



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 1213 OF 2014

PETER XAVIER INDINDI OJIAMBO

CONCILIA AKUKU ODUNDO

REGINA OCHAMI ODUORI

TRUSTEES OF REGIECHRISTIES CHURCH MINISTRY.....PLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES OF

ARCHDIOCESE OF NAIROBI.....DEFENDANT

RULING

Coming up for determination is a Preliminary Objection filed by the Defendant dated **22nd October 2014**. The objection is against the Plaintiff's on grounds that it is incompetent, bad in law, misconceived and an abuse of the Court process as it offends **Section 6 of the Civil Procedure Act**. The Defendant avers that there is a **Civil Appeal Case No. 427 of 2006** emanating from a ruling of a Lower Court, **CMCC No. 260 of 2006**, involving the same parties and touching on the matter directly and substantially in issue herein. Further, that the Plaintiff had also instituted a suit **HCCC No. 1221 of 2006** with the same parties touching in the same subject matter, which suit was struck out in a ruling dated **22nd May 2007**.

The Preliminary Objection was in response to the Plaintiff's application filed alongside the Plaint dated **10th September 2014**, wherein the Plaintiff sought orders that:

- 1. A declaration that the Plaintiff is the lawful exclusive owner of plot L.R. No. 209/14854 situate in Villa Franca Estate, Nairobi by virtue of the registration of 17th February 2003.***
- 2. A permanent injunction does issue against the Defendant, their agents, servants and/or employees from trespassing, attempted destruction, subsequent destruction, evicting the Plaintiffs from plot L.R. No. 209/14854 situate in Villa Franca Estate, Nairobi and/or otherwise howsoever from interfering with the said plot.***
- 3. Damages/mesne profits.***
- 4. Costs and interests.***

This objection was canvassed by way of written submissions. Counsel for the Defendant submitted that the Plaintiff in their memorandum of appeal **No. 427 of 2006** sought orders that the ruling of the lower court delivered on **30th May 2006** be set aside, the 3rd Respondent's Preliminary Objection be overruled and the suit be reinstated. They also sought an order that the application dated **24th February 2006**, be heard de novo before a different magistrate. It was submitted that in the event that the appeal would be determined in favour of the Plaintiff, it would result to the reinstatement of suit at the lower court **CMCC No. 260 of 2006** and be heard pursuant to **Rule 8 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the use and Occupation of, and Title to Land and Proceedings in other Courts**. Counsel submitted that it is only upon the determination of the revived suit at the lower Court and the dissatisfaction of the decision therein that an appeal can lie before this Court pursuant to **Rule 13 of the Practice Directions**. Further, that the suit herein not being a new case, **Rule 14 of the Practice Directions** is inapplicable.

On behalf of the Plaintiff, counsel submitted that the instant suit is distinct from the one filed in the lower Court, subject of the appeal **No. 427 of 2006**. It was submitted that the current interference was being occasioned by the Registered Trustees of Archdiocese of Nairobi, the trustees of St. Bakhita Catholic Church whose property adjoins that of the Plaintiff. Therefore, the Defendants herein are not the same as the Defendants in the suit filed at the lower Court, neither is the interference complained of that is putting up a toilet and drilling a borehole. Counsel urged the Court to dismiss the Preliminary Objection.

The Defendant's objection is founded under **Section 6 of the Civil Procedure Act**, which provides as follows:

"No court shall proceed with the trial of any suit or proceeding 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 the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

The questions to be answered are whether, first, there are two suits pending. Secondly, whether the issue in dispute is directly and substantially similar in both suits and thirdly, whether the parties in both suits are the same. The Defendant contends that there is a suit in the lower court, subject of a pending appeal in the High Court involving the same parties and that the issues in dispute are similar to the instant suit. This averment is denied by the Plaintiff who asserts that the Defendants as well as the interference complained of are different in the two suits.

Upon perusal of the pleadings and annexures thereto, it is evident that there is a pending appeal in which the Plaintiffs herein are the Appellants therein. However, the Defendant in the instant suit is different from those listed in the pending appeal. The Defendant does not allege, neither is there anything to show that the said Defendants in the previous suit are the registered trustees of **St. Bakhita Catholic Church**, the Defendant herein. Notably, none of the parties availed copies of pleadings of the suit filed at the lower Court. The Memorandum of appeal **No. 427 of 2006** as well as the ruling in **HCCC No. 1221 of 2006** does not reveal the disputed property. This court cannot in the circumstances discern with certainty that the subject matter in the instant suit is similar to the previous suit.

Consequently, the Defendant's preliminary objection fails and not merited and the same is hereby dismissed with Costs of the application being in the cause.

It is so ordered.

Dated, Signed and Delivered this 19th day of **October, 2015**

L. GACHERU

JUDGE

In the Presence of:-

None attendance For the Plaintiff/Respondent

M/s Mathenge holding brief Mr Kiongera for the Defendant

Hilda: Court Clerk

L. GACHERU

JUDGE

19/10/2015