

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 18 OF 2008

ELDORET EXPRESS CO. LTD PLAINTIFF

VERSUS

TAWAI LTD..... DEFENDANT

RULING

The Applicant Tawai Limited brought a Notice of Motion dated 9th August, 2012 under the provisions of Order 2 Rule 15 (1) (c) of the Civil Procedure Rules and Section 6 of the Civil Procedure Act. The Applicant contends that this suit is similar to HCCC No. 202 of 2006 and that the cause of action is the same and parties are the same. The Applicant also contends that the filing of the present suit is only meant to delay the quick determination of HCCC No. 202 of 2006. The Applicant annexed pleadings in HCCC No. 202 of 2006.

The application was opposed by the Respondent who contends that the cause of action in the present suit is different from that in HCCC No. 202 of 2006. The Respondent contends that the Applicant is relying on a draft amended Plaintiff which is seeking to re-align the LR No. in HCCC NO. 202 of 2006 with the present suit so that the Applicant can find a ground of attacking the present suit. The Respondent contends that the cause of action in this case is distinct from the one in HCCC No. 202 of 2006 and that the Respondent is not seeking to delay the finalization of HCCC No. 202 of 2006.

I have considered the Applicant's application as well as the Respondent's opposition to the same. Section 6 of the Civil Procedure Act provides as follows:-

“6. 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”.

In Kitale HCCC No. 202 of 2006, the present Defendant is the Plaintiff in that case and the current Plaintiff is the Defendant in that case. In Kitale HCCC No. 202 of 2006 the parties were litigating on LR No 5707/R. In the present case, the parties are litigating on LR No. 5707/6. These are two distinct titles. In the former case LR No. 5707/R is 96 hectares whereas LR NO. 5707/6 is 259.1 hectares. Each of the two parties are separately registered as proprietors of their respective portions. The subject matter is therefore not the same.

The Applicant has annexed a draft amended Plaintiff to its application as the basis of its application seeking stay of the present suit. The draft amended Plaintiff has not been allowed and it cannot therefore form part of the pleadings in the former suit. The Court cannot rely on it as the basis of this application. As the Plaintiff which seeks to be amended stands, the title numbers are distinct and one cannot be heard to argue that the subject matter is the same. I therefore find that the issues in this and the earlier suit are different.

The next issue to be determined is whether this suit should be struck out on the basis of the provisions of Order 2 Rule 15 (1) c of the Civil Procedure Rules. There is nothing which shows that this suit was filed merely because the Plaintiff wanted to delay the quick disposal of the matter. As I have said herein before, the causes of action are distinct and as such this case cannot be struck out. Striking out of a pleading is a drastic remedy which should be granted sparingly and in the clearest of cases. In the present

case there is no basis upon which the Court can strike out the Plaintiff. It is neither prejudicing the Defendant's case nor delaying the trial. I find that the application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 8th day of October, 2013.

E. OBAGA

JUDGE

In the absence of the parties.

Court Clerk: Kassachoon.

E. OBAGA

JUDGE

08/10/2013