



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 48 of 2006

GEORGE MANGA DAVID NZIUPLAINTIFF

VERSUS

1. KANTAFU COMPANY LTD

2. MWANGI GACHERUDEFENDANTS

RULING

1. The Chamber Summons dated 3.4.2007 is premised on the provisions of Order VI rule 7 and 13 (1) (b) (c) and (d) of the Civil Procedure Rules and the order sought is that the ***“Defendant’s defence and counter claim filed herein be struck out and judgment be entered for the Plaintiff in terms of the Plaintiff.”***
2. In the Affidavit in support sworn on 3.4.2007 by the Plaintiff/Applicant, George David Manga Nziu, it is his case that the defence and counter-claim are frivolous, untenable and an abuse of court process. That the land, subject of the suit, was agricultural land and the sale transactions in issue were subject to Land Control Board Consent, and without such consent, the said transactions were rendered null and void. That being the case, there is nothing to be taken to trial and the prayers in the Plaintiff should be granted.
3. I have read the Replying Affidavit sworn by one Kimani Wanyoike on 18.9.2008 and the case for the Defendants is that the Plaintiff sold 3 of his plots in Lukenya Ranching Company Ltd’s land in Lukenya and in respect of plots nos. 11 and 399, full payment was made. In respect of plot no 114, a dispute arose and the Plaintiff filed HCCC 220/1998(Machakos) seeking payment of Kshs. 898,000/=. Once the sum was paid, the matter was deemed as settled. That the issues in this suit are similar those in that suit and therefore this suit is res-judicata. Further, that it is debatable whether the sale transaction was subject to Land Control Board consent or not.
4. It is the Defendant’s contention that the defence and counter-claim raise triable issues and should not be struck off.
5. It has been said time and time again that striking out is a drastic remedy and a court should be slow to invoke its power in that regard. *Madan J.A* in D.T. Dobie (k) Ltd vs Muchina[1982] KLR 1 stated that where the merits or demerits of a case are in issue, then the right forum to deal with the same is in a trial and not summary procedures. Only in ***“very clear, plain and obvious cases”*** should that procedure be applied – see Coast Properties Ltd vs M. R. Shah Construction (K) Ltd [2004] 2 KLR 119 per *Omolo, Okubasu JJA* and *Onyango Otieno, Ag. J.A.*

6. I have read the Plaintiff in this matter as well as the Defence and Counter-claim. A number of questions arise viz;

i. was the sale transaction between the parties in respect of sale of land per se or sale of Shares which entitled the buyer to land?

ii. was the transaction subject to Land Control Board Consent or not?

iii. was there fraud in the sale transactions and was the Plaintiff the guilty party? Alongside that issue, another question is whether the Plaintiff had any capacity to enter into the sale transactions at all.

7. Without pre-determining these questions, all I can say is that they are not idle and should best be left to the trial court. The case is neither plain, obvious and clear as the Plaintiff thinks and there is certainly something to be tried.

8. In the end, I see no merit in the application dated 3.4.2007 and the same is dismissed with costs.

9. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **12th** day of **March 2010**.

H.P.G. WAWERU

JUDGE