



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 3 OF 2015

1. TWO THIRDS INVESTMENT LIMITED

2. F. G. NDUA

3. SIMON MUCHIRI

4. DR. GITHAE

5. STEPHEN MUTHII

6. M. N. GITONGU

7. F. K. KAHU

8. KAMAU J. G. NJENDU

9. J. K. WANYOKE

10. FELIX MUGAMBI NJERU.....PLAINTIFFS/RESPONDENTS

-VERSUS-

1. KATANA SAID KALAMA

2. ALI MWAKANENO

3. KASSIM STEPHEN CHEMBE

4. JUMA KAZUNGU.....DEFENDANTS/APPLICANTS

RULING

1. The defendants/applicants moved this Court vide their application dated 3rd April 2018 brought under the provisions of section 1A, 1B, 3A & 6 of the Civil Procedure Act seeking the following orders:

1. That this Honourable Court be pleased to stay this suit and/or the proceedings in this matter pending hearing and determination of HC (ELC) Case No. 232 of 2014(O.S), Katana Said Kalama and 40 others VS Two Thirds Investments Limited.

2. That costs of this application be provided for.

2. The application is supported by grounds listed on the face of it and the affidavit of William Kenga advocate for the 2nd – 4th defendants. The applicants aver that their suit ELC Case No 232 of 2014 is seeking orders of adverse possession in respect of plot No 390/II/MN, CR No 1222 against the plaintiffs/respondents.

3. The application is opposed by the plaintiff vide the affidavit of their advocate Kioko Maundu. Mr Maundu deposed in paragraph 5 that

the orders cannot issue because the parties in the two suits are not the same and the subject matters are also different. The plaintiffs aver that the defendants are using the current application to slow the progression of this case. They urged the Court to dismiss it with costs.

4. The question for determination in confirming the contention of the applicants on whether the suit contravenes the provisions of section 6 is by establishing if the subject matter and the parties to the two suits are the same. As pleaded by the applicants, ELC Case No 232 of 2014 was the first one to be filed for a claim of adverse possession over plot No 390/II/MN by 41 applicants against Two Thirds Investments Limited. In the present suit, the claim is for vacant possession against the four defendants/applicants. At paragraph 14 of their plaint, the Plaintiffs/Respondents admitted the existence of ELC Case No 232 of 2014 over what they called the mother title to wit plot Number MN/II/390.

5. In paragraph 4 of the Respondent's plaint, several plot numbers are listed and referred to be form original Number CR 1222, MN/II/390. Therefore from the plaintiffs' own pleadings they have confirmed that the subject matter relates to MN/11/390 which is the same parcel of land as the one in ELC Case No 232 of 2014. In the plaintiffs' own documents, there is a certificate of title showing the transfer to Two Thirds Investments Limited was registered as entry No 13, and a Charge to Barclays Bank as entry No 14, Caveat registered as entry No 15 and Caveat lifted as entry No 16. In his replying affidavit, Mr Maundu has not annexed copies of titles for the plot numbers listed in paragraph 4 of the plaint. I am therefore persuaded by the applicants' averment that the subject matter is the same.

6. The defendants in the present suit are also named as applicants in the previous suit No 232 of 2014. The addition of more plaintiffs in the present suit in my view does not change the intention of section 6 of the Civil Procedure Act. Instead the law should be used to enable all parties having a stake in the suit property to participate in one suit to avoid duplicity of suits.

7. However given that there are respondents who were not included in the originating summons may not have a better way of presenting their claim in the earlier suit by virtue of the mode in which that suit was commenced, I will not give an order staying the present suit. The order which commends itself in the circumstances is to consolidate the two files. Consequently the ELC Case No 232 of 2014 shall be the lead file while the pleadings in ELC Case No 3 of 2015 shall be treated as a defence and counter - claim to the claim for adverse possession. The defendants/applicants in the current motion are awarded costs of their application.

Dated, signed & delivered at Mombasa this 2nd November 2018

A. OMOLLO

JUDGE