



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT KAKAMEGA**

**ELC CASE NO. 8 OF 2019**

**PATRICK AKOI ABWOTO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FEDELIS ONJARI MASANYI.....DEFENDANT/APPLICANT**

**RULING**

The application is dated 3<sup>rd</sup> April 2019 and is brought under Sections 1A, 1B, 3, 3A and 6 of the Civil Procedure Act Cap 21 and order 2 rule 15 (1) (d) & order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That the suit herein be struck out.
2. That costs of this application and the suit be awarded to the applicant.

It is based on the grounds that this suit is duplicity to Kakamega ELC No. 184 of 2015 now Mumias SPMELC NO. 152 OF 2018. That the matters in issue herein are directly and substantially the same in KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018. That this suit is an abuse of the court process. That it is in the interest of justice and equity that this application be allowed.

They submit that the respondent had also filed KAKAMEGA ELC NO. 184 OF 2015 now Mumias SPMELC NO. 152 OF 2018. That the matters in issue herein are directly and substantially the same in KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018. That KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018 is still pending and has not been stayed. That he is the registered owner of land parcel No. E/WANGA/LUBINU/4223. That the applicant has placed a caution on his land parcel using KAKAMEGA ELC NO. 184 of 2015 now MUMIAS SPMELC NO. 152 OF 2018.

The respondent submitted that, the application is misconceived and is based on the complete misconstruction of the Civil Procedure Act. The application is thus an abuse of the court process. The respondent submits that the parties and subject matter in the two cases mentioned above are different hence this matter is not sub judice.

This court has considered the application and the submissions therein. The issue for determination whether or not this suit is sub judice. 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.”*

This court has perused the court records in both KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018 and KAKAMEGA ELC NO. 8 OF 2019. Both matters were brought in by way of originating summons and the applicant Patrick Akoi Abwoto is the same in both matters. The suit land parcel is the same, that is E Wanga/ Libinu/766. In the Mumias case the applicant has sued on Rajab Makhoha Murambi. In this current suit and according to the applicant’s pleadings the said Rajab Makhoha Murambi has caused the subdivision of the original suit land and transferred a portion namely E Wanga/ Libinu/4223 where the applicant resides to the current respondent Fedelis Onjari Masayi. This court finds that the proceedings in this matter are directly and substantially in issue in a previously instituted suit KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018 and the applicant and his advocate are the same. The matter in Mumias is still pending and if the applicant feels that that court has no jurisdiction then the correct procedure is to apply to have it transferred to this court. Any new or third party can be enjoined in that suit if need be. Indeed the sale agreements to be relied on by the applicant are the same. I find this matter is an abuse of the court process. It is a duplication and sub judice KAKAMEGA ELC NO. 184 OF 2015 now MUMIAS SPMELC NO. 152 OF 2018. Having found the same I strike out this suit with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14<sup>TH</sup> MAY 2019.**

**N.A. MATHEKA**

**JUDGE**