



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO.331 OF 2015

MESHACK ODHIAMBO MBASA.....1ST PLAINTIFF
PERCY OWINO OCHIENG.....2ND PLAINTIFF
CHARLES ROSA MBASA.....3RD PLAINTIFF

VERSUS

PATRICK MBASA.....DEFENDANT

RULING

1. **Patrick Mbas**a, the Defendant, vide the notice of motion dated 19th August 2016 seeks to have this suit commenced by **Meshack Odhiambo Mbas**a, **Percy Owino Ochieng** and **Charles Rosa Mbas**a, the 1st to 3rd Plaintiffs respectively, struck out and injunction order of 28th July 2016 set aside an/or vacated on the grounds that;

- i. There exists Kisumu ELC No.309 of 2015 between the same parties and over the same subject matter that was filed earlier.
- ii. That the Plaintiffs failed to disclose the existence of that earlier case while filing the current one.
- iii. That this suit is an abuse of the court process.

The application cites **Article 159 of the Constitution 2010, Sections 1A, 1B and 3A** of the Civil Procedure Act and **Order 2 Rule 15** of the Civil Procedure Rules in its heading. The application is supported by the affidavit sworn by the Defendant on the 19th August 2016.

2. The application is opposed by the Plaintiffs through the replying affidavit sworn by the 1st Plaintiff on the 21st October 2016.

3. The court gave directions on the 2nd November 2016 on filing and exchanging written submissions on the application. The first to file their submission was counsel for the Plaintiff who filed theirs dated 30th November 2016 on the 1st December 2016. The counsel for the Defendant filed theirs dated 25th January 2017 on the same date.

4. The following are the issues for the determination by the court;

- a. Whether there exists a previously filed suit between the same parties, suing under the same capacities and over the same subject matter.
- b. Whether this suit is an abuse of court's process, and if so, whether it should be struck out.
- c. What orders to issue.
- d. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, the written submissions by the parties' counsel and come to the following determinations;

a. That the main basis of the Defendant's application is that this suit is an abuse of the courts process as it is similar to Kisumu ELC 309 of 2015 which is between the same parties, suing in the same capacity and over the same subject matter. That further the plaintiffs did not disclose the existence of that other case when filing the current one. The Plaintiffs have vehemently denied the existence of Kisumu ELC 309 of 2015 stating that before filing the current suit, they had signed draft suit papers with another counsel over the same land claim but those papers were not filed. The Plaintiffs further state that the Defendant may have unlawfully obtained the copies of the suit papers he has annexed to this supporting affidavit from that advocate. That though the Plaintiffs claim that the registry confirmed to their counsel that the file for ELC 309 of 2015 does not exist in the registry, they have not availed any written communication or affidavit from the registry personnel to that effect.

b. That the court has on its own motion called for the original record for Kisumu ELC 309 of 2015 from the registry and confirmed that it is available. The court noted the following;

- That the parties are the same to the parties in these case.
- That the parties have appeared in the same capacity as in this case.
- That the subject matter is land parcel L.R. No. **East Gem/Ramula/874** as in this case.
- That the four prayers in the Plaints commencing the two suits are the same.
- That the suit was commenced through the plaint dated 12th November 2015, drawn and filed through M/S M. A Ochanji – Opondo & Co. Advocates on the same date vide receipt No.3445057.
- That the plaint was filed contemporaneously with a notice of motion under certificate of urgency of the same date which was placed before the judge on the same day.
- That directions were issued to have the application served for hearing on a date to be fixed at the registry.
- That on the 17th November 2015, the application was fixed for hearing on the 9th February 2016. That none of the parties attended court on that day and the matter was stood over generally.
- That the Plaintiffs were ordered to pay court adjournment fee which is yet to be paid.
- Though there is no indication when the Defendant was served with summons to enter appearance, a memorandum of appearance dated 29th June 2016 was filed on 1st July 2016 under receipt No.3601181.
- That the Defendant filed the statement of defence dated 25th July 2016 on the 26th July 2016 under receipt No.7622866.

c. That in view of the fact that the current suit was commenced through the plaint dated 30th November 2015, and considering the finding in (b) above, the Plaintiffs averment in paragraph 30 of their plaint to the effect "that there are no pending proceedings between themselves (Plaintiffs) and the Defendant concerning the same subject matter" cannot be true.

d. That while it may be the case that the counsel on record for the Plaintiffs in this case may have not known of the existence of Kisumu ELC No.309 of 2015 while drawing and filing the suit papers, the Plaintiffs must have known of the existence of that earlier case as they acknowledge having signed the suit papers. They also paid some money to the counsel who drew and filed the

suit on their behalf. That the Plaintiffs ought to have instructed their counsel to withdraw the earlier suit before filing the current one or for their new counsel to have taken over the conduct of the earlier case through filing a notice of change of advocate. That the route the Plaintiffs followed of filing this suit while Kisumu ELC 309 of 2015 was still pending contravenes **Section 6 of The Civil Procedure Act Chapter 21** of Laws Kenya which states as follows;

“ 6. No court shall proceed with the trial of any suit or proceedings 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 such suit or where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

That the parties, their capacity and subject matter in Kisumu ELC 309 of 2015 is in every aspect the same as in the current suit. That it is an abuse of the courts process for the Plaintiffs to file the current suit while the previous one was still pending in the court.

e. That the court agrees with the submission by counsel for the Defendant that the practice of parties to file and prosecute more than one suit between the same parties, suing or being sued in the same capacities and pursuing the same claim should be discouraged. That the court concurs with the findings in the following previous decision;

- **Chairman District Alcoholic Drinks Regulation committee & 4 others & 2 Others. Earparte Detlef Heler & another** [2013] eKLR, where Angote J. held as follows;

“ 38. A party who wishes to file a suit which is

similar to an existing suit must withdraw the first

suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit (s) wanting either

in content or form. This court must and should invoke its inherent jurisdiction to stop such abuse of the court process.

39. Abuse of court process includes a situation where a party improperly uses judicial process to irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.”

That needless to add, the filing of the current suit while the previous one is still pending in court, result in additional and unnecessary costs to the parties and is a wastage of judicial time.

f. That the Defendant’s notice of motion invokes **Order 2 Rule 15** of the Civil Procedure Rules and **Section 3A of Civil Procedure Act** among others. These provisions of the law allows this court to strike out a suit where it is shown that the same amounts to an abuse of the process of the court among others. The defendant has established that his application has merit and he deserves the prayers sought. That had the Plaintiffs been forthright and candid with the facts, they would have taken steps to have one of the suits withdrawn or both consolidated immediately they learnt that the two firms of advocates they had instructed, had each filed a suit on their behalf over the same subject matter.

6. That flowing from the foregoing, the court find that the Defendant’s notice of motion dated 19th august 2016 has merit and is granted as prayed and the following orders issued;

a. That this suit commenced vide the plaint dated 30th November 2015 is hereby struck out with costs.

b. That for avoidance of doubt, the temporary injunction order issued on the 28th July 2016 is

hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF MAY 2017

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr. Onyango for Kowino for Defendant.

M/S Otieno for Sala for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/5/2017

24/5/2017

S.M. Kibunja Judge

Parties absent

Mr. Onyango for Kowino for Defendant/Applicant

M/S Otieno for Sala for Plaintiff/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/5/2017

Order: Ruling dated and delivered in open court in presence of Mr. Onyango for Kowino for the Defendant and M/S Otieno for Sala for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/5/2017