



**Were (Suing as the Personal Representative of the Estate of Dixon Okumu) v Muhudi  
(Environment and Land Case 2 of 2022) [2024] KEELC 423 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 423 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 2 OF 2022  
FO NYAGAKA, J  
JANUARY 31, 2024**

**BETWEEN**

**WALTER WERE ..... PLAINTIFF  
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DIXON  
OKUMU**

**AND**

**RASHID MUKHWANA MUHUDI ..... DEFENDANT**

**RULING**

1. The Plaintiff instituted the instant suit through a Complaint dated 10/01/2022. He claimed to be the legal Administrator of the Estate of owner of Dixon Okumu whom he alleged died on 28/05/2018. He claimed further that the deceased was the registered owner of land parcel No. Trans-Nzoia/Kipsoen/1645 (herein referred to as “the suit land”). Further, he averred that in the year 2012 the Defendant, without any consent or authority, invaded the suit land and constructed structures thereon. He prayed for a permanent injunction against the Defendant, an order of eviction and demolition of the Defendant’s structures on the land, and costs of the suit.
2. The Defendant entered appearance on 22/02/2022 and filed a Defence on 01/03/2022. In the Defence he denied the averments in the Complaint. He denied that the Plaintiff was the beneficial owner of the suit land and put the Plaintiff to strict proof thereof. He denied invading, constructing on or occupying the suit land. He added that he was the lawful owner of the land having purchased it through an agreement dated 08/08/2012 witnessed by, among others, the Plaintiff. He averred that he had been in occupation of the suit land with the knowledge of both the deceased and the Plaintiff and accused the Plaintiff of acting in bad faith and further that he was in the process of excising the one (1) acre he bought from the deceased. He pleaded that he would be raising a preliminary objection and/or that the suit be transferred to the Chief Magistrate’s Court Environment and Land Case No. 137/2021 which is



between him, the Plaintiff and another, for final determination. He pleaded that there was another suit pending in the subordinate court as between the parties.

3. True to his averments, the Defendant brought a Notice of Motion dated 13/10/2023. He brought it under Order 2 Rule 15 of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act and “all enabling provisions of the law”. In it he prayed for the following orders:
  - a. The Plaintiff’s suit dated 18<sup>th</sup> January, 2022 be struck out.
  - b. Costs of the application be borne by the Respondent.
4. The application was based on two grounds, being that the Plaintiff herein was an abuse of the process of the court; and that the Plaintiff was evasive, inconsistent and does not raise bona fide triable issues.
5. It was supported by the Affidavit of Rashid Muhudi Mukhwana sworn on 13/10/2023. He deponed that the instant suit was an abuse of the process of court because it was filed during the pendency of Kitale Chief Magistrate’s Land Case No. 137 of 2021. He annexed and marked as RMM 1(a) and (b) copies of the original and amended Plaintiff in the said subordinate matter. He deponed further that after he filed the lower court matter against the Respondent herein the Respondent entered Defence on 02/11/2021. He annexed and marked RMM 2 a copy of the Defence in the case.
6. The Applicant deponed further that on 04/11/2021 the Chief Magistrate issued a temporary injunction to protect the suit land. He annexed and marked as RMM 3 a copy of the order. Then on 01/03/2022 the Respondent herein challenged the pecuniary jurisdiction of the Court. It was dismissed on 04/04/2023 and the matter fixed for mention on 23/05/2023. He annexed and marked RMM 4(a), (b) and (c) copies the Application and submissions on the issue.
7. His further deposition was that the lower court matter was referred to a mediator on 18/07/2022 but it failed. Therefore, the matter was then fixed for hearing on 26/09/2023. He annexed and marked as RMM 5 a copy of the Notice of Appointment of a mediator.
8. He swore that during the pendency of the matter before the subordinate Court the Respondent filed the instant suit on the same question and issues as between the parties, prompting the Applicant to bring this application after filing a memorandum of appearance and defence. He annexed and marked as RMM 6 (a) and (b) copies of the Memorandum of Appearance and Defence herein.
9. He deponed that the suit land was formally (sic) known as Kapsoen Scheme Plot No. 1175 but after conversion it was designated as Trans Nzoia/Kipsoen/1645 to which the Applicant was entitled to 1 acre out of the 21.32 acres. He annexed and marked as RMM 7 a copy of the area Chief’s letter dated 25/05/2021. He deponed that he was advised that filing another suit was basically an abuse of the process of the Court.
10. The Respondent opposed the Application through Replying Affidavit sworn on 23/10/2023. He deponed that the Application lacked merit as the Plaintiff was not an abuse of the process of the Court. He stated that at the time of filing the Plaintiff herein the plaintiff was dealing with a different land parcel than that of the lower court.
11. He deponed that it was after he filed the instant suit that the Applicant amended the lower Court matter replacing Kipsoen Scheme Plot No. 1175 with Trans-Nzoia/Kipsoen/1645. He annexed a copy of the Plaintiff dated 26/10/2021 and the amended one dated 17/02/2022 together with the respondent’s Plaintiff dated 18/01/2022 and marked them as WW -1(a) and (b).
12. He stated that the Plaintiff herein was properly filed. Further, that he had made an application to withdraw Kitale CMCC No. 137 of 2021 to this Court since the value of the subject property was over



