REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 372 of 1994

JOSEPH WACHIRA WAITHAKA…………..……..…APPLICANT/DEFENDANT

VERSUS

SUSAN WANGECHI WAITHAKA………..……1ST RESPONDENT/PLAINTIFF
JOHN MAINA WACHIRA…...………………….2ND RESPONDENT/PLAINTIFF
NAFTALY WACHIRA WAITHAKA……………3RD RESPONDENT/PLAINTIFF

RULING

JOSEPH WACHIRA WAITHAKA, the defendant/applicant herein, has invoked *Section 3A* of the Civil Procedure Act, whereupon he took out the summons dated 8th March 2010. In the aforesaid Summons, the Applicant seeks for an order to direct **SUSAN WANGECHI WAITHAKA, JOHN MAINA WACHIRA** and **NAFTALY WACHIRA WAITHAKA**, the 1st, 2nd and 3rd Plaintiffs/Respondents respectively, to compensate the Applicant for the developments he has put on the parcel of land known as **L.R. NO. MAHIGA/KAMOKO/77**. The Summons is supported by the affidavit sworn by the applicant. The Respondents opposed the Summons by filing the replying affidavit of Susan Wangechi Waithaka. The Applicant also filed a supplementary replying affidavit to support the Summons upon obtaining leave.

The history leading to the filing of this summons appears to have started with the filing of the Plaint dated 28th November 1994 in which the Respondents herein sought for judgment against the applicant in the following terms:

(i) ***Land parcel MAHIGA/KAMOKO/77 be declared family land.***
(ii) ***That the Defendant holds the suit land in Trust for himself and the plaintiffs.***
(iii) ***Land parcel MAHIGA/KAMOKO/77 be shared equally between the plaintiffs and the defendant.***
(iv) ***The defendant and plaintiffs be issued with two separate Title deeds.***
(v) ***The Executive officer of the High Court be authorized to sign all the relevant subdivision and transfer documentations should the defendant refuse to do so.***
(vi) ***Costs of this suit be provided by the Defendant.***
(vii) ***Any other and/or better relief that the Honourable court may deem fair and just.***

The Applicant filed a defence to deny the Respondents' claim. The suit was heard by Justice Khamoni who in turn found the case in favour of the Plaintiffs/Respondents. The Honourable judge directed the parcel of Land known as **L.R. NO. MAHIGA/KAMOKO/77** to be sub-divided into two equal portions. It would appear the sub-division known as **L.R. NO. MAHIGA/KAMOKO/1411** went to the Plaintiffs. The Applicant has averred that in the portion which was given to the Plaintiffs, he had planted 1000 coffee stems, 10 avocado fruits and 50 macadamia trees. It is argued that the judgment of Justice Khamoni delivered on

27th November 2006 is silent on who should compensate him for the aforesaid developments. He has now come to this court seeking to be

given the order to compel the Plaintiffs to compensate him. The Applicant has raised grounds which in essence tend to attack the evidence used to award the Plaintiffs/Respondents judgement.

The main ground argued by the Plaintiffs/Respondents against the Summons is that the application is *resjudicata* and that *Section 3A* cannot be used to create a new cause of action. It is not in dispute that the Defendant/Applicant was sued by the Plaintiffs/Respondents over **L.R. NO. MAHIGA/KAMOKO/77**. He defended the suit but he lost the same. The judgment of the honourable Mr. Justice Khamoni led to the sub-division of the aforesaid land into equal portions namely:

L.R. NO. MAHIGA/KAMOKO/1410 and

L.R. NO. KAMOKO/1411.

The Defendant was not happy with the aforesaid judgment. Consequently he decided to apply for review vide the Notice of Motion dated 14th July 2009. The aforesaid Motion was heard and dismissed by this Court on 30th October 2009. The Applicant is now saying that the judgment of Justice Khamoni did not take into account the developments he undertook in **L.R.NO. MAHIGA/KAMOKO/1411**. I have carefully perused the Plaint dated 28th November 1994 and the defence dated 8th December 1994. It is obvious from the above pleadings that neither the Plaintiffs nor the Defendant asked to be compensated for the developments done on their respective portions. The Defendant was enjoined by law to file a counter-claim if he so desired to seek for compensation. Unfortunately he did not do so. In the absence of such a prayer, the Court was not bound to give a gratuitous order. In any case there was no evidence presented to prove such a case. If there was such a prayer, the Court would be enjoined to make a finding. The Applicant is presumed to have known or ought to have known that claims arising out of the suit should be pleaded to avoid parties litigating in piecemeal. In such a case a fresh application will be regarded as being *resjudicata* as it attempts to introduce a new cause of action in a judgment. Judgment was pronounced long time ago. Execution is complete hence litigation must come to an end. With respect, I agree with the submissions of Mr. Macharia, learned advocate for the Plaintiffs that *Section 3A* of the Civil Procedure Act does not apply. It cannot be used to set up new causes of action. The Summons in my view is misplaced. The Applicant is abusing the process of this Court by filing a plethora of applications in a suit which was concluded and he has preferred no appeal at all. At the beginning of this ruling I stated that the Applicant has attacked the basis of the judgment. I cannot go back to the judgment to determine its basis because I am already *functus officio*. This Court cannot sit on appeal in its cause.

The end result is that the Summons dated 8th March 2010 is found to be without merit. The same is dismissed with costs to the Plaintiffs/Respondents.

Dated and delivered at Nyeri this 9th day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of J. Macharia for Respondent and the applicant in person.