



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 435 OF 2012

JOSEPHINE LUNDE MATHEKA (*Suing through her*

ATTORNEY MONDESTER KEMUNA MAINA).....**PLAINTIFF**

VERSUS

KATELEMBO ATHIANI MUVUTI FARMING &

RANCHING SOCIETY LTD**1ST DEFENDANT**

GLADYS MULI**2ND DEFENDANT**

RULING

- 1.. In the Application dated 18th June, 2014, the 2nd Defendant is seeking for the dismissal of the suit on the basis that the same is an abuse of the court process.
2. The Application is premised on the ground that the Plaintiff filed a similar suit being Civil Suit Number 295 of 2009 which was dismissed for non-attendance and that the Plaintiff is barred from filing another suit.
3. In response, the Plaintiff's advocate deponed that although both suits relate to Plot No. CB/CP -54 Kyumbi Trading Centre, the parties are different and that the reliefs sought in the two suits are different.
4. The Plaintiff's advocate has further deponed that the property is owned by the Plaintiff and that it will be unjust to shut the doors of justice against the Plaintiff.
5. In his submissions, the 2nd Defendant's advocate submitted that the previous suit involved the same parties and suit property; that the addition of new parties to the suit does not cure the issue of multiplicity and that once a suit is dismissed, the provisions of Order 12 Rule 6(2) bars litigation on the same subject.
6. The Plaintiff's advocate submitted that the provisions of Order 12 Rule (6) (2) are couched in a flexible language; that it will be unjust to shut a party from the corridors of justice and that the cause of action against the Defendants in this matter is different from the cause of action in Machakos HCCC. No. 295 of 2009.
7. It is not in dispute that on 16th October, 2012, Machakos HCCC No. 295 of 2009 came up for hearing. The record shows that on that day, although the defendant was ready to proceed with the hearing of the suit, the Plaintiff was not ready.

8. The reasons that were advanced by the Plaintiff's advocate as to why the Plaintiff could not prosecute his suit was because the Plaintiff, who was residing in the USA, had not been in touch with him.
9. The court declined to adjourn the matter and proceeded to dismiss it for want of prosecution and or evidence.
10. The copy of the Plaint in Machakos HCCC No. 295 of 2009 shows that the Plaintiff herein sued the 2nd Defendant herein claiming that the 2nd Defendant herein had trespassed on Plot No. CB/CP-54 Kyambi Trading Centre.
11. The Plaintiff claimed for a mandatory injunction restraining the 3rd Defendant herein from trespassing or alienating the suit property.
12. In the present suit, the Plaintiff has not only sued the 2nd Defendant (*who was the only Defendant in Machakos HCCC No. 295 of 2009*) but has sued one more Defendant that is, Katelembo Athiani Muvuti Farming and Ranching Society Ltd.
13. In the Plaint, the Plaintiff has alleged that the 2nd Defendant has trespassed on Plot No. CB/CP-54 Kyumbi Trading Centre and is seeking for a mandatory injunction as against the Defendants.
14. The only reason that the Plaintiff has added the 1st Defendant in the current suit is to show that the person who sold to him the suit property was a member of the 1st Defendant.
15. Other than the addition of the 1st Defendant as a party to the suit, the cause of action remains similar to the cause of action in HCCC No. 295 of 2009.
16. I say so because the Plaintiff's complain in the two matters is that the 2nd Defendant has trespassed on the suit property.
17. Indeed, the issues that are before the court in this matter are whether the Plaintiff is the owner of parcel of land number CB/CP-54, Kyumbi Trading Centre and whether Gladys Muli has trespassed on the said land. Those are the same issues that were before the court in Machakos ELC. No. 295 of 2009.
18. The mere fact that a second Defendant has been added to the current suit does not change the cause of action in the two suits.
19. Machakos HCCC No. 295 of 209 was dismissed with costs when the matter was called out for hearing but the Plaintiff or his witnesses were not in attendance.
20. Indeed, the Defendants' advocate opposed the Plaintiff's Application for adjournment and informed the court that the Defendant does not admit any part of the Plaintiff's claim.
21. Having dismissed the Plaintiff's claim pursuant to the provisions of Order 12 Rule (3) (1) of the Civil Procedure Rules, the Plaintiff cannot file a fresh suit in respect to the same cause of action (*See Order 12 Rule 6(2)*).
22. If the Plaintiff's claim is that he was removed from the seat of justice unfairly, he should have filed an appeal against the order of the court dismissing the suit. Having failed to do so, he cannot file a fresh suit over the same suit property involving the same parties in the manner that he has done.
23. Consequently, I find and hold that this suit is contra-statute and is an abuse of the court process.
24. For those reasons, I dismiss the suit with costs to the 2nd Defendant.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE