



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Civil Suit 55 of 2006**

**WABULULU MULONGO       : PLAINIFF**

**VRS**

**1. FRANCIS JUMA MUTORO       : DEFENDANTS**

**2. KOROFIA SICHANGI**

**RULING**

The Plaintiff one Wabululu Mulongo filed the suit on 10<sup>th</sup> April, 2006, seeking *inter alia* a Declaratory Order to the effect that the defendants' occupation of land parcel NO.BUNGOMA/KAMUKOIWA/2162 is illegal and unlawful; an eviction order against the defendant and injunctive orders to restrain them from entering or remaining onto that land. His claim is pegged on the registration of himself as the absolute proprietor of that parcel on 3.4.1998.

According to the defendants' however, that title does not exist. The 1<sup>st</sup> defendant's defence is that the said plot actually belongs to him and he is the registered owner thereof. On that basis, the defendants moved the court under order VI rule 13 (1) b, c & d of the Civil Procedure Rules asking the court to strike out or dismiss the plaintiff's plaint. That application is dated 15.3.2007 and this is the ruling in respect of the same. The same is based on the 4 grounds on its face and the affidavit of Francis Juma Mutoro – 1<sup>st</sup> defendant. He has deponed that the land was transferred to him vide Gazette Notice No.6454/1999 which he has annexed to his application. According to the said annexure, the transfer was done pursuant to a court order in Civil suit No.17 of 1999 which ordered that the land in question be transferred to the 1<sup>st</sup> defendant. Indeed, annexure

WM 1 which is annexed by the plaintiff to his replying affidavit supports the applicant's claim that the title in question was transferred to him. According to this annexure, the land was transferred from the 1<sup>st</sup> defendant to the plaintiff on 3.4.1998 and the plaintiff was issued with a title deed the same date. (See entry No.6).

According to the entry No.8 however, entry No.6 was cancelled which means that the said title deed was cancelled and this was done on the strength of Kenya Gazzette No.6454 of 19.11.99.

As of today therefore, in absence of other evidence to the contrary, the land in question belongs to Francis Juma Mutoro (1<sup>st</sup> defendant). This information is actually drawn from the plaintiff/applicant's own annexure. Other than that annexure which is definitely not in his favour, he has not put forward any document to show that the 1<sup>st</sup> defendant was divested of the said title and the same reverted to him subsequently. As things stand now, the 1<sup>st</sup> defendant and not the plaintiff/applicant is the rightful owner of the said land. I wish to mention something on the issue of *Res Judicata* which was raised although the same has no bearing in my finding.

A party who seeks to rely on the doctrine of *Res Judicata* must present to court evidence that the issues raised in the present suit were raised in a previous suit and that the said issues were in respect of the same parties; in respect of the same subject matter; and that they were heard and determined on merit. It is not

enough for a party to just mention a case number and say that the issues were determined in that case. He has to support his claim by annexing the proceedings, order or decree in the previous suit to show that the issues in question were determined. Mr. Waswa's contention that this matter is *Res Judicata* was inconsequential in the circumstances.

My finding nonetheless after a careful study of the entire pleadings before me is that the plaintiff has not shown that he has title to the land in question. He has no leg to stand on and on this ground only, his suit is a non-starter. I appreciate the fact that striking out a suit is a drastic and draconian step which should not be taken unless it is clear that the plaintiff's case is hopeless. Nonetheless, in this case, even if the matter went to full trial, without proof of title to the land, orders of injunction and eviction would never be issued in favour of the plaintiff against the holder of the title to that property. Although the plaintiff refers to an order which rendered the said Gazette Notice obsolete, he did not annex the said order to his affidavit. We cannot assume its existence. As the case stands now, this case has no life. It cannot be sustained. It is my considered finding that it must fail at this stage. I therefore order that the same be and is hereby dismissed with costs to the defendants' respondents. The application dated 15-03-2007 is therefore allowed with costs.

W. KARANJA

JUDGE

DELIVERED, Dated and Signed at Bungoma this 23<sup>rd</sup> day of May, 2008.

In the presence of M/S Mukhongo for Makali for the plaintiff/respondent.