



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 84 OF 2011

PETER MUEMA MUMO.....PLAINTIFF

VERSUS

AMOS MULEE MUTISYARESPONDENT

RULING

1. The Applicant/Defendant filed a Notice of Motion dated **14th September, 2012** pursuant to provisions of **Order 2 Rules (1) (b) (d)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law
2. He seeks orders as follows:-
 - i. **That** the plaint filed herein on the **11/4/2011** be struck out as it is frivolous, vexatious a sham and otherwise an abuse of the process of the court.
 - ii. **That** costs of the application be to the defendant/applicant
3. The application is based on grounds that:-
 - i. The plaintiff did not obtain the requisite consent to institute this suit as required under the Land Adjudication Act.
 - ii. The suit is still under the adjudication process and Civil Proceeding concerning the said parcel of land is barred by **Section 30(1)** of the **Land Adjudication Act**.
 - iii. The plaintiff's suit is *res judicata* and subjudice.
 - iv. The plaintiff's suit is incompetent, fatally defective, bad in law and an abuse of the process of this Honourable Court.
4. It is supported by an affidavit sworn by the applicant where he states that the Adjudication Officer ought to have consented to institution of this suit concerning an interest in land in the adjudication process therefore the court lacks jurisdiction to entertain the dispute; the suit is *res judicata* since there was a similar suit, **Machakos HCC No. 29 of 2007** that was determined; **Machakos CMCC No. 1334/2004** that is pending in court as alluded to in paragraph 6 of the plaint and that the plaintiff did not file a dispute as provided for under the Land Adjudication Act for arbitration.
5. The application is unopposed. When it come up for hearing **Mr. Musila** holding brief for counsel for the Respondent/Defendant stated that the hearing notice was received under protest as the advocate had pointed out at the time of being served. A perusal of the affidavit and the copy of the hearing notice are silent on the issue of the alleged protest. No evidence was also given why existence of **ELC 830/2012** that the advocate was allegedly prosecuting before another court. Of importance was whether there was any response to the application. Counsel failed to address the issue. Therefore the application stands unopposed for the last one year.
6. Looking at the pleadings – paragraph 3 of the plaint states as follows:-

“In the year 1965 the plaintiffs bought what is now Plot No. 2853 Kaewa Adjudication Section from one Mutie Mutala...”

7. The claim herein is for an interest in land in an Adjudication Section. According to law, no person can institute proceedings concerning such an interest unless consent has been obtained in writing from the Adjudication Officer. Similarly no court can entertain any civil proceedings in that regard unless the Adjudication Section has been finalized. [see **Section 30(1) of the Land Adjudication Act, Cap 284 (k)**]. I have perused the statement filed by the plaintiff. It is silent on whether or not the consent was obtained. Failure to respond to the application herein leaves the averment uncontroverted, therefore without any directive from the Adjudication Officer, these proceedings cannot be continued.
8. It is stated that the suit is *res judicata* and *subjudice*. In **paragraph 5** of the supporting affidavit to the application, it is stated that there is a similar suit **No. 29 of 2007** which was determined and there is a similar suit number **Machakos CMCC 1334/2004** pending in court which facts have been alluded to in **paragraph 6** of the plaint. **Paragraph 6** of the plaint states as follows;-

“The plaintiff avers that there has been civil suits numbers Machakos HCC No. 29 of 2007 between the plaintiff and the defendant which suit was withdrawn and Machakos CMCC No. 1334 of 2009 between the defendant and the plaintiff claiming compensation in respect of vegetation destroyed by the plaintiff and defendant from Plot No. 2853 which is pending hearing”.

9. The claim in **CMCC 1334 of 2009** is for compensation of vegetation destroyed allegedly by the plaintiff herein. The relief sought in this suit being a declaration of ownership of Plot No. 2853 Kaewa Adjudication Section cannot be said to be substantially in issue. Secondly, it is pleaded that **HCC No. 29 of 2007** between the plaintiff and defendant was withdrawn. There having been no determination in the matter it cannot be said to be *res judicata*.
10. From the foregoing, it is apparent that there was no consent obtained from the Adjudication Officer prior to the institution of this suit. In the premises, it cannot continue. The plaint filed herein is therefore struck out with costs to the applicant/defendant.
11. It is so ordered.

DATED, DELIVERED and SIGNED this 15th day of JANUARY, 2014.

L.N. MUTENDE

JUDGE