



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Environmental & Land Case 1476 of 2005

MARGARET NYOKABI KAHIHU PLAINTIFF

JOHN KAMUYU KAHIHU.....2ND PLAINTIFF

VERSUS

SAMUEL MUKUHA NJUKI.....DEFENDANT

JOHN KIMANJI NJUKI.....APPLICANT

RULING

1. Before me are 2 motions for determination. There is the plaintiffs notice of motion dated 27/11/08 brought under section 3A of the Civil Procedure Act and Order L 1 Rule (1) of the Civil Procedure rule. The plaintiff/applicant is seeking the following order

i. That the other Court do issue an order directing the Deputy Registrar to sign the consent to transfer and transfer forms to enable the plaintiff's execute the decree issued on the 22/4/08 by the L. Justice Angawa.

The defendants application is dated 27/7/12 brought under order 32 rule 3 and rule 15 and under order 21 rule 22 of the Civil Procedure Rule and section 3A of the Civil Procedure Act. The defendant applicant is seeking the following orders.

i. That this Court be pleased to appoint John Kimanji Mukuha guardian ad litem for the defendant herein for the purpose of this suit and that there be a temporary stay of proceedings pending the hearing of this application inter-parties.

ii. Both applicants seeks costs.

2. I have read the affidavits filed by the parties in each application together with the submissions which were made by counsels. I will deal with the defendants application first. I have gone through the Court file and I note that the defendant made such an application before Osiemo J as he was then and Justice Osiemo made a ruling. The same reasons were used in the same application that the defendants has lost his land and is unstable and cannot deal with the case. I note that the defendant did not appeal against the said decision. Thereafter the defendant brought an application of the order made by by J. Osiemo before J. Mbogholi and the same was dismissed.

3. I agree with the submissions made by the plaintiffs counsel THAT THE Notice of Motion is res-judicata as the same was conversed and determined through the Notice of Motion is a res-judicata as the

same was conversed and determined through the notice of motion application dated 13/10/08 by Hon. J Osiemo by his ruling dated 23/6/09. I also agree that this court has no jurisdiction to site similar application by being a parallel Court with equal jurisdiction.

4. Having found that that the matter is resjudicata I therefore find the application before me has no merit and I dismiss it with costs to the plaintiff. The defendant applicant should have moved to the Court of appeal if aggrieved with the said order.

5. On the plaintiff application, I find as follows; there is a decree from a judgment of J. Angawa, that has not been set aside by this Court or the Court of appeal. The decree cost still stands.

The plaintiff argues that the application should not be granted because the applicant fails to consider that the defendant is of unsound mind and was of unsound mind when the suit was concluded by consented that the applicant therefore cannot argue that the defendant has refused to sign any document as he is incapable of comprehending what he is being told to do. This judgment I note was delivered on the 15/8/00. there has been no appeal. I note that there is a ruling of J. Mbogholi where he dismissed. The defendant's application to set aside the consent judgment,. The application is not opposed by the applicant. Counsel for the defendant has made very passionate submission on the defendant state of mind but I find that the defendant has failed to have the consent judgment set aside. I find that the plaintiff has a decree that needs to be enforced. The matter has been pending in Court for some time. Unless the previous order set aside the plaintiff applicant is entitled to the orders sought.

I therefore grant prayer No. 1 of the application dated 27/11/00. costs to the applicant/defendant. .

Orders accordingly.

Dated, signed and delivered this 4th day of December 2012

**R. OUGO
JUDGE**

In the Presence of:-

.....For the Applicants
.....For the Respondents
.....Court Clerk