THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 182 OF 2009

JOHN MUSYOKA MATHEKA.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MAVOKO.....1ST DEFENDANT

WARAB LIMITED.....2ND DEFENDANT

RULING ON PRELIMINARY OBJECTION

(1) John Musyoka Matheka ("**the Plaintiff**") filed this suit on the 10th June 2009 against (1) Municipal Council of Mavoko and (2) Warab Limited (the Defendants) claiming, among other orders, a permanent injunction restraining the second Defendant their agents and or servants from entering into Plot No. L.R No. 59 ("**the suit property**") situated within Athi River Township and carrying on demolition of permanent structures and or houses or in any way interfering with the said Plot. The Plaintiff avers that he owns a valid Letter of Allotment of the suit property where he has constructed and or erected permanent structures namely houses and has been paying rents and rates to the first Defendant and that on the 5th June 2009 the second Defendant without any colour of rights and without notice entered the suit property and commenced demolishing the Plaintiff's structures and permanent houses thereon.

(2) The Plaintiff also took out a Chamber Summons (being the application now before me) on the 10th June 2009 under Order 39 rules 1(a), 2, 2A(1) and 3 of the Civil Procedure Rules seeking a temporary injunction in terms of the said prayer in the Plaint pending the hearing and determination of the suit on the same grounds as the averments made in the Plaint. The application is supported by the Plaintiff's own affidavits made on the 9th June 2009 and the 27th July 2009.

(3) The first Defendant filed a Statement of Defence on the 14th July 2009 denying knowledge of the Plaintiff's alleged registration of ownership and also having issued any Letter of Allotment to the Plaintiff.

The second Defendant also filed a Defence dated the 7th July 2009 stating that it shall raise a preliminary objection ***in limine*** on the grounds that the Plaintiff's suit is an abuse of the process of the court and offends the express provisions of section 6 of the Civil Procedure Act in that the matter in issue is also directly and substantially in issue in Machakos HCCC No. 220 of 2008 – **Warab Ltd. – vs – Mavoko Municipal Council and 6 Others** – which suit is still pending before this court. Further, the second Defendant contends that the issues raised in this suit are ***res judicata*** since the same have been tried and determined is HCCC No. 220 of 2008 aforesaid leading to the order given by this court on the 26th March 2009. The suit therefore offends the express provisions of section 7 of the Civil Provision Act and should be struck out with costs.

(4) The second Defendant had also filed a Notice of Preliminary Objection dated the 25th June 2009 objecting to the Plaintiff's Chamber Summons applications on the grounds set out in paragraph 3 hereinabove. In further opposition to the application, Serah Wambui Bano, a Director of the second Defendant, swore a replying affidavit and a further affidavit on the 25th June 2009 and the 18th August 2009 respectively contending that by virtue of a Certificate of Title dated the 10th June 1992 issued by the Commissioner of Lands on behalf of the President of the Republic of Kenya, the second Defendant is the registered proprietor of the suit property.

(5) I have considered the application in conjunction with the supporting and replying affidavits and the pleadings and in light of the respective written submissions of both learned counsel. I will first deal with the second Defendant's preliminary objection.

(6) In paragraph 11 of his Plaint, the Plaintiff states that he

"**has not previously sued the Defendant over the cause of action herein and as such there are no other court proceedings pending or finalized over the same subject matter**." [Emphasis added]

He goes on to aver in paragraphs 6 and 7 of his supporting affidavit made on the 9th June 2009 that the second Defendant had on the 5th June 2009 and without any colour of right and without notice to the Plaintiff entered into the suit property and commenced demolition of the permanent structures erected and being thereon. When confronted with Serah Wambui Bano's replying affidavit made on the 25th June 2009 in which she deponed that the second Defendant had undertaken the demolition pursuant to the order of court given on the 26th March 2009 in Machakos HCCC No. 220 of 2008, the Plaintiff responded as follows in paragraphs 22, 23, and 24 of his supplementary affidavit dated the 27th July 2009:

"22. THAT I have had a look at the court order dated 26.3.2009 in HCCC No. 220/2008 but the said order does not state that my structure be demolished as alleged in paragraph 17 of the Respondent's affidavit.

23. THAT there was no sufficient notice given to me as per Law requires and the act of demolition of the Residential House was illegal and unlawful and will seek for compensation.

24. THAT the court should note that HCCC 220 of 2009 is scheduled for hearing on 18.11.2009 and that no party will be prejudiced if orders on injunction are issued."

(7) In the Amended Plaint dated and filed on the 18th December 2008 in Machakos HCCC No. 220 of 2008, the Plaintiff is named as the sixth Defendant. He has not denied this in either his supporting or supplementary affidavits. The Plaintiff was therefore a party to that suit when the order of court was given on the 26th March 2009. That order reads in part as follows —

"3. A mandatory order be and is hereby issued compelling the 2nd, 3rd, 4th 6th and 7th Defendants, their servants, officers, employees and/or agents to forthwith vacate and hand over to the Plaintiff

vacant possession of all that property known as LR No. 337/996 Mavoko township and to forthwith remove at their own cost the developments illegally constructed or erected thereon and in default the Plaintiff be at liberty with the assistance of duly authorized auctioneers and the O.C.S., Athi River Police Station to forcefully demolish any constructions and/or developments erected thereon and to evict the Defendants and their agents at their own cost."

(8) Sections 7 and 8 of the Civil Procedure Act [Cap. 21] are in the following terms:-

"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

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 been subsequently raised, and has been heard and finally decided by such court."

(9) It is quite clear from the aforegoing that the Plaintiff, having all along been very well aware of the proceedings against him on the same subject matter in Machakos HCCC No. 220 of 2008 and of the court order made on the 26th March 2009, was duly bound to disclose these material facts to the court both in his Plaint and in the supporting affidavit to his application. The principles of this duty of candour, enunciated in the well known case of **Reg. – v – Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac** (1971) 1 KB 486, were reiterated and followed by the Court of Appeal in **The Owners of the Motor Vessel "Lilian S" – v – Caltex Oil (Kenya) Ltd**. [1989] KLR 1. In his Plaint and supporting affidavit both bearing date the 9th June 2009, the Plaintiff failed to disclose, and in fact concealed, facts which it was material for the court to know in dealing with his application as made. The Plaintiff cannot, therefore, succeed in obtaining the equitable remedy sought and the second Defendant's preliminary objection must accordingly succeed.

(10) In any event, were this court to grant the order sought in the application, it would be sitting on appeal against the order made by Lenaola, J., on the 26th March 2009 in Machakos HCCC No. 220 of 2008. As I have no such jurisdiction, I decline to do so. The Plaintiff ought to have appealed against the said order to the Court of Appeal or sought to have the same set aside or stayed in the same proceedings such order was given.

(11) For the reasons I have given, the second Defendant's preliminary objection dated the 25th June 2009 succeeds and is upheld. The order which must follow is that the Plaintiff's Chamber Summons application dated the 9th June 2009 and filed on the 10th June 2009 is incompetent and an abuse of the process of the court. It is accordingly struck out with costs to the second Defendant only. It must follow that the interim orders to maintain the ***status quo*** granted on the 15th June 2009 be and are hereby discharged and vacated accordingly.

So ordered.

Dated and delivered at Machakos this 29th day of June, 2011.

P. Kihara Kariuki
Judge.