



Sambu v Eliazar & another (Enviromental and Land Originating Summons E006 of 2023) [2024] KEELC 4059 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023**

JM ONYANGO, J

MAY 21, 2024

BETWEEN

MELVILLE KIPNGETICH SAMBU PLAINTIFF

AND

ROSELINE JEPKOECH ELIAZAR 1ST RESPONDENT

WALTER KIPKEMBOI LAGAT 2ND RESPONDENT

RULING

1. What is before me for determination is a Notice of Motion dated 22nd August, 2023 filed by the Plaintiff/Applicant herein seeking the following order
 - a. Spent
 - b. That the Honorable Court be and is hereby pleased to transfer the suit in ELD CM ELC Case No.E117 of 2022 to this court and the same be consolidated with this suit for full hearing and final determination.
 - c. In The Alternativeto prayer (b) this Honourable court be pleased to stay the proceedings and all orders in ELD CM ELC Case No. E117 of 2022
 - d. Costs b provided for
2. In support of the application, the Applicant swore an affidavit on 22nd August 2023 in which he deposed that he bought a parcel of land measuring 5 acres known as Moi's Bridge,/ Sirikwa Block 2(ZIWA) 345 from one Mary Tabutany at a consideration of Kshs.110,000 vide a sale agreement dated 27.6.2006. He subsequently took possession of the suit property and he has been occupying the same from 2006 to date and he has carried out various developments thereon.



3. He avers that he was recently served with court papers in respect of the case filed in the lower court being ELD CM ELC Case No. E117 of 2022 where the Plaintiff seeks to evict him from the suit property. He has since obtained an order of injunction which he intends to use to evict him from the suit property. He therefore implores the court to stay the proceedings in the lower court.
4. In response to the application the Respondent filed a Replying Affidavit sworn on 18th September 2023. In the said affidavit he deposes that he obtained an order of injunction against the Applicant but the same was disobeyed. He successfully applied for contempt and the Applicant was arrested and committed to civil jail but later released pursuant to a consent order. That the Applicant's Originating Summons is an afterthought and an abuse of the court process as he cannot seek adverse possession in respect of the suit property when there is a matter pending in the lower court. He adds that the Applicant has not given any good reason why the suit in the lower court ought to be stayed or transferred to this court as he has not stated that the lower court does not have jurisdiction to hear and determine the suit.
5. The application was canvassed by way of written submissions and both parties filed their submissions.
6. Learned counsel for the Applicant submitted that the Applicant was condemned unheard as he was not served with the application for injunction, contrary to article 50 (1) and (2) of the *Constitution* of Kenya 2010. It was his contention that the Respondent willingly concealed facts before the court by failing to disclose that the Applicant had been in possession of the suit property for a period of over 15 years. He further contended that the Respondent had failed to disclose that the Applicant had filed the Originating Summons herein seeking to be registered as the proprietor of 5.0 acres of land parcel No. Moi's Bridge/sirikwa Block Ziwa 2(ZIWA) 345 through adverse possession. He argues that prior to the said orders being granted, the Applicant had developed the suit property and planted maize which were rotting on the farm.
7. It is the Respondent's contention that the lower court has jurisdiction to determine the issues raised in the suit filed by the Respondent. He is of the view that staying the suit in the lower court would only serve to delay the resolution of the dispute. He also contends that the suit for adverse possession has been overtaken by events as the Respondent has already filed suit against the Applicant and obtained a temporary order of injunction.

Analysis and Determination

8. The only issue for determination is whether the court ought to stay the proceedings in the lower court and/or transfer the suit in the lower court to this court for hearing and determination.
9. It is not in dispute that there is a suit in the lower court being CMELC Case No. E117 of 2022 where the Respondent has sued the Applicant for trespass. In the said case the Respondent obtained an order of temporary injunction against the Applicant. The matter was scheduled for hearing on 30th January 2024. The Applicant had a chance to raise the issue of adverse possession as a defence but he failed to do so. His attempt to circumvent the suit in the lower court by filing the instant suit is clearly an abuse of the court process.
10. In the circumstances, I am disinclined to grant the orders sought as the court's discretion has not been sought in good faith. Consequently, I find no merit in the application and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2023

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J.M ONYANGO

JUDGE

In the presence of;

1.Mr. B.I Otieno for the Respondent

2.Mr. Gichana for the Applicant

Court Assistant: Brian

