



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 136 OF 2012**

**ANASTASIA WANJIRA MUSIDI..... PLAINTIFF**

**VERSUS**

**ANTHONY MWANGI MUTHONI..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant/Applicant by a Notice of Motion application dated 22<sup>nd</sup> November 2013 expressed to be brought under order 2 Rule 15 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act seeks an order that the plaintiff's suit be struck out for being an abuse of court process and that the costs be in the cause.

The applicant founds his application on the grounds set out on the face of the application and principally avers that there is another pending suit namely High court petition **NO.127 of 2011** at Nairobi where the subject matter herein is the same subject matter in that suit. The applicant avers that the plaintiff in that suit has acknowledged that the land the subject matter was reallocated and as a consequence the plaintiff in that suit has sued the 2<sup>nd</sup> Defendant for compensation. Thus the 1<sup>st</sup> Defendant applicant avers that the instant suit by the plaintiff is abusing the process of the court by using the court to launch a simultaneous strategy in pursuit of the same subject matter.

The affidavit sworn by the applicant reiterates the grounds on the face of the application and faults the plaintiff for misleading the court that there is no other pending case between the parties on the same subject matter. The Applicant has annexed a bundle of documents marked "**AMM1**" relating to the suit referred to being High Court petition **NO. 127 of 2011** Nairobi.

The plaintiff opposes the application by the 1<sup>st</sup> Defendant and has filed grounds of opposition dated 6<sup>th</sup> January 2014 and a replying affidavit sworn on the same date. The plaintiff in her grounds of opposition avers that the 1<sup>st</sup> defendant's application is vexatious, frivolous and abuse of the court process and that it is merely intended to delay the trial and conclusion of the instant suit. The plaintiff contends she is not a party and has no interest in HC Petition number **127 of 2011** and further avers that at any rate constitutional rights cannot be transferred to 3<sup>rd</sup> parties as in the case of the plaintiff who has nothing to do with the petition. The plaintiff's contention is that she purchased the suit property from one **P.K. Karanja** and she is not party to the High Court Petition **NO. 127 of 2011** and she ought not to be drawn into it.

I have perused the pleadings in this suit and I have reviewed the annexures including the pleadings in HC Petition **NO. 127 of 2011**. The property in issue in petition Number **127 of 2011** is the property described as **L.R. NO. 11344/R** which it is said was subdivided into subplots (**217 in number**) and allotted to members of **Komarock Bridge Jua Kali Association**. The plaintiff in the present suit purchased plot NO. 81 from one **Paul Kabunga Karanja** and the officers of the 2<sup>nd</sup> Defendant from the Housing Development Offices at Dandora were fully involved at the time the transaction took place and they verified the plot and she was issued with a plot formalization card. The 1<sup>st</sup> Defendant as per the pleadings in this suit claims to have been allocated the suit plot by the 2<sup>nd</sup> Defendant. Indeed the issue in this suit is who between the plaintiff and the 1<sup>st</sup> Defendant is the rightful owner of the suit property. Is there a case of double allocation and if so who between the allottees is the rightful owner?

High court petition **NO. 127 of 2011** is to determine whether there was any violation of any constitutional and fundamental Rights of protection of property under Article 40 of the Constitution. It is unclear whether **L.R. NO.11344/R** mentioned in the petition was the same land out of which plot **NO. 81** claimed by the plaintiff came from. The plaintiff has maintained she is not a party to the petition and she is not interested with the petition but would like her property rights to plot **NO. 81** to be determined and she be declared as the owner thereof. The claim by the plaintiff is specific to this one plot and she has singled out the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant as the persons against whom are rights and entitlement are to be determined.

In my view the plaintiff's plaint against the Defendants raises triable issues and her claim is not frivolous and cannot be in abuse of the court process. There is indeed nothing to suggest that the plaintiff was at the time she filed her suit aware of the High Court petition **NO. 127 of 2011**. It cannot be said that she gave her consent and authority for the petition to be brought on her own behalf and the others. She simply is not a party to the petition and she cannot constructively be made a party. The plaintiff in the present suit demonstrates she has an interest in the suit property (plot 81) and she is entitled to institute the present suit to have those rights determined. The 1<sup>st</sup> Defendant cannot properly set up the High court petition NO. 127 of 2011 as a bar to the plaintiff ventilating her rights if any, over the suit property.

The plaintiff is properly before the court and her suit is not an abuse of the court process.

I accordingly find the 1<sup>st</sup> Defendant's Notice of Motion application dated 22<sup>nd</sup> November 2013 to be without any merit and order the same to be dismissed with costs to the plaintiff.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this.....16<sup>th</sup> .....day of .....  
May.....2014.

**J.M. MUTUNGI**

**JUDGE**

In presence of:

..... For the Plaintiff

..... For the Defendants