



Sheelali v Kivulini Cottages Limited (Environment & Land Case 45 of 2023) [2024] KEELC 4373 (KLR) (29 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 45 OF 2023**

FM NJOROGE, J

MAY 29, 2024

BETWEEN

ABDALLA ATHMAN SHEELALI PLAINTIFF

AND

KIVULINI COTTAGES LIMITED DEFENDANT

RULING

1. For determination is the Defendant’s Notice of Motion dated 27th November 2023 seeking the following orders:
 - a. Spent;
 - b. That the plaint dated November 22, 2023 filed by the Plaintiff be struck out on account of being sub-judice and for being otherwise an abuse of court process;
 - c. That the orders issued by this honourable court on the November 24, 2023 be vacated on the account of this suit being sub judice to Environment and Land Court Petition Number 5 of 2023 between Kivulini Cottages Limited Versus Abdalla Athman Sheelali, The Chief Lands Registrar Mombasa, Director of Survey and the Attorney General;
 - d. That the costs of this application be awarded to the Defendant/Applicant herein;
 - e. That this honourable court be pleased to issue any other orders it deems fit.
2. The application is founded on the grounds set out on its face and on the sworn affidavit of Adam Abdillah Ibrahim who describes himself as “the Principal” of the Defendant, and who deponed that the Plaintiff is premised on the suit property identified as No. 5599 belonging to the Defendant while the plaintiff fraudulently procured a parallel title identified as CR 82075. He stated that the Defendant is the actual registered owner of the suit property and has faced interferences from the plaintiff thus necessitating him to institute a petition before the Malindi Environment and Land Court, being



Petition No. 5 of 2023 where the applicant herein is the Petitioner while the Plaintiff herein is the 1st Respondent in the said Petition. He averred that the Plaintiff is alive to the proceedings in the aforesaid petition as he was served on 4th November 2023 and has failed to enter appearance and file his responses to the petition. It was additionally averred that the court issued conservatory orders in respect to the suit property against the Plaintiff on 30th October 2023 and these orders are still alive. Further, the Plaintiff is aware that the Petition is scheduled for hearing on November 28, 2023.

3. The Plaintiff did not file any response.

DISPOSITION.

4. On 30/01/2024 when the application came up for hearing, the court directed that be disposed of by way of written submissions. None of the parties have complied with the said directions of the court. I would dismiss the application for noncompliance of court orders but having considered the application, I find that the same falls short of merit of the provisions of section 6 of Civil Procedure Act defines the above principle or the doctrine as follows;

“..... 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 the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

5. In this court's opinion there are different methods of commencing action depending on the purpose of the proceedings. A petition usually serves a different purpose from a suit filed by way of plaint and it would be strange to seek to determine issues of fraud therein. Other than state in the supporting affidavit that the petition concerns fraudulent actions of the plaintiff at paragraph 7 of the supporting affidavit little else has been said to show the subject matter and the reliefs sought are similar and within the parameters set by section 6 and 7 of the Civil Procedure Act insofar as they are applicable to the present application. The Applicant has not attached to its application a copy of the said Petition for me to peruse and determine that there is a pending suit between the parties over the same subject matter or that indeed the issues arising in both matters are the same. In the premises, the application is hereby dismissed with costs to the Respondent. Parties shall comply with the Civil Procedure Rules in readiness for hearing. This matter shall be listed on 18/9/2024 for issuance of a hearing date.

Dated, signed and delivered at Malindi via electronic mail on this 29th day of May 2024.



MWANGI NJOROGE

JUDGE, ELC, MALINDI

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