



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Suit 4 of 2010

GEORGE KATHENYA NDUYO.....PLAINTIFF

VERSUS

JULIUS KIGUNA MUCEE.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

R U L I N G.

The Application is a Notice of Motion dated 12th January, 2011 brought by the 1st Defendant. It has been brought under Order 51 Rules 1 and 4 of the Civil Procedure Rules. It seeks two prayers.

(a) That this honourable court be pleased to have the plaintiff's suit struck out with costs to the defendant.

(b) That cost of this application be borne by the plaintiff.

It is supported by 3 grounds on the face of the application which are namely.

(a) This suit is Res-judicata objection case No. 122 of 2008 KAMANYAKI/KAMARANCI ADJUDICATION SECTION.

(b) That this suit offends express provisions of Cap 284 of the Laws of Kenya; particularly section 29 and 30 whereof.

(c) The suit is otherwise an abuse of the court process.

The Application is supported by a supporting affidavit sworn by the 1st defendant dated 12th January, 2011. The 1st defendant deposes that the Plaintiff filed an objection case No. 122 of 2008 against the Applicant before the Land Adjudication Officer. He deposes that the case was determined in the

Applicant's favour vide a ruling delivered on 13th May, 2009. He deposes that the Plaintiff did not appeal and neither did he file a Judicial Review Suit; that instead, almost 6 months later, the plaintiff filed the instant suit without the consent of the Land Adjudication Department.

The 2nd Respondent, who was represented by Mr. Menge, learned State Counsel, did not oppose the application.

The 1st Respondent has filed a Replying affidavit dated 11th November, 2011. The Replying affidavit annexes Consent by the District Land Adjudication Officer, issued under S.30 and 58(1) of the Land Adjudication Act. The effect of the Consent is to allow the Plaintiff/Respondent to continue with this suit.

The gist of the replying affidavit is that the suit is properly before court as there is Consent from the Land Adjudication Officer. The deponent avers that a Judicial Review Application was not mandatory and that besides this the court has jurisdiction to hear and determine the suit.

The Applicant's advocate urged the application on behalf of the Applicant. All counsel stated was that the suit is *res judicata* on the grounds an objection filed by the Respondent was heard and determined and that no judicial review orders or appeal were preferred over the said decision.

The power of the court to strike out suit is draconian power which ought to be exercised only in plain and obvious cases.

The following quotation from the judgement of Lakha J. A. in the case of Yaya Towers Ltd. vs. Trade Bank Ltd (in liquidation) (supra) at pages 4 to 5 provide an appropriate guide in dealing with this application.

"Where however, the application is made under Order VI rule 13 (1) (b) or (c) or (d) of the Rules or the inherent jurisdiction of Court on the ground that the claim is 'frivolous' or is an abuse of the process of the court (as in the present case) evidence is admissible to show that this is the case. A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial."

I have looked at the plaint and noted that the Respondent's claim is based on customary land tenure. The Respondent has also raised issue with the jurisdiction of the Adjudication Officer to affect or disregard the decision of clan elders in distribution of land to its clan members. This is in my view a triable issue which the Respondent should be allowed to ventilate at the trial.

In my considered view the Plaintiff's case is not *res judicata* as he raises a cause of action which the previous proceedings had no

jurisdiction to determine. In the circumstances the application has no merit.

I accordingly dismiss it with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED THIS 7th DAY OF JUNE, 2012.

LESIIT, J.

JUDGE