- KShs. 20,000,000/=. He annexed and marked as WW-3 a copy of a valuation report of the property in issue and WW-2 a copy of the application for transfer. He deponed that striking out the suit would not serve any interest of justice hence it should be dismissed.
13. The Application was canvassed by way of written submissions. The Defendant filed his dated 01/11/2023 while the Plaintiff filed his dated 11/11/2023.
  14. The Defendant submitted that this suit was filed contrary to Section 6 of the *Civil Procedure Act*. He cited the entire provision, whose text and tenet this Court takes into account. He relied on the case of *Njuguna Gatboo v. Samuel Gatbuka Njuguna* [2015] eKLR where the learned judge held that if the lower court (in that matter) were to be found to have jurisdiction to hear the matter before it, the superior court would be prohibited by operation of the law from proceeding in the suit by entering a judgment.
  15. He submitted that the instant suit was filed during the pendency of the lower court matter hence it was an abuse of the process of the Court. He stated that if the Respondent had a legitimate claim over the subject, he should have filed an application to transfer the lower Court matter to this Court rather than filing a fresh suit. The learned judge went on to hold, in the *Njuguna Gatboo (supra)* decision that since there was no evidence of the lack of jurisdiction of the lower court the party (in the matter) had erred in law in filing a fresh suit instead of applying to transfer it to the ELC Court. The learned judge went on to dismiss the suit on account of the fact that the suit was sub-judice. The Defendant submitted that the suit be struck out.
  16. The Plaintiff, on his part, began his submissions by summarizing what transpired before filing the instant suit. He went on to state that it was after he filed the instant suit that the Applicant amended the lower court Plaint to change the suit land number from Kipsoen Scheme Plot No. 1175 to reflect parcel No. Trans-Nzoia/Kipsoen/1645 hence the suit was not sub-judice.
  17. He submitted further that he made an application to withdraw Kitale CMCC No. 137 of 2021 to be transferred to this Court for consolidation and determination with the instant suit.
  18. He submitted that the authority relied on by the Defendant was distinguishable since the Plaintiff in the subordinate court matter had filed a suit over a different parcel of land.
  19. He argued further that the Plaintiff in his Replying Affidavit had annexed an Application dated 02/10/2023 filed in Kitale ELC Misc. Application No. 6 of 2023. He submitted further that the Applicant should have responded to that Application first rather than moving the Court to strike out the instant suit. He summed it that the application had no merits.

### **Issue, Analysis and Determination**

20. I have considered the Application, the law and the submissions by the rival parties. I am of the view that that three issues lie before me for determination. One is whether the application is merited. Two is whether, if the answer to the above is negative, this Court has power to try this matter during the pendency of Kitale CMCC No. 137 of 2021. Three, is who to bear the costs of the application.
21. This Court starts with determining the first issue, which is whether the application is merited. The issue in this application is that there is pending a subordinate court matter, namely, Kitale CMCC Land Case 137 of 2021 between the parties. A further issue is that in the lower court matter the Applicant herein is the Plaintiff while the Plaintiff herein is that Defendant: basically, whether the lower court matter is between the parties herein over the same or substantially similar issue. It is then argued that the instant suit having been filed during the pendency of the lower court matter would be sub-judice, and an abuse of the process of the Court hence a candidate for striking out.



