



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 08 OF 2019

JOSPHAT KINYUA KAJUI.....PLAINTIFF

VERSUS

STEPHEN KANYARU M'IMPWI.....RESPONDENT

RULING

1. This application is dated **16.10.2019** and has been brought to court under Section 1, 1A, 1B, 3, 3A and 6 of the Civil Procedure Act and order 51 of the Civil Procedure Rules. The application seeks the following orders:

1. That pending the inter-partes hearing of this application, this honourable court be pleased to order stay of further proceedings in this suit.
2. That this honourable court be pleased to order stay of further proceedings in this suit, pending the hearing and determination of Marimanti PM ELC 21 of 2018.
3. Costs of this application be provided for.

2. The application is supported by the affidavit of Cicilio Murango Mwenda and has the following grounds:

- a) That there is pending before the Principal Magistrates Court at Marimanti PM ELC No. 21 of 2018.
- b) That Marimanti PM ELC No. 21 of 2018 involves the same parties as the suit herein.
- c) That the subject matter in this suit being land parcel number L.R. No. Tharaka/Marimanti/761 is also the subject matter in Marimanti PM ELC No. 21 of 2018.
- d) That it is in the interest of justice, fair and orderliness in judicial practice that this suit be stayed pending the determination of the suit before the principal Magistrate's Court at Marimanti which was filed first.

3. The supporting affidavit states as follows:

I, CICILIO MURANGO MWENDA, an adult male of P. O. Box 1163-60200, Meru in the Republic of Kenya do hereby make oath and solemnly swear as follows:-

1. That I am an advocate of the High Court of Kenya practicing in the name of Murango Mwenda & Company Advocates who have the conduct of this matter on behalf of the defendant/applicant herein.
2. That the dispute herein involves ownership and title to land parcel number L.R. No. Tharaka/Marimanti/761.
3. That the defendant/applicant herein is the plaintiff in Marimanti PM ELC No. 21 of 2018 while the plaintiff/respondent is the defendant therein.
4. That the defendant/applicant previously filed Marimanti PM ELC 21 OF 2018 against the plaintiff/respondent via a plaint dated 6.3.2018 seeking an order of permanent injunction to restrain the plaintiff/respondent by himself, his agents, workmen and representatives from entering into, remaining or doing any act of interference with land parcel number L.R. No. Tharaka/Marimanti/761. (Annexed and marked CMM1 is a true copy of the plaint in Marimanti PM ELC 21 of 2018).

5. That the plaintiff/respondent subsequently filed his defence in Marimanti PM ELC No. 21 of 2018 in which he did file a counter-claim nor seek title to L.R.No. Tharaka/Marimanti//761 but prayed for dismissal of the defendant's/applicant's suit. (Annexed and marked CMMII is a true copy of the statement of defence filed in Marimanti PM ELC No. 21 of 2018).
6. That the defendant/applicant obtained temporary orders of injunction against the plaintiff/applicant in Marimanti PM ELC No. 21 of 2018 pending the hearing and determination of the substantive suit. (Annexed and marked CMM III is a true copy of the order issued on 6.12.2018).
7. That the plaintiff/respondent was aggrieved by the grant of the temporary orders of injunction and preferred an appeal before this honourable court, being Chuka ELC Appeal No. 1 of 2019, which has been heard and is now awaiting delivery of judgment on 21.1.2019. (Annexed and marked CMM IV is a true copy of the memorandum of appeal).
8. That while Marimanti PM ELC No. 21 of 2018 and an appeal against temporary orders granted therein were pending hearing and determination, the plaintiff/respondent filed the present suit (OS) this year claiming title to L.R.No. Tharaka/Marimanti/761 by adverse possession.
9. That the defendant/applicant subsequently filed a response to the plaintiff's/respondent's claim via an affidavit dated 27.5.2019 filed in this suit on 28.5.2019.
10. That it is clear that the matter in issue herein is land parcel number L.R. No. Tharaka/Marimanti/761 which is also the matter directly and substantially in issue in Marimanti PM ELC 21 of 2018 and it involves the same parties.
11. That the plaintiff/respondent filed this suit as an afterthought to the temporary orders of the court knowing that Marimanti PM ELC 21 of 2018 was in court and is pending hearing and determination.
12. That the plaintiff/respondent is proceeding with this matter as well as Marimanti PM ELC No. 21 of 2018 which are two matters involving the same parties and the same subject matter.
13. That Marimanti PM ELC No. 21 of 2018 was filed in the year 2018 while the plaintiff/respondent filed the present O.S On 18.4.2019, a year later, knowing that the Marimanti matter existed.
14. That the plaintiff/respondent wants to waste time and abuse the due process of the court knowing that he substantive suit in Marimanti is pending and wants the parties to start in this court again.
15. That it is in the interest of justice, fair and orderliness in judicial practice that this honourable court stays further proceedings in this suit to give a chance to the lower court matter which was filed first to be heard and determined.
16. That it is economical, expeditious, and in full compliance with the law and the overriding objective that the application be allowed and parties be allowed to finish the Marimanti matter first.
17. That the plaintiff/respondent is aware that he has trespassed on the defendant's applicant's land and wants the parties to litigate forever and in every court as he enjoys the defendant's/applicant's land illegally.
18. That it is in the interest of justice that this application be allowed and stay orders be granted as prayed in favour of the defendant/applicant.
19. That I swear this affidavit in support of the application for stay of further proceedings in this suit pending the hearing and determination of Marimanti PM ELC No.21 of 2018.
20. That what is deponed herein is true to the best of my personal knowledge, information and belief.

