



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 241 OF 2013**

**KIBII KOSKEI.....PLAINTIFF**

**VERSUS**

**KIPLANGAT ARAP KIMUTAI.....1<sup>ST</sup> RESPONDENT**

**SAMWEL K. NGENO .....2<sup>ND</sup> RESPONDENT**

**ELISHEBA IMINZA KHAYERI .....3<sup>RD</sup> RESPONDENT**

**JUSTINE KIPROTICH BEIMOK.....4<sup>TH</sup> RESPONDENT**

**RULING**

***(Application to strike out suit; suit being a claim for adverse possession; argument that the case is subjudice and an abuse of the process of court; no merit in the application; application dismissed)***

1. The application before me is that dated 18 December 2015. It mentions that it has been filed by the 4th defendant but I note that it is an application actually filed by the 5th defendant. The application is seeking the following orders (which I have paraphrased for there are obvious typographical errors) :-

*(i) The suit herein be stayed against the 5th defendant.*

*(ii) The suit against the 5th defendant is subjudice and otherwise an abuse of the process of court.*

*(iii) The suit against the 5th defendant is scandalous, frivolous or vexatious.*

2. The application is said to have been brought under the provisions of Order 1 Rule 14 and Order 2 Rule 15 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act.

3. The application is opposed and before I go to the gist of it, I think it is necessary that I give a little background to this suit.

4. This case was commenced by way of an Originating Summons filed on 24 July 2007. The case of the plaintiff is that he is entitled by way of adverse possession to the land parcels Nakuru Municipality Block 29/1017, 1088, 1191, 903, and 900 owned by the 1st, 2nd, 3rd, 4th and 5th defendants respectively. The defendants filed their responses and the matter is awaiting trial.

5. In this application, the 5th defendant has averred inter alia that in respect of his land parcel No. 900, the plaintiff trespassed into this land in the year 1985 and he filed a suit No. 50 of 1985 in the Resident Magistrate's Court. The case was referred to a panel of elders who made an award in favour of the 5th defendant. The same was adopted as a judgment of the court on 5 December 1985. The plaintiff however declined to move out. In the year 2007, the 5th defendant filed the suit Nakuru HCCC No. 145 of 2007 seeking that the plaintiff be evicted from this land. It is then that the plaintiff commenced this suit for adverse possession. The 5th defendant now wants to be excused from this case which he believes engages him in endless litigation.

6. The plaintiff has responded to the application by filing a replying affidavit. He has stated that the case No. 50 of 1985 was withdrawn by consent. He has averred that he filed this suit claiming adverse possession of the land and that the issues in this case are different from the issues in the case Nakuru HCCC No. 145 of 2007. He is of the view that the two cases need to be consolidated.

7. I took in the submissions of Mrs. Chesaro for the 5th defendant and Ms. Kipruto for the plaintiff.

8. The application before me seeks to have the suit against the 5th defendant struck out. It is the view of the 5th defendant that this suit is sub judice and is scandalous. I do not think that this suit is sub judice. I have no judgment showing that there has previously been a suit for adverse possession filed by the plaintiff and which has been decided. I think the plaintiff is perfectly entitled to try his chances through the avenue of adverse possession. Whether or not he will succeed will be left for determination after the case is heard on its merits. Neither do I see any abuse of the court process by the action of the plaintiff in filing this case. He deserves to be heard on his case for adverse possession. The effect of the other cases whether pending or finalized will of course be taken into consideration before arriving at the final judgment.

9. I have been made aware of the case Nakuru HCCC No. 145 of 2007 but the issues in that case are different from the issues herein although it may be wise for the two cases to be consolidated for purposes of having one judgment that settles the matters once and for all. But I am not too sure of the position of that case and I hesitate to make that order at this moment. It is however a matter that I will certainly revisit before I can give final directions on the hearing of this case.

10. From the above discourse, it will be seen that I find no merit in this application. It is hereby dismissed with costs to the plaintiff.

11. Given the age of this matter, I urge the parties to take immediate steps to list the same for hearing.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of February 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Ms Kipruto for plaintiff/respondent

Mr. Chege holding brief for Mr. Kisila and Mrs Chesaro for defendants

Court Assistant :Nelima