



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 46 OF 2019

FLORA ALWALA ORIPA.....PLAINTIFF

VERSUS

PRAJAPATI PRAVINBHAI JIVABHAI

SAMWEL ATSWONG'O ALWALA.....DEFENDANTS

AND

MERIDINA ALWALA

LIVINGSTONE MWANGU

BELLA ALOSA ALWALA.....INTERESTED PARTY

RULING

The application is dated 24th September 2019 and is brought under Section 3 & 3A Civil Procedure Act, Order 2 Rule 15 and Order 11 Rule 3 (O)(1) Civil Procedure Rules. 2010 seeking the following orders;

1. That the suit herein be dismissed for being scandalous, frivolous, vexatious, duplex and an abuse of the process of the court.
2. That costs of this application and the suit be provided for.

It is based on the annexed affidavit of Prajapati Pravinbhai Jivabhai and the following grounds that there exists, in this honourable court, another suit viz; Kakamega High Court Environment and Land Case No. 120 of 2017 involving the same parties herein and the same cause of action. This suit is meant to embarrass the 1st defendant. The suit herein is duplex.

The respondent submitted that she filed it for the sake of getting justice after learning that he colluded with the 2nd defendant to defraud Ainea Alwala Odwogo (deceased) of his property (i.e. Kakamega/Municipality Block 1/220). The case of ELC 120 of 2017 was filed by Meridina Alwala and others against the deceased while he was still alive but completely incapacitated mentally. Mr. Prajapati and Mr. Samuel are co-defendants in that suit alongside the deceased. Ainea Alwala Odwogo who is represented by her does not have a case against the plaintiffs in ELC 120 of 2017 since he does not oppose the prayers requested by the plaintiffs. But he has a case against Mr. Prajapati Pravinbhai Jivabhai and Mr. Samuel Atswong'o Alwala for reasons that the two colluded to defraud Ainea's property. Because of that, she found it very complicated to file a counter-claim in that ELC 120 of 2017 because she believed that one can only counter-claim against the plaintiff and not against a fellow co-defendant whom you have been sued with. As the personal representative of Ainea Alwala Odwogo, she could not sit back and wait for the outcome of ELC 120 of 2017 because one can never predict what could happen later in that case. That she is aware that the plaintiffs in ELC 120 of 2017 have already filed an application asking the court to consolidate their case and this case in order to avoid duplication of hearing and judgments. That application is annexed as "FOA-1". She supports their application for consolidation.

This court has considered the application and the submissions therein. This court has compared the two suits sought to be consolidated namely Kakamega ELC Case No. 120 of 2017 and Kakamega ELC case No. 46 of 2019 to determine whether the same involve common questions of law or fact, whether the reliefs sought arise out of the same transaction and whether it would be convenient and efficient to consider the same in a consolidated suit. I find that the parties are the same, subject matter is the same and the reliefs sought are the same. The parties to both suits are the same. The cause of action in both suits arise out of the same transaction and involve the same subject matter, namely; the impugned transfer of land parcel number Kakamega/Municipality Block 1/220 from the late Ainea Alwala Odwogo to Prajapati Pravinbhai Jivabhai. The suits are the same and not similar. The respondent filed the current suit Kakamega ELC case No. 46 of 2019 knowing very well that the earlier suit Kakamega ELC Case No. 120 of 2017 existed. 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 suit is not only misconceived and duplex but also sub judice Kakamega High Court Environment and Land Case No. 120 of 2017 involving the same parties. I find the application has merit and this suit is struck off with costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE