

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 72 OF 2007

PETER KANYUA NGACHAPLAINTIFF

VERSUS

JAMES WACHIRA MUNENE.....DEFENDANT

RULING

The Application that was supposed to be before this Court for consideration is a Chamber Summons dated 22nd January 2007 wherein the Plaintiff is seeking the following two substantive orders:

1. That the Court grants an injunction restraining the Defendant by himself, his agents and /or servants as against plucking the Plaintiff's 1200 bushes of tea on land parcel MUTIRA/KAGUYU/3287 (hereinafter referred to as the suit property), pending the hearing and determination of the main suit.
2. That the Defendant be ordered to account and refund the amount already earned from the sale of tea leaves plucked from the Plaintiff's tea bushes.

The grounds for the application are that the said tea bushes are owned by the Plaintiff who purchased the same, and that the Defendant while aware of this fact continues to forcefully pluck and sell the tea leaves. The parties accordingly filed written submissions with the Plaintiff's Advocate submissions dated 28th October 2011 and those of the Defendant's dated 8th November 2011. Upon perusal of the court record, I have established that a ruling was delivered by Lady Justice Mary Ang'awa on 9th May 2007 granting the first prayer for an injunction and disallowing the second prayer seeking an account and refund. There is also a court order issued on 18th June 2007 on the court file with the said orders, which the both the Plaintiff and Defendant relied upon in applications dated 14th November 2008 and 12th August 2008 respectively. Although the said ruling and order refer to the Plaintiff's application as being dated 2nd January 2007, this is an obvious error as the suit herein is dated 22nd January 2007 and was filed on 24th January 2007. This court cannot therefore consider the said application as it is *res judicata*.

Upon perusal of the Court record I also noted that the suit herein is against a Defendant who died on 26th November 2006. The fact of the Defendant's death is admitted to in pleadings filed by both the Plaintiff's and Defendant's Advocates. No application for substitution of the Defendant with a legal representative was filed within one year of the Defendant's death, and the suit herein has therefore abated pursuant to the provisions of Order 24 Rule 4 of the Civil Procedure Rules.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____July____, 2012.

P. NYAMWEYA

JUDGE