4. The application was canvassed by way of written submissions.

5. The defendant/applicant's written submission are reproduced herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist.

DEFENDANT'S/APPLICANT'S SUBMISSIONS ON MOTION DATED 16/10/2019

The applicant has moved this court for orders that the hearing of the suit be stayed pending the determination of a suit filed in the lower court at Marimanti being PM ELC NO 21 of 2018.

Section 6 of the Civil Procedure Act provides,

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also 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 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.”

There is pending before Marimanti Court PM ELC NO 21 of 2018, between the two parties and concerning the same parcel of land. Copies of the plaint and the defence are attached to the affidavit herein.

We wish to only further add that, the respondent did not raise any counter-claim in the Marimanti case.

There is also evidence on record that, there is also pending before this court Appeal No 1 of 2019 involving the same parties and the same subject matter.

We submit that clearly, this is a case that should be dealt with under the provisions of Section 6 of the Civil Procedure Act and order stay of proceedings/trial.

That the plaintiff/respondent is engaging in two processes, and which is clearly a fishing expedition that goes against the letter and the spirit of Sections 1A and 1B of the Civil Procedure Act. It negates the desire to deal with disputes in expeditious, proportionate and affordable way.

Section 1A (3) provides,

“A party to civil proceedings or an advocate for such party is under duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”

The conduct of the respondent in filing appeal against the orders issued in Marimanti ELC NO 21 of 2018, filing a fresh suit to determine issues that are substantially in issue in an existing suit is a total negation of duty set out herein above.

Section 1B obligates this court to act in a manner that affords efficient disposal of the dispute and just determination of the dispute. When a party engages the court in 3 different processes that is to say, this suit, the appeal No 1 of 2019 and the Marimanti case he makes litigation expensive, consumes a lot of judicial time and leads to delays in determination of the dispute.

We urge the court to find merit in this application and grant the orders sought herein.

DATED AT MERU THIS.....8THDAY OF.....NOVEMBER,.....2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE APP/DEFENDANT

6. The plaintiff/respondent's submissions are reproduced herebelow without any alterations whatsoever including correction of spelling or any other mistakes, is any exist:-

SUBMISSIONS BY THE PLAINTIFF/RESPONDENT

Your lordship, the application dated 16th Octobe,2019 is opposed vide the plaintiff's replying affidavit sworn on 28th October,2019.

It is our most humble submission that the application is misconceived and ought to be dismissed.

It is conceded that indeed Marimanti ELC No.21 of 2018 is pending. In the suit the plaintiff therein seeks orders of permanent injunction over the suit land against the defendant therein. A statement of defence was filed denying the plaintiff's claim. However, no counter-claim was filed in the suit.

The plaintiff has approached this honourable court by way of originating summons under the provisions of section 37 of the Limitation of Actions Act. Under the said act it is this honourable court only that is clothed with the jurisdiction to adjudicate disputes on adverse possession and make appropriate declarations. The court is obliged to hear the dispute and make its determination. It cannot divest itself of jurisdiction statutorily vested in itself in favour of a magistrate's court. To do so would amount to abdication of duty.

For the provisions of section 6 of the civil procedure Act to apply it must be demonstrated that the court handling the previously instituted suit has the jurisdiction to hear and determine the subsequently instituted suit. It is not contended by the defendant that the Marimanti Magistrate's court has the jurisdiction to handle a claim based on adverse possession under the provisions of the Limitation of Actions Act. A counter-claim based on adverse possession could not have been filed in the suit instituted at the Marimanti Law courts. The court has been denied jurisdiction by statute.

In our submission the filing of this suit does not amount to a parallel process as contended by the defendant. The plaintiff is legally bound to come to this honourable court for adjudication of his claim. He cannot be compelled to lodge his claim in a court without jurisdiction.

We urge you to find that no compelling reasons for stay of the proceedings herein have been given and that the orders sought ought to be rejected.

We so humbly pray, your lordship.

DATED AT MERU THIS 20TH DAY OF NOVEMBER, 2019

GATARI RINGERA & COMPANY

ADVOCATES FOR THE PLAINTIFF

7. I have carefully considered the assertions made by the parties in their proceedings. Without going into the merits of both cases, the one in the lower court and this one, I find that there are issues which can be handled more exhaustively in the lower court. I do note that the plaintiff had filed ELC Appeal No. 1 of 2019 which appeal was dismissed on **21st November, 2019**. He cannot be allowed to canvass apposite issues in separate suits. Judicial Practice and Public Policy do not embrace the existence of parallel and multiple proceedings concerning the same subject matter.

8. In the circumstances, I find that this application has merit. The application is, therefore, allowed in terms of prayer 2 with the immediate effect that proceedings in this suit are stayed PENDING hearing and determination of Marimanti PM ELC 21 of 2018. It is hereby directed that PM ELC 21 of 2018 be heard and be determined without delay.

9. Costs shall be in the cause.

10. The parties are directed to come to court on **19th February, 2010** to report on the status of Marimanti PM ELC 21 OF 2018.

11. Orders accordingly.

Delivered in open Court at Chuka this **9th day of December, 2019** in the presence of:

CA: Ndegwa

Plaintiff and his advocate – not in court

Murango Mwenda for the defendant

P. M. NJOROGE

JUDGE