22. However, the point of divergence between the Applicant herein and the Respondent is that the Applicant had sued the Plaintiff herein in the subordinate court over a different subject and upon seeing the instant suit file he amended the Plaintiff to change the subject therein to reflect the suit land herein. Again, the other issue is that the Respondent herein had moved this Court in ELC No. 6 of 2023 to move the lower Court matter to this Court for consolidation and final determination.
23. From the facts before me, through annexure WW 1(a), (b) and (c), being the copies of the Applicant's Plant and Amended Plaintiff in the lower court, annexed to the Respondent's Replying Affidavit, and annexure RMM 1(a) and (b), being the Plaintiff and Amended Plaintiff, annexed to the Applicants Supporting Affidavit, and annexures WW-2 and WW3 being copies of an Application dated 02/10/2023 in Kitale ELC Misc. No. 6 of 2023 seeking to transfer the subordinate court case to this court and a Valuation Report respectively, I am of the view that except that the lower court matter has another party, namely, James Walweyo as a 2<sup>nd</sup> Defendant, the parties herein are the same. In that matter the Plaintiff herein is the 1<sup>st</sup> Defendant while the Defendant herein is the Plaintiff. The subject matter is the same in that in the lower Court matter the Plaintiff claims that he is entitled to a declaration that he is the owner of one (1) acre out land parcel No. Kipsoen Scheme Plot No. 1175 (in the Plaintiff) which he amended to read Trans Nzoia/Kipsoen/1645. In the instant suit the Plaintiff seeks a permanent injunction against the Defendant over the same parcel of land and an order of eviction.
24. Although the Plaintiff herein does not specify the size of the portion of the suit land that the Defendant occupies, a careful comparison of the pleadings of the parties in both matters leads this Court to the conclusion that the size of the portion the Plaintiff wishes the Court to order an eviction from the same suit land must be the one (1) acre he claims in the lower court. That being so, then the instant suit has been filed during the pendency of another one which was filed prior, and the subject is the same. In any event the Respondent herein has, through annexure WW-2 demonstrated that he has moved this Court through an Application dated 2/10/2023. The fact that the prayers in both claims in the two suits are different does not make the issues different. The issues could be better litigated in the same matter, as envisaged under the Civil Procedure Rules, 2010.
25. The Respondent herein decided to draft his pleadings differently to paint a different but false impression about the suit parcel of land being different. He must have been moved to consternation when an amendment to the pleadings was sought in the subordinate court. One wonders why, if the subject matter was different, the Respondent moves this Court to transfer the lower Court matter to this Court to have them consolidated. The argument that the suit land was differently pleaded in the subordinate court but was changed in the Amended Plaintiff therein to reflect the current parcel reference as pleaded herein is neither here nor there. If anything, the Respondent craftly withheld in his pleading in the lower court disclosure of the fact that the suit land had been registered and renamed as currently it is because from the copy of the certificate of official search being part of Annexure WW-3 it is shown that the current registered owner had been issued with the title deed to the suit land as at 10/09/2018.
26. Therefore, given that the subordinate suit was filed on 26/10/2021, about three years later, and the Respondent herein craftly elected to file a Defence without that disclosure, this Court of the view that the said party was dishonest and may have been having something to hide from the court. Those being my findings above, I find that this suit is on all fours with the ingredients of Section 6 of the [Civil Procedure Act](#).
27. In accordance with Section 6 of the Act, this Court should have stayed the instant suit pending the hearing and determination of suit Kitale CMC Land Case No. 137 of 2021 had the applicant sought such a prayer. I am of the humble view that it would be unreasonable, illogical, absurd and not in the interest of justice to stay the instant suit by virtue of Section 6 of the Act while awaiting the finalization



- of Kitale CMC Land Case No. 137 of 2021 when the issues herein could be determined together. Moreover, none of the parties have prayed that this Court stays the instant suit. Thus, what is left of the Court to do with the matter? The Applicant argues that the suit is an abuse of the process of the court.
28. With the above in place, I now turn to the crux of the Application: The Applicant prays for this Court to strike the instant suit for being an abuse of the process of the Court. There is need to understand what it means by “abuse of the process of the Court”. In the simplest terms it is the misuse of the process of the Court, which is basically the use of the court process for a different purpose that it ought to be used, for instance, a party using it for punishment of the other.
29. In *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, the Court of Appeal stated as follows:-
- “The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which h is wanting in bona fides and frivolous, vexatious or oppressive’.
30. With the above understanding, it is clear that when a party uses the process of the court for purposes other than the one it is designed for he abuses the process thereof. What process is the Court mandated to carry out? As per Section 1A(1) of the *Civil Procedure Act* which provides for the overriding object of the Civil Procedure that governs the filing of pleadings in this court and the subordinate court, it is to hear and determine disputes in a just, expeditious, proportionate and affordable manner. Further, in terms of Section 1B(1) of the *Act*, the duty of the Court is to further the overriding objective of the Court by justly determining proceedings, efficiently disposing its business and use of the available judicial and administrative resources, and timely disposing the proceedings at a cost affordable to parties.
31. As for parties and their learned counsel, if they have any, in terms of Section 1A(3) of the *Act*, they are under a duty to assist the Court to further the overriding objective of the Act. That being so, I once again turn to the facts of the Application before me. In summary, the Plaintiff was sued by the Defendant/Applicant in Kitale CMC Land Case No 137 of 2021 over the same subject matter and same or closely related issues that they cannot be justly and efficiently tried separately. Rather bringing all the issues before the trial Court by filing a defence which raised every fact to be pleaded, and if need was thereafter for him to move the Court to transfer the matter, he chose to remain silent over some facts therein and instead decided to file another suit in another Court, being this one. Also, he decided to raise the issue of jurisdiction in that Court and then later seek to have this Court to grant him a prayer to transfer the lower court suit.
32. The above facts, especially of ‘multiplying’ the dispute by filing another suit, when applied to the overriding objective of the Court and the duty of both the Court and the party, the question this Court asks itself is, were the Respondent’s actions or steps towards using the process of the court for the purpose it is designed? In my humble view I do not think they were. Instead, they were an abuse of the process of the Court, a design for going around the orders of the lower court and increasing the costs of the Applicant unnecessarily.
33. The upshot is that I find the application meritorious and I grant it.
34. Since the second issue was dependent on the finding of the Court regarding the first, and it is in the affirmative, there is no need for the Court to use the precious judicial time and mind in determining it.



35. About costs, it is clear that Section 27 of the *Civil Procedure Act* requires the Court to record the reasons for not awarding costs to a successful party if it exercises its discretion otherwise. I find not reason to depart from the first point of call that costs follow the event. I award them, both for the instant application and the suit, to the Defendant/Applicant.

36. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**HON. DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC KITALE.**

