



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

HCCC NO.80 OF 2009

EMMANUEL W. WANYONYIAPPLICANT

VERSUS

JOHN BARASA PLANDURESPONDENT

RULING

The Plaintiff/Respondent herein, filed this suit by a plaint dated 26.10.2009. The prayers he sought are below paragraph 16 of the Plaint and this court can do no better than quote the same verbatim:-

REASONS WHEREFORE the Plaintiff prays for judgement against the Defendant for:-

- a) In terms of paragraph 10 above
- b) Costs
- c) Interests
- d) Any other relief the Court shall deem fit.

It is therefore relevant and necessary to find out the terms of paragraph 10 of the said plaint. It states-

“10. On 1.7.2009 the application dated 2.1.2009 the application dated 2.1.2008 was struck out on a preliminary Objection that the same was filed out of time and without seeking leave.”

In my view the fact that the plaintiff's application dated 2.1.2008 was struck out for the reason(s) given, is not a prayer which this court can grant. It seems to me therefore that apart from costs and interests and notwithstanding narrations and facts in the said plaint, the same does not have the prayers intended to be sought by the Plaintiff. In, other words the plaint as it stands, is bad in law and liable for striking out for making little or no common sense.

On the other hand, the facts stated in the plaint are very similar to the facts in the plaintiffs Kitale suit HC MCA No 52 of 2007 and Kitale High Court Misc. Appl No 2 of 2008 wherein the applicant to set aside or quash orders of Tongaren Land Disputes Tribunal through Judicial Review Orders. It is not denied by the Plaintiff that a notice of Appeal filed to the Court of Appeal is still pending in that Court, whether or not it is presently valid.

The Plaintiff/Respondent herein John Barasa Plandu, did not deny that fact. That means that he filed this suit as Plaintiff, well knowing that the appeal arising from the Kitale suit which itself raised similar issues relating to the same subject matter i.e. land parcel Bungoma/Soysambu/233, between the same parties, was still pending in the Court of Appeal.

I have also carefully perused the plaint and the facts averred therein. I have no doubt that the intention of the Plaintiff is to try and obtain similar prayers as those sought in the Judicial Review application which was struck out by the High Court in Kitale. For example, the Judicial Review application in Kitale High court sought to remove to itself the Award Orders of Tongaren Division Land Dispute Tribunal for quashing. On the other hand in this case before me in paragraph 13 of the Plaint, the plaintiff who was in Kitale matter, the Ex Parte applicant, now seeks a Declaration that Tongaren Division Land Disputes Tribunals award, was null and void and that an eviction order should issue to remove Defendant from the said land.

It's the view of this court that the Plaintiff/Respondent herein, is trying to obtain the substance that he failed to obtain under Kitale High Court suit. In my further view, he cannot achieve such intentions because the principle of "Res" stands on his way.

There are therefore three possible independent reasons why this suit or plaint should be struck out and those are:-

- 1) **That the plaint has no prayer or seeks no Sensible relief in paragraph 10 referred to by the plaint, and is therefore fatally defective.**
- 2) **That this suit or plaint is "Res" the Kitale Misc. Application No 52 of 2007 for Judicial Review Orders.**
- 3) **That for the two grounds above singly and/or jointly, the suit is an abuse of court process.**

It is hereby struck out with costs to the applicant/Defendant.

Orders accordingly.

Dated and delivered at Bugoma this 11th day of October 2011.

D.A. ONYANCHA
J U D G E