



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.717 OF 2005

BENSON NDUNGU KARIUKI.....PLAINTIFF/RESPONDENT
VERSUS
KAMAU KABENU & OTHERS.....DEFENDANTS/APPLICANTS

RULING

1. By a chamber summons dated 25th June, 2010, the applicants who are the defendants in this suit, seek to have the respondent's amended originating summons dated 25th May, 2010, struck out and the suit filed herein dismissed with costs. It is contended that the suit is frivolous and vexatious and a gross abuse of the court process. This is because there is another suit Thika CMCC No.492 of 2002 over the same subject matter i.e. Chania/Ngorongo/11 and that this suit has been determined. It is contended that the current suit is meant to circumvent the orders issued in the Thika Court.
2. The application is opposed through an affidavit sworn by respondent Benson Ndungu Kariuki, who is the plaintiff in this suit. He contends that he was never a party in Thika CMCC No.492 of 2002. He is not therefore aware of the orders issued in that suit. The respondent maintains that he has been in occupation of the suit property for a period of 37 years. He is therefore entitled to be declared the owner of the suit property by adverse possession. He contends that the applicants while filing Succession Cause No.245 of 2001, concealed the fact that he i.e. the respondent was in occupation of the 3 acres of the suit property, and had by then been in possession for a period of 29 years. He therefore urges the court to dismiss the application.
3. I have considered the application and the submissions made before me. I find that although the pleadings in respect to Thika CMCC NO.492 of 2002 have been annexed to the affidavit of Kamau Kabenu, most of the documents annexed are illegible. Secondly, copies of the proceedings have not been annexed. It is not therefore possible for me to appreciate the matters which were substantially in issue in the Thika suit, whether they involved the same parties as the current suit and whether the issues have been substantially determined. Further, the respondent's amended originating summons dated 25th May, 2010, seeks a declaration under Section 38 of the Limitations of Actions Act as read with Order XXXVI Rule 3D of the Civil Procedure Rules. The orders sought are not orders which can be granted by the magistrate's court.
4. For the above reasons, I disallow the application dated 25th June, 2010. I order that costs shall be in the cause.

Dated and delivered this 3rd day of November, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff/respondent absent but the plaintiff present
Ms Maneno H/B for Khaminwa for the defendants/applicants
B. Kosgei - Court clerk