



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 504 OF 2017**

**DANIEL MARANGA KAMAU**

**(suing on his own behalf and as**

**Administratrix and beneficiary of the**

**estate of ISIDORUS KARANJA GITIKO).....PLAINTIFF**

**VS**

**NELSON MUGO.....1<sup>ST</sup> DEFENDANT**

**MARY NYAMBURA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On the 21/2/18 the Defendants filed an application under Section 6 of the Civil Procedure Act seeking stay or striking out of the suit and to direct the parties to revert to SPMCC No 30 of 2012 Kangema. The application is grounded on the affidavit of the 2<sup>nd</sup> Defendant who has deponed that there exists a similar case filed by the Plaintiff in Kangema in which 7 witnesses have already testified. That currently the pecuniary jurisdiction of the Kangema SPMCC Court has been enhanced to Kshs 15 million and the approximate value of the suit land is 4.9 million according to the valuation on record. She urged the Court to strike the suit out or stay pending the hearing and determination of the suit at Kangema. She annexed the proceedings as at 2014.

2. The application is opposed by the Plaintiff vide his replying affidavit dated the 17/4/18 where he deposed that on advise of his former Advocates Kiriba & Co Advocates he filed a suit SPMCC No 30 of 2012 on 18/4/12 at Kangema without capacity to sue on behalf of the deceased estate. That the suit is not properly before the Court because of this defect. That he has however obtained the letters of administration on 24/6/2014. That on the 1/10/15 he filed a similar suit at Environment and Land Court Nyeri which suit was later transferred to this Court and given a different number. That this application is resjudicata on account of the Court holding on 30/1/2018 that the suit could be heard in Environment and Land Court instead of it being transferred to Kangema Court. He informed the Court that on 17/4/2018 he filed a notice to withdraw SPMCC 30 of 2012 as the suit was fatally incompetent in view of lack of capacity to sue then.

3. Parties filed written submissions which I have read and considered.

4. The doctrine of subjudice is enshrined in Section 6 of the Civil Procedure Act it states as follows;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign Court”.

5. I have perused the file in detail in this suit and a background of this suit will shed some light. The Plaintiff filed a suit SPMCC No 30 OF 2012 suing the same Defendants in this suit over the same subject land in relation to ownership of the suit land. On the 24/6/2014 the Plaintiff obtained letters of grant of representation ad litem over the estate of the deceased. On the 3/7/14 the issue of jurisdiction of the SPMCC Court came for determination before the Learned Magistrate J O Magori who ruled that although the Court had no jurisdiction to handle the matter, gave the parties 30 days to decide how to proceed. It will be noted that the suit was not struck out but it still subsisted.

6. On the 2/12/14 the Plaintiff filed an application in the High Court Murang'a seeking to transfer the suit to the High Court. It was not to be because the said application was withdrawn. On the 1/10/15 the same Plaintiff whilst the Kangema suit is pending files this suit at Nyeri ELC. On the 13/11/17 this suit is transferred to this Court for hearing and determination. On 30/1/2018 the Defendants advocate on record

made an oral application to have the suit transferred to Kangema but on hearing the plea by the Plaintiff the Court allowed the parties to have the suit heard and disposed off in the ELC Court. It would appear that the fact of the existing suit SPMCC No 30 of 2012 was not disclosed to the Court.

7. On the filing of this application on 21/2/18 by the Defendant the Plaintiff filed a notice of withdrawal of SPMCC No 30 of 2012 at Kangema on 17/4/18. The withdrawal is expressed under Order 25 Rule 1 and 2 which provides as follows;

“1 At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

8. I have perused the file and there is no evidence that the said withdrawal has been either consented by the parties or leave of the Court has been granted in accordance with the above provisions of the CPR. In the absence of any evidence to the contrary, it follows that the case at Kangema is still subsisting. The onus was on the Plaintiff to show proof that the suit has been withdrawn.

9. Given the provisions of Section 6 of the Civil Procedure Act above it is clear that the suit herein is subjudice. Going by the proceedings on record I note that 7 witnesses have so far testified and it would be massive judicial waste of time to commence fresh hearing of the matter. The conduct of the Plaintiff in this matter in filing a fresh suit whilst another subsists amounts to an abuse of the process of the Court. Section 6 disallows parallel proceedings in respect the same cause of action. It is against public policy to prosecute parallel suits in different foras. Indeed such conduct is clearly an abuse of the process.

10. In the interest of justice and pursuant to the provisions of section 6 of the Civil Procedure Act I direct that this suit is stayed and parties are directed to proceed with the hearing of the suit pending in SPMCC No 30 of 2012 Kangema Court until final disposal and determination of the same.

**11. The final orders;**

a) The application is allowed and the suit is hereby stayed.

b) The costs of the application shall be payable by the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22<sup>ND</sup> NOVEMBER DAY 2018.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ajulu HB for C N Kihara for the Plaintiff

1<sup>st</sup> and 2<sup>nd</sup> Defendants – Absent

Irene and Njeri, Court Assistants