



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Civil Suit 152 of 2009

**PROFESSOR KIVUTO NDETI.....PLAINTIFF**

**VERSUS**

**1. IDAH NDINDA MUTHEKE**

**2. LENGESI MUTHEKE**

**3. NZOMO MUTHEKE**

**4. NZIOKA MUTHEKE**

**5. PRISCILLAH MWANIA**

**6. LAWRENCE MAINGI KIILU.....DEFENDANTS**

**R U L I N G**

1. The Defendants herein have applied by **chamber summons dated 27<sup>th</sup> August, 2009** under **Order VI, rule 13 (1) (d)** of the then **Civil Procedure Rules (the Rules)** for an order to strike out and/or dismiss the Plaintiff's suit, or in the alternative, to stay the suit.

2. The grounds on the face of the application are, *inter alia*, that the suit or issues raised therein directly relate to a matter which was directly and substantially in issue between the parties in **Nairobi HCCC No. 430 of 1981**, which suit has been decided on merit.

3. The Plaintiff opposed the application by a replying affidavit in which he avers that the issues in Nairobi HCCC No. 430 of 1981 and the suit herein are different. In particular he states that the issue in the former is a claim by the Plaintiff therein (Patrick Ndeti, now deceased), for a house situate on the suit property while in the latter, the issue is trespass on the entire parcel of land.

4. The learned counsels canvassed the application by way of written submissions which I have considered together with the authorities cited and the pleadings on record.

5. The Defendant's application was brought under Order VI, rule 13 (1) (d) of the Rules. In other words, it is the Defendants' case that the Plaintiff's suit is an abuse of the process of the court on account of the suit being *res judicata*.

6. It is clear from the pleadings that the issue in HCCC No. 430 of 1981 is a claim by the plaintiff there (Patrick Ndeti, now deceased), for a house situate on the suit property, while in this suit the issue is trespass on the entire parcel of land. The Plaintiff in the suit herein was the defendant in the former suit and therefore ought to have raised the issue of trespass therein by way of counterclaim rather than

bringing issues to court in bits and pieces. Nyamu, J (as he then was) in **PIL Kenya Ltd vs. Oppong (2009) KLR** at Pg. 442 said:

**“... Alternatively, even if the issues raised were not the same, all the issues in the subsequent suit could have been raised in the earlier suit and if they were not raised they were deemed to have been raised under the doctrine of judicial estoppel or issue estoppel. The respondent’s suit therefore was not sustainable in law and ought to be dismissed. In certain situations similar to the matter before court there can arise estoppel by silence and acquiescence – Pacol Ltd & 8 Others Vs. Trade Lines Ltd & Another (The Times, February 8, 1988). The Respondent was caught by the species estoppels founded on general equitable principles not to allow a party to act in unconscionable manner established in the English Court of Appeal Case. Amalgamated Investment and Property Co. Ltd Vs. Texas Commerce International Bank Ltd (1981) 2WLR 554, 3 WLR 565.”**

7. Section 7 of the Civil Procedure Act which enacts-

**“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 been subsequently raised, and has been heard and finally decided by such court.”**

8. The question therefore is, has HCCC No. 430 of 1981 been finally heard and determined? It appears that the suit was referred to arbitration by a Land Disputes Tribunal and an award was filed in court. An application to enter that award as judgment of the court is pending. There is also apparently pending an appeal in the Court of Appeal against an order of the High Court that refused to set aside the award. The long and short of it is that the said suit, is thus still pending and has not been finally determined.

9. In the circumstances, I refuse the application to strike out the suit. But I will allow the application to stay the suit, and the same is hereby stayed pending final determination of Nairobi HCCC No. 430 of 1981. Costs shall be in the cause. It is so ordered.

10. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained fully my health.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....  
**JUDGE**