REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 104 OF 2010

LIVINGSTONE ACHOLA ….......................... PLAINTIFF

VERSUS

FEMINA VIHENDA …........…………………..... DEFENDANT

RULING

Before me is a Chamber Summons dated 10th September, 2010 brought by the defendant under Section 1A and B and 3A of the Civil Procedure Act (Cap.21) as well as Order 6 rule 13 (1)(d) and Order 36 rule 12 of the Civil Procedure Rules. He seeks the following orders -

1. **The Originating Summons and/or the suit herein be struck out and/or be dismissed with costs.**
2. **Costs be awarded to the applicant.**

The application has grounds on the face of the Chamber Summons. The grounds are that the Originating Summons or suit is an abuse of the process of court; that the questions raised cannot lie before this court on an Originating Summons when the same could have been answered on appeal against a ruling of the Senior Resident Magistrate Vihiga in Succession Cause No. 58 of 2004; that the Originating Summons seeks to invoke the jurisdiction of this court wrongly by asking it to interpret or execute a transaction which the lower court found to be illegal; that the Originating Summons was premised on an affidavit which was incurably and fatally defective; that it disclosed no reasonable cause of action; that the issues were *res-judicata*; and lastly that the plaintiff herein had no *locus-standi* over the property known as Kakamega/Tigoi/455.

The application was filed with a supporting affidavit sworn by the defendant. In the affidavit, two parcels of land were referred to. That is land parcel No. Tiriki/Tigoi/455 and Kakamega/Tigoi/455. It was deponed that it was not clear whether parcel number Tiriki/Tigoi/455 was in the name of Musundi as shown in a copy of a sale agreement filed by the plaintiff. It was also deponed that the plaintiff wanted to subject the defendant to incur unnecessary costs of the case, as the issues herein were considered in a Succession Cause before which the plaintiff never bothered to appear.

The plaintiff opposed the application by filing a replying affidavit sworn by himself on 2nd December 2010. It was deponed therein that the Originating Summons was not an abuse of court process. That he was seeking the court's intervention to establish his proprietory interest in land parcel No. Kakamega/Tigoi/455. That his action could not be defeated just because of the position taken by the defendant as the administratrix. That the plaintiff had been in occupation of the land un-interrupted for more than 18 years and had developed the same.

Counsel for the defendant M/S A.B.L. Musiega filed with submissions on 11th October 2011.

Counsel for the plaintiff Mr. Chitwa filed submissions on 6th December 2011. I have considered the submissions, as well as the case of **Ishmael Ondego Matisha -vs- David Adolwa Matisha – Kakamega HCCC. No. 166 of 2009** which was cited by the plaintiff's advocate**.**

This is an application to strike out a suit or pleadings. Courts have been slow to strike out pleadings or proceedings, unless the same are fatally defective and cannot otherwise be saved.

The main objection by the defendant, in my view, is that the matter is *res-judicata* because it was determined in Succession Cause No. 68 of 2004 at Vihiga Senior Resident Magistrate's court. I have seen the judgment of the Vihiga Senior Resident magistrate in the succession cause.

The petitioner therein was the defendant. There was an objector therein known as Stephen Muloni Musundi. In the proceedings therein, there was no mention of the plaintiff herein. It was acknowledged that there were two houses of the deceased. However, all the names mentioned therein did not include the plaintiff herein. It cannot therefore be said that the interest or claim of the plaintiff herein is *res-judicata*.

As was correctly stated in the case of **Ismael Ondego Matisha -vs- David Adolwa Matisha** (supra) the application of the doctrine of *res-judicata* in Kenya is grounded on the provisions of **Section 7** of the Civil Procedure Act (Cap.21) which provides as follows -

> ***"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has subsequently raised and has been heard and finally decided by such court."***

The plaintiff herein was neither a party nor participated in the Succession Cause in the Vihiga Court. Therefore, the doctrine of *res-judicata* cannot apply to him. The objections of the defendant cannot therefore be sustained herein.

Of course, whether the Originating Summons herein has merits or not will be determined later. The decision in the Vihiga Succession Cause will be taken into account if it is used in evidence, since he has disclosed the existence of those proceedings.

On my part however, I find that the application of the defendant herein is not merited. I dismiss the same. However, as the matter is still in progress, I order that costs of this application be in the cause.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E