



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 191 OF 2018

HENRY KIPKOSGEI SEREM.....PLAINTIFF

VERSUS

ERDEMANN PROPERTY LTD.....1ST DEFENDANT

MAVOKO WATER AND SEWERAGE COMPANY.....2ND DEFENDANT

RULING

1. This Ruling is in respect to the 1st Defendant's Notice of Preliminary Objection dated 11th November, 2018 in which the 1st Respondent has averred as follows:

a. That by dint of Section 6 of the Civil Procedure Act, 2010 the instant suit is sub judice as the issues raised herein for determination are substantially and directly before the High Court of Kenya at Nairobi on the same subject matter and between the same parties in Nairobi HCCC No. 55 of 2016- John Kieti Makila vs. Erdemann Property Limited and Mavoko Water and Sewerage Company which is still pending and is yet to be heard and fully determined.

b. That the suit is premature, otherwise an abuse of legal and court process and filed in breach of specific procedure provided for under Sections 119 and 121 of the Water Act No. 43 of 2016.

c. That the Application and the suit herein is bad in law, frivolous, vexatious and otherwise gross abuse of the court process and should be struck out/dismissed with costs.

2. The Notice of Preliminary Objection proceeded by way of written submissions in which the 1st Defendant submitted that the issues raised in the current suit are substantially and directly before the High Court in Nairobi HCCC No. 55 of 2016; that the matter was transferred to this court and given a new number being Machakos ELC. No. 35 of 2019 and that the matter is coming up for hearing on 17th September, 2019.

3. Counsel submitted that the instant suit is sub judice for reason that the Defendants in both suits are the same while the Plaintiffs in both suits are both residents of Greatwall Apartments and that the issues in connection relates to the Waste Water Treatment Plant situated on L.R. No. 12715/6322. Counsel did not submit on how this suit is contrary to the provisions of Sections 119 and 121 of the Water Act No. 43 of 2016.

4. The 2nd Defendant's advocate submitted that the present suit is an act of mischief and an outright abuse of court process; that there is a similar ongoing suit being Nairobi HCCC No. 55 of 2016 over the same subject matter and that this suit should be struck out.

5. The Plaintiff's advocate submitted that the Nairobi suit pertains to the residents of Greatwall Apartments Phase III and that the prayers in the suits are different. The Plaintiff's counsel finally submitted that the Plaintiffs in the two suits are different; that the residents of Phase I, II, and III of Greatwall Apartments are different and that in any event, the two suits were filed in different courts.

6. This suit was commenced by the Plaintiff vide a Complaint dated 4th October, 2018. In the Complaint, the Plaintiff averred that on 28th September, 2018, the 2nd Defendant threatened to disconnect all the residents of Greatwall Apartments Phase I (I.R. No. 12715/450) on account of alleged outstanding sewer bills. In the prayers, the Plaintiff has sought for a permanent injunction restraining the Defendants from interfering with the operations and ownership of the Waste Water Treatment Plant located on L.R. No. 12715/6322.

7. In the said Complaint, the Plaintiff is also seeking for a mandatory injunction compelling the 1st Defendant to transfer the reversionary interest in L.R. No. 12715/450 to Greatwall Apartment Phase I Limited, a Management Company of the Plaintiff and other home owners as stipulated in the Lease.

8. The Plaintiff did admit in the Plaintiff of the existence of Nairobi HCCC No. 55 of 2016 (currently Machakos ELC. No. 35 of 2019) as follows:

“a. As a result of the constant wrangling, the Plaintiff avers that through a duly authorized representative, the residents of Greatwall Apartments Phase III filed in the High Court Commercial and Admiralty Division at Nairobi, HCCC No. 55 of 2016 – John Kieti Makila vs. Erdemann Property Limited seeking among others, a permanent injunction to restrain the 1st Defendant from interfering with the operations and ownership of the WWTP.

b. The Plaintiff avers that on 20th June, 2016, the Court (Hon. Lady Justice Grace Nzioka) granted an interlocutory injunction inter alia restraining the 1st Defendant from interfering with the operations and ownership of WWTP.

c. The Plaintiff avers that in utter disregard of the court order issued on 20th June, 2016, the 1st Defendant proceeded to purportedly transfer the WWTP to the 2nd Defendant vide a Sale Agreement dated 1st November, 2016.

d. The Plaintiff avers that since the date of the purported sale of the WWTP by the 1st Defendant to the 2nd Defendant, the 1st Defendant has been demanding that the residents of GWA Phase I do pay their share of the WWTP monthly operation costs to the 2nd Defendant.”

9. Indeed, I have perused the Plaintiff in Machakos ELC. No. 35 of 2019. In the said suit, the Plaintiff filed the suit on behalf of the other home owners of the Greatwall Phase III Estate situate on L.R. No. 12715/6322. The Plaintiff in this matter is neither a signatory to the letter of authority that authorized the Plaintiff to file Machakos ELC No. 35 of 2019 nor a resident of “Greatwall Phase III”.

10. To the extent that the Plaintiff herein has filed the suit in his capacity as “the Chairman of the Greatwall Apartments Phase I Residents Association”, I find and hold that the parties herein are not the same as the parties in Machakos ELC No. 35 of 2019 (formerly Nairobi HCCC No. 55 of 2019).

11. To the extent that the residents of Greatwall Apartments Phase I are different from the residents in Phase III, I find that the Plaintiff is not litigating under the same title as the Plaintiff in ELC. No. 35 of 2019 (formerly Nairobi HCCC No. 55 of 2019). For that reason, this suit cannot be said to be sub judice ELC No. 35 of 2019.

12. However, considering that the issues in the two suits are the same, and for convenience of all the parties, one of the suit should either be used as a test suit or alternatively, the two suits should be consolidated.

13. For those reasons, I dismiss the Plaintiff’s Notice of Preliminary Objection dated 11th November, 2018 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE