and entertaining the

proceedings in the Kakamega Kadhi Court on top of the absence of jurisdiction as per the Land Registration Act. That the case as filed in the Kadhi Court which has no jurisdiction as per the law is incurably defective and incapable of being transferred to any other court for disposal save for its withdrawal to this court for dismissal and or striking out for the abuse of the process of the court by the court and the respondents. That it is just and fair that Kakamega Kadhi's Courts Miscellaneous Application No. 3 of 2020 (Miraji Mustafa, Swaleh Mustafa Ahmed Mustafa, Hussein Mustafa and Kulthum M. Mustafa vs. Musa Said) be withdrawn and disposed by this court to prevent the abuse of its process by the respondents and the honourable Kadhi Zaharan Mohamed Omar. That the respondents' reasons for the removal of the caution is to enable them file the orders for the revocation of the titles of the proprietor namely Nandi/Kamobo/5275 which had been fraudulently, corruptly and unlawfully awarded to them by the Vihiga Kadhi Courts, the Honourable Kadhi Ally W. Bakari in the fraudulent, corrupt, criminal and fictitious and non-existent Vihiga Kadhi Court Civil Case No. 1 of 2019 (Musa Chepkoech Said and Two others (Petitioners) Miraji Mustafa and Swaleh Mustafa (Interested parties) and Mariam Said Musa (Respondent) and for which appeals against the same namely Kakamega High Court Civil Appeal No. 69 of 2019 and Kakamega High Court Civil Appeal No. 80 of 2019 were allowed on the 26th day of February, 2020 by the Honourable Justice W. Musyoka. That this court is empowered to supervise the subordinate courts within its area of jurisdiction under the provisions of Article 165 (6) and (7) of the Constitution as read with section 13 (5) and (6) of the Environment and land Court Act in order to prevent the abuse of the process of the court and or for any other sufficient cause and in the circumstance, this court be pleased to withdraw the said Kakamega Kadhi's Court Miscellaneous Application No. 3 of 2020 ((Miraji Mustafa, Swaleh Mustafa Ahmed Mustafa, Hussein Mustafa and Kulthum M. Mustafa vs. Musa Said) for disposal by way of dismissal for want of jurisdiction.

The 1st and 2nd respondents submitted that the application is unmeritorious, an abuse of court process and a waste of judicial time. That the applicant has not moved or attempted to move or repetition the said Kadhis Court by way of a preliminary objection on the point of jurisdiction, and nothing in law bars him from doing so as a Kadhis court bears the status of a magistrate court, the said court would hear him and recuse itself an option he has not fully exhausted. That section 73 (2) of the Land Registration Act also provides an avenue for the applicant to lodge his dispute with the Land Registrar who will then remove the said caution, the applicant need not burden this court. That the said application is subjudice and is pending before another forum, i.e. Kadhis Court Vihiga and High Court Family Division in Kakamega under Civil Appeal No. 65 of 2019, which matters have not been exhausted. The applicant is therefore being mischievous and forum shopping when he has other avenues to air his grievances. That the land parcels are probate in nature. The applicant is deliberately withholding material facts in failing to disclose that succession proceedings have already been conducted and concluded in favour of the respondents, a decision from which the applicant has appealed. No stay order is issued at the moment and the caution in question was registered by the applicant. That the prayers by the applicant are therefore self-defeating as they clearly indicate there is a court order registered on 19th July, 2019 barring further dealings on the said parcel by virtue of Kakamega Civil Appeal No. 69 of 2019, the application is therefore frivolous as the Land Registrar is barred from any further dealings on the said parcel.

This court has considered the application and the submissions herein. A Preliminary question of law has been raised by the 1st and 2nd respondent that this matter is sub judice. Before getting into the merit or demerits of this application the court will first determine this issue. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and 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, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The respondents submitted, the matter herein is subjudice. and is pending before another forum, i.e. Kadhis Court Vihiga and High Court Family Division in Kakamega under Civil Appeal No. 65 of 2019. Indeed the applicant submitted that, the respondents' reasons for the removal of the caution is to enable them file the orders for the revocation of the titles of the proprietor namely Nandi/Kamobo/5275 which had been fraudulently, corruptly and unlawfully awarded to them by the Vihiga Kadhi Courts, the Honourable Kadhi Ally W. Bakari in the fraudulent, corrupt, criminal and fictitious and non-existent Vihiga Kadhi Court Civil Case No. 1 of 2019 (Musa Chepkoech Said and Two others (Petitioners) Miraji Mustafa and Swaleh Mustafa (Interested parties) and Mariam Said Musa (Respondent) and for which appeals against the same namely Kakamega High Court Civil Appeal No. 69 of 2019 and Kakamega High Court Civil Appeal No. 80 of 2019 were allowed on the 26th day of February, 2020 by the Honourable Justice W. Musyoka. I find that this matter is sub judice and/or res judicata Kakamega High Court Civil Appeal No. 69 of 2019 and Kakamega High Court Civil Appeal No. 80 of 2019 between the same parties and concerning the same subject matter. Having found so there will be no need of getting into the merit or demerits of this application. I find the preliminary issue of law has merit and I uphold the same. This application is struck off with costs to the 1st and 2nd respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE