



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO 319 OF 2015**

**ANTHONY NTUTU.....PLAINTIFF**

**VERSUS**

**SAIYALEL OLOLOSO.....DEFENDANT**

**RULING**

***(Plaintiff filing suit in the Environment and Land Court and denied an injunction; plaintiff then filing a suit in the Magistrate's Court and proceeding to obtain an injunction; issue raised by defendant that the plaintiff is engaging in abuse of court process; plaintiff later withdrawing the case before the Environment and Land Court and pleading that he should be allowed to proceed with the case before the Magistrate's Court; clear abuse of process of court in filing the case before the Magistrate's Court; only remedy is to have that case struck out; the said case struck out with costs).***

1. On 5 November 2015, Anthony Ntutu through the law firm of M/s Chelanga & Company Advocates, filed suit via plaint, in the Environment and Land Court at Nakuru which was registered as Nakuru ELC No. 319 of 2015. The defendant in the case is Saiyalel Ololoso and the subject matter is the land parcel Cis-Mara/Lemek/3217 which is land measuring 12.407 Hectares (the suit property). The plaintiff claimed to be the owner of this property and he averred that the defendant is a neighbor residing near it and that the two have no boundary dispute. He pleaded that in October 2015, the defendant without any colour of right started overt acts of trespass into the suit property by driving his livestock into the land and destroying the plaintiff's property. In the case, the plaintiff sought the following orders :-

*(a) A permanent injunction restraining the defendant, his servants, licencees, agents or any other person action (sic) on his behalf from trespassing into, obstructing the plaintiff's access into or in any manner whatsoever interfering with the quiet possession and ownership by the plaintiff of all that parcel of land known as Cis-Mara/Lemek/3217.*

*(b) Damages for trespass and destruction of property.*

*(c) Cost.*

2. Contemporaneously with the plaint, the plaintiff filed an application under Certificate of Urgency, where he sought ex-parte orders of injunction to restrain the defendant from the suit property. The matter was placed before me, as the Environment and Land Court Judge sitting in Nakuru, on the same day, that is 5 November 2011. Mr. Chelanga for the plaintiff was present. I saw the application and directed that it be served for inter partes hearing on 19 January 2016.

3. On 19 January 2016, neither the plaintiff nor Mr. Chelanga appeared in court. The only persons who appeared were the defendant and his counsel Mr. Karanja Mbugua. Mr. Karanja then submitted that 6 days after this case was filed, and in total abuse of the court process, the plaintiff proceeded to the Narok Chief Magistrate's Court, and filed a case being Narok CMCC No. 250 of 2015 (Narok case). A similar application for injunction was filed and orders granted. He pointed out that this court has supervisory powers over the subordinate court. Given those submissions, I ordered a stay of proceedings in the Narok case and directed that this matter be mentioned on 11 February 2016 and that the plaintiff and his counsel be served. I did not sit on 11 February 2016 but the matter was mentioned on 1 March 2016 when both Mr. Chelanga and Mr. Karanja were present. Mr. Chelanga then submitted that his client instructed him to withdraw this suit and I indeed did see a Notice of Withdrawal of Suit dated 21 January 2016 and filed on 28 January 2016. He also pointed out to me that in respect of the Narok case, there is a consent for boundary verification.

4. I directed that the Narok file be availed for me to peruse it. In the opinion of Mr. Karanja, the Narok case was an abuse of the process of court, only aimed at obtaining interim orders that had been refused by this court. He pointed out that the plaintiff never served the proceedings before this court but only served the proceedings of the Narok case after obtaining interim orders. He stated that his client only became aware of this matter after seeing it in the cause list. It is then that he perused the file and discovered that the subject matter was the same as that where his client had been served. He asked this court to stamp its authority to prevent an abuse of the process of court.

5. Mr. Chelanga on his part submitted that he got instructions to withdraw this suit after it was filed given the value of the subject matter. He informed me that a different advocate, Mr. Kamwaro, appears for the plaintiff in the Narok case. His view was that I should allow the other suit to proceed and that I should look at the element of substantive justice.

6. Having received information that a different counsel appears for the plaintiff in the Narok matter, I thought it best that I should hear from him. Mr. Kamwaro did attend on 10 May 2017. He stated that when he took instructions, the plaintiff did not reveal to him that he had filed this case. He submitted that he would not have filed the Narok case if he had been aware of this suit. He asked that I exercise my discretion and pardon the plaintiff so that the matter may be resolved as a boundary dispute.

7. I have considered the issues raised. I have also perused the case Narok CMCC No. 250 of 2015. Interestingly, word for word, for the plaint in the said suit is exactly similar to the plaint filed herein. The only difference is that it is filed by a different firm of advocates. It is quite a miracle that two firms of advocates proceeded to draw the exact pleadings. I of course think a lot more transpired between the law firms of Mr. Kamwaro and Mr. Chelanga than has been mentioned.

8. The only conclusion I can reach is that the plaintiff, after failing to get interim orders in this case, decided to try his luck in the Narok Magistrate's Court, and see if he can get orders which he was unable to get before me. If ever one needs an example of abuse of court process, this is the classical case. Both Mr. Chelanga and Mr. Kamwaro asked me to do substantive justice. I will do exactly that. This court cannot stand by and watch while persons engage in an abuse of the court process. In exercise of my supervisory jurisdiction and in exercise of my discretion, I find that the fittest remedy in the unfortunate scenario that has played out in front of me, is to have the case Narok CMCC No. 250 of 2015 declared to have been filed in abuse of the court process and be ordered struck out in the interests of safeguarding the integrity of the judicial process. That case is hereby struck out with costs. The proceedings therein are declared a nullity and all orders issued in that case are hereby quashed and/or set aside and declared to be of no effect.

9. The plaintiff already withdrew this suit. That was within his rights. I will declare this suit as withdrawn and will award costs to the defendant.

10. The plaintiff will have to start the entire process from scratch, but before he does so, he will have to pay the costs of both suits to the defendant.

11. I hope that the above is going to be a lesson to any person who imagines that the court is a place where you can play lottery or forum shop as you wish. It is mandatory that the integrity and sanctity of the court process be safeguarded.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**In presence of :**

Mr. Morintat holding brief for Mr. Chelan'ga for plaintiff.

Mr Karanja Mbugua for defendant

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**NAKURU**