



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 75 OF 2018**

**PHILIP ODERO MAKABONG'O.....PLAINTIFF**

**VERSUS**

**JOSEPH OKECH NYAMANGA.....DEFENDANT**

**RULING**

1. The present application was filed on 13<sup>th</sup> February 2019 by way of Notice of motion dated 12<sup>th</sup> February 2019 under section 1A, 1B,3A 6 of the Civil Procedure Act (Cap 21) and order 2 Rule 15 (1) (d) Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicant Philip Odero Makabong'o through his learned counsel, Mr. Sam Onyango is seeking the following orders:-

- a) THAT this suit be struck out being an abuse of the process of this Honourable court.***
- b) THAT the orders of temporary injunction granted herein against the defendant be vacated and/or set aside.***
- c) THAT in the alternative to prayer No. (a) above this Honourable court be pleased to stay any further proceedings herein pending the hearing and determination of Migori ELC case no. 860 of 2017.***
- d) THAT the costs of this application be provided for.***

2. The application is anchored on grounds (i) to (xii) set out on the face of the application. The grounds include that;-

- a) The defendant herein filed a suit against the plaintiff herein being Migori ELC case No. 860 of 2017 sometime on the 29/10/2017.***
- b) The subject matter of the suit above is land parcel No. Kamagambo/Kanyajuok/1640 (suit land)***
- c) The plaintiff duly filed a defence to the said suit which is now pending hearing and determination.***
- d) The court has since been misled into granting ex-parte orders without disclosure of material facts particularly of the existence of the previously instituted suit.***
- e) It is therefore proper that this suit be struck out as an abuse of the process of this court and the ex-parte orders vacated and /or set aside.***

3. The application also rests on the applicant's supporting affidavit of 18-paragraphs sworn on even date and annexed copies of plaint dated 27<sup>th</sup> October 2017 and a statement of defence dated 27<sup>th</sup> February 2018 in Migori ELC No. 860 of 2012 marked as "JON 1" and JON 2" respectively. The applicant averred, inter alia, that sometimes on or about 27<sup>th</sup> October 2017, he filed Migori ELC Case No. 860 of 2017 against the plaintiff (respondent), who filed a statement of defence and counter claim and that the said suit is still pending before this court. That in the said suit and the instant suit, the parties, subject matter, namely the suit land, LR NO. Kamagambo/Kanyajuok/1640 and reliefs of permanent injunction, declaration and costs sought are the same.

4. In a 14-paragraphed replying affidavit sworn on 27<sup>th</sup> February 2019 the plaintiff (respondent) who is represented by learned counsel Mr. S.M. Sagwe and Mr. Nelson Jura, opposed the application, termed the same bad in law and an abuse of the court process and sought its dismissal with costs. He deponed in part that whereas the other suit is pending before this court, the applicant refused to file his response and set down the suit for hearing. That the instant suit does not depend on the outcome of the other suit but on High Court succession cause No.

13 of 1997 which gave prohibitory orders against the applicant.

5. On 15<sup>th</sup> July, 2019, this court directed that the present application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions 2014.**

6. On 9<sup>th</sup> October 2019, Learned counsel for applicant filed 2-page submissions dated 8<sup>th</sup> October, 2019. He relied on section 6 of the Civil Procedure Act (Cap 21), Order 2 Rule 15 of the Civil Procedure Rules, 2010 and urged this court to strike out the suit with costs for being an abuse of the due process.

7. On the other hand, the respondent filed submissions dated 8<sup>th</sup> October 2019 through Jura and Company Advocates in respect of Notice of motion dated 21<sup>st</sup> May 2018. However, in the presence of Mr. Jura for the plaintiff, the said motion was determined in terms of orders 2 and 3 sought therein on 13<sup>th</sup> November 2018. Therefore the said submissions are with regard to a spent application.

8. The respondent also filed submissions dated 9<sup>th</sup> October 2019 through S.M. Sagwe and Company Advocates who gave an outline of the matter and three (3) prerequisites for the grant of injunctive reliefs as sought in the notice of motion dated 21<sup>st</sup> May 2018 which is now spent. Counsel cited authorities including; **Giella –vs- Cassman Brown and Company Limited (1973) EA 358 and Wamwea –vs-Catholic Diocese of Muranga Registered Trustees (2003) KLR 389.**

9. I have duly considered the entire application, the replying affidavit and rival submissions herein. It is the duty of this court at the instant stage to resolve whether this suit is subjudice and whether the applicant is entitled to the orders sought in the application.

10. The **Black’s Law Dictionary 10<sup>th</sup> Edition** defined the term “subjudice “ as follows;-

***“Before the court or Judge for determination; at bar”***

11. The applicant anchored his application under section 6 of the Civil Procedure Act (**supra**) which provides;-

***“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly an 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, litigating 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.” (Emphasis added)***

12. It is discernable from the documents marked as “JON1” and JON2” that the plaintiff in Migori ELc case No. 840 of 2017 is the defendant herein. Furthermore, the 1<sup>st</sup> defendant therein is the plaintiff in this suit.

13. The subject matter in that suit is the same subject matter herein, as revealed at paragraphs 3, 5, 16, to 18 and reliefs (i) to (iii) sought in the plaint marked as “JON1”. The same subject matter features in paragraphs 4, 5, 7, 12 and 18 of the statement of defence as well as paragraph 2 and prayers 2 and 3 sought in the counterclaim marked as “JON2” in the other pending suit.

14. At paragraph 18 of the statement of defence herein the defendant clearly stated that the jurisdiction of this court is expressly ousted by section 6 (**supra**). I bear in mind the source of jurisdiction of a court; see **Samwel Kamau Macharia and another –vs- KCB and 2 others (2012) eKLR.**

15. It is trite law that an application to strike out proceedings might properly be made at any stage ; see **Munyua and others –vs- Attorney General (1976-80) KLR 83 which applied the decision in Attorney General for Duchy of Lancaster –v- London and North Western Railway (1892) 3 Ch 274, CA.**

16. Can this court strike out the suit as per order 1 sought in the application? The answer is not in the affirmative in view of **Article 10 (b) of the Constitution of Kenya, 2010**, in respect of the principles of equity which include that the first in time in equity, prevails.

17. The plaintiff stated at paragraph 20 of the plaint in this suit that this court has jurisdiction over the suit. However, is it true in view of the definition of the term “**subjudice**” and as provided under **section 6 cited** hereinabove?

18. It is the finding of this court that the instant suit is barred by subjudice doctrine under section **6 (supra)**. The application is merited in the circumstances.

19. Wherefore, the defendant’s application dated 13<sup>th</sup> February 2019 be and is hereby allowed in terms of orders 2 and 3 sought therein.

20. By dint of the proviso to **section 27 of the Civil Procedure Act Cap 21** and the decision in **Samwel Kamau Macharia case (supra)**, costs of this application be in the cause.

**DELIVERED, DATED and SIGNED at MIGORI this 20<sup>th</sup> day of NOVEMBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Sam Onyango learned counsel for defendant/applicant

Mr. Jura learned counsel for the plaintiff/ respondent

Tom Maurice – Court Assistant