



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. CIVIL APPL. NO. 19 OF 2019

DOMINIC OMUNYINI MAGARA.....APPLICANT

VERSUS

ALFRED JUMA MAKANDA.....RESPONDENT

RULING

1. The applicant filed a motion dated 9/7/2019 and filed in court on 13/8/2019 seeking the following orders:

(a) ...spent

(b) ...spent

(c) That the court be pleased to transfer Kitale Chief Magistrate's Court Land Case No. 47 of 2018 to this court.

(d) That upon such transfer the said suit be consolidated with Kitale ELC No. 50 of 2019.

(e) That there be made such further and/or other orders as the end of justice may demand.

2. The grounds upon which that application is brought are that the two suits involve the same parties and are in respect of the same subject matter; however the two suits cannot be heard before the lower court as the lower court has no jurisdiction to entertain the issues raised in the **Kitale ELC No. 50 of 2019**.

3. The application is supported by sworn affidavit of the application sworn on 9/7/2019 in which it reiterates the same matters as the grounds.

4. The application is opposed by the respondent vide an affidavit sworn on 9/7/2019 and a preliminary objection dated 14/10/2019. The preliminary objection is to the effect that the application is an affront to the express provisions of **Sections 11 and 6** of the Civil Procedure Act Cap 21 Laws of Kenya.

5. The applicant filed submissions on 7/10/2019. The respondent filed submissions on 16/10/2019. I have considered the application, objection and the submissions.

6. In the submissions of the applicant he cites **Section 2** of the Land Registration Act which states as follows:

“Subject to subsection 2, the court may order the rectification of the register by directing that any registration be cancelled or amended if it is certified if any registration was obtained, made or omitted by fraud of mistake.”

7. He also cites the definitions section of the same Act in which “Court” is defined as “*the Environment and Land Court established under the Environment and Land Court Act 2011 (No. 19 of 2011)*”

8. He submits that the magistrate's court is not the appropriate court contemplated by **Section 80 (1)** of the Land Registration Act 2012 and that it has no jurisdiction to rectify or cancel a title issue under that Act.

9. In opposition to those submissions the respondent submitted that the provisions of **Sections of 11 and 6** of the Civil Procedure Act which require that a suit be instituted in the lowest court competent to try it have been violated. He submitted that this court's only power is limited to staying the subsequent suit. In particular he reiterates the provisions of **Section 6** and submits that the applicant withdrew his counterclaim in the lower court case and filed **Kitale ELC No. 50 of 2019** and that the only recourse available is the application of an automatic stay of **Kitale ELC No. 50 of 2019**.

10. On examination of the pleadings in both cases is necessary for the determination of the instant application. In the lower court case the plaintiff is the respondent herein and the defendant is the applicant. In that suit the respondent appears to be seeking orders of declaration that he is the legal proprietor of the suit land, a declaration that the applicant is a trespasser thereon, an order of eviction of the applicant from the suit land, a permanent injunction and costs.

11. The applicant's statement of defence and counterclaim is filed in that suit. In that pleading, citing fraud on the part of the respondent, he sought an order cancelling the registration of the plaintiff as proprietor of the suit land and rectification of the register to reflect the applicant as the legal owner.

12. In **Kitale ELC No. 50 of 2019** the applicant herein is the plaintiff and the respondent is the defendant. His prayers in that plaint are the same as those sought in his counter claim in the lower court suit.

13. In the circumstances above it is clear that both matters are closely related. However the desire of the respondent to have the applicant's title cancelled has led to the invocation of **Section 80 (1)** of the Land Registration Act 2012 and definition of "Court" in the same Act. The respondent has not countered these allegations. His only response is that the subsequent suit ought to be stayed pending the hearing of the earlier suit. However this court hesitates to accept the respondent's argument as that would render the applicant's claim for rectification of title inert till the lower court case is determined. That would not be in interests of justice since all claims over a related subject matter related to the same cause of action should as far as possible be dealt with in the same suit to avoid a multiplicity of suits. Though the respondent was entitled on the basis of his registered proprietorship to lodge, and he did indeed lodge a claim for eviction before a court that had jurisdiction, the need of the applicant to file a counterclaim based on a challenge to the same proprietorship necessitated a suit in a court of competent jurisdiction which according to the Land Registration Act is this court. Each party was therefore within his rights to lodge their respective suits in the respective court that they did. However when such an event occurs which is not directly addressed by statutes, this court is enjoined to take the cause that will best serve the interests of justice.

14. Having regard to the foregoing it is clear that if the lower court case is tried first the applicant's claim for fraud and the rectification of the title would not be tried alongside the respondent's eviction claim and whole dispute would not be wholistically addressed in the same suit. However if both claims were consolidated and tried in this court which has original jurisdiction in respect thereof, both claims would be settled in a single proceeding and there would be no need of repetition of the giving of evidence by the parties at different fora. In this court's view therefore the course proposed in the application dated **9/7/2019** is proper.

15. For the foregoing reasons I find the application dated **9/7/2019** has merit. The same is granted in terms of prayers **No. (c)** and **(d)** thereof. The costs of the application shall be costs in the consolidated suit.

Dated, signed and delivered at Kitale on this 27th day of November, 2019.

MWANGI NJOROGE

JUDGE

27/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Respondent present in person

N/A for the Applicant

COURT

Ruling read in open court at 3.15 p.m.

MWANGI NJOROGE

JUDGE

27/11/2019