



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC SUIT NO. 85 OF 2013**

**ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF**

**-VERSUS-**

**SHAIBU HAMISI MGANDI.....1<sup>ST</sup> DEFENDANT**

**SHEIKH ALI TAIB.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant/applicant in his motion dated 18<sup>th</sup> May 2018 which is brought under the provisions of section 1A, 1B, 3A, 6 & 7 of the Civil Procedure Act and Order 2 rule 15; Order 5 rule 2; Order 7 rule 1, Order 45 and Order 51 requests the Court to grant him the following orders:

**1. Spent**

**2. That this Honourable Court be pleased to stay proceedings in this matter pending the hearing and determination of this application.**

**3. That this Honourable Court be pleased to make orders staying the 14 day statutory requirement placed on the 2<sup>nd</sup> defendant to file a Statement of Defence pending the hearing and determination of this application.**

**4. That this Honourable Court be pleased to declare that this suit is subjudice and or res judicata and therefore is incurable defective in law and be pleased to dismiss this suit in its entirety; or**

**5. That the further and without prejudice to the above this Honourable Court be pleased to vacate and or set aside and or vary and or amend its Order and Ruling delivered on 10<sup>th</sup> October 2017 by the Honourable Justice M. A. Odeny and all other consequential orders thereof and order that the Notice to Show Cause be relisted for hearing inter-parties.**

**6. That the costs of this application be provided for.**

2. The application is supported by the grounds on the face of it inter alia

**a) That the 2<sup>nd</sup> defendant herein has entered appearance under protest in this suit vide Memorandum of Appearance dated 3<sup>rd</sup> May 2018 and filed in this Court on 7<sup>th</sup> May 2018 owing to the fact that this Honourable Court does not have jurisdiction to hear and determine the instant suit.**

**b) That the issues raised for determination in the suit are subjudice and or res judicata in light of the proceedings in MOMBASA HIGH COURT ELC SUIT NO 212 OF 2012 ENGEL GISELA t/a ENGELCOP TOURS & SAFARIS -VS- SHAIBU HAMISI MGANDI; SHEIKH ALI TAIB; COMMISSIONER OF LANDS; MUNICIPAL COUNCIL OF MOMBASA; and THE ETHICS AND ANTI CORRUPTION COMMISSION.**

**c) That there was no legal basis relied upon by the plaintiff by which this Honourable Court could grant the Orders to re-issue the summons to enter appearance.**

3. The application is opposed by the plaintiff/Respondent via the affidavit of Emanuel Arunga sworn on 25<sup>th</sup> July 2018. Mr Arunga deposes

that the application is frivolous, incompetent and made in bad faith to defeat the object of recovering public land. The plaintiff admitted to being aware of case No ELC Case No 212 of 2012 between Engel Gisela t/a Engelcop Tours vs Safari Hamisi Mgandi, Sheikh Ali Taib & Two others where the plaintiff applied to join the present plaintiff as an interested party. The plaintiff admits this suit relate to the same subject matter as ELC case No 212 of 2012 except Engel Gisela is not a party to this suit. He proposes that the two suits be consolidated. Mr Arunga deposed further that this suit is not res judicata as the previous suit has not been heard or determined. That the applicant has defied the provisions of Order 7 rule 1 by filing his defence within the time frame set out. He urged the Court to dismiss the application in the public interest and instead make an order of consolidation of the two suits.

4. The advocates for the parties relied on the pleadings as filed. Mr Taib advocate for the applicant submitted that the summons were extended without a formal application made. He also reiterated the fact that this matter is subjudice ELC case No 212 of 2012; that this suit is meant to embarrass the Court. Mrs Abdulrahim for the plaintiff submitted that the matter was in Court on 10.10.17 when the Judge directed that they re-issue the summons. According to her, the reliefs sought in this suit are different from those sought in ELC case No 212 of 2012. That this suit was filed after they had conducted investigations and the investigators found that the land should be returned to the relevant institution. He urged the Court to make an order to consolidate the two files.

5. The applicant did not annex any order or decree to show that ELC case No 212 of 2012 has already been determined. Therefore the averment of this suit is res judicata is misconceived. However it is admitted that the parties herein are parties in ELC case No 212 of 2012 except for Engel Gisela and that the subject matter herein plot No. MN/1/9816 is the same subject matter in dispute in ELC No 212 of 2012. This suit was filed in 2013 therefore it would directly offend the provisions of section 6 of the Civil Procedure Act. The 2<sup>nd</sup> defendant/applicant has told this Court that ELC case No 212 of 2012 has proceeded for hearing on an application to have it dismissed for want of prosecution. I have checked with the registry and confirmed the ruling is reserved for 17.12.18. This suit would then remain as subjudice only if the application for dismissal of ELC case No 212 of 2012 is not granted. It was thus premature to have argued the present application before the determination of the application in the earlier suit. In any event if that application succeeds, it cannot make this suit res judicata since that earlier case would not have been heard on its merits as provided under section 7 of the Civil Procedure Act. For these two reasons, I find the prayer for declaration that this suit is subjudice and or is res judicata premature and the same is disallowed.

6. The remaining question for the Court to determine is whether the order given on 10.10.17 for extension of the summons to enter appearance was made in error and should be set aside. Order 5 rule 2 (5) provides that,

*“an application for an order under sub – rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result and the order may be made without the advocate or plaintiff in person being heard.”*

*Under subrule (7), where no application has been made, the Court may without notice dismiss the suit at the expiry of the twenty – four months from date of issue of the original summons.”*

7. When the matter came up for Notice to Show Cause on 10.10.2017, Mr Bii advocate appearing for the plaintiff informed the trial Judge that they were interested in pursuing the matter and asked for re-issue of the summons. The reason given is that the file had gone missing. Since there was no appearance for the defendants, the Judge granted the order and the summons to enter appearance were re-issued. The Applicant has annexed a notice to show cause served on them by the Court bearing the date of 11<sup>th</sup> October 2017. They were thus served with a different date from the one when the order was given thus denying them an opportunity to agree or oppose the application for the re-issue of the summons.

8. For the reason of service of a wrong date on the Applicant which denied him the opportunity to participate in arguing his case of whether or not the summons could be re-issued and on account that such application was made 4 years after the date of filing of the suit, I do find merit in the prayer seeking to have the orders of 10.10.2017 set aside. Consequently I shall grant prayer 5 of the application on terms that the orders of 10.10.17 are vacated and or set aside as they relate to extension of the summons. The plaintiff is directed to file an application seeking for extension of the summons to enter appearance within 14 days hereof and fix the same for hearing. In default of such application being made within the set timelines, this suit stands dismissed for there being no valid summons hence no suit.

9. In conclusion, the application succeeds in terms of prayer (3) and 5 with costs ordered to abide the outcome of this suit.

**Dated, signed & delivered at Mombasa this 26<sup>th</sup> Nov. 2018**

**A. OMOLLO**

**JUDGE**