



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 146 of 2007

GABRIEL NGARUIYA MWANIKI PLAINTIFF

VERSUS

JOSEPH WIATIRUKA KAMAU ALIAS

JOSEPH NGOCHI MWANIKI DEFENDANT

RULING

**APPLICATION TO STRIKE OUT SUIT
AND TO ENTER SUMMARY JUDGMENT
NOTICE OF MOTION 25 JANUARY 2008**

I: BACKGROUND

1. On the 29 October 2007, this court heard an application Notice of Motion 21 June 2007 that sought the orders of this court to stay the proceeding of CMCC 398/07 Thika. The parties in that suit and in this present case were the same including the issues therein.

2. The court ruled that the two files be consolidated (Ruling of 1.11.07) Order XI r1 and 2 Civil Procedure Rules. That the proceeding be then proceeded in the High court of Kenya.

3. The CMCC398/07 subordinate court file was called to this High Court and duly consolidated.

4. On the 30 January 2008 the 1st defendant

Joseph Waituka Kamau alias Joseph Ngochi Mwaniki filed application dated 25 January 2005 seeking:-

“that the High Court suit be strike out as being an abuse of the court process.

That Interlocutory Judgment be entered in favour of Joseph Waituika Kamau as prayed in CMCC398/07”.

4. The grounds of the said application is that the respondent did not assert his alleged interest and or

entitlement from 1973 to 2007.

5. It was only when the said respondent was served with proceeding in CMCC398/07 that he filed the second suit.

6. In reply, the respondent states the application was premature. This was a question that is to be determined in the trial.

III: Opinion

7. I hereby find that when the court consolidated this suit on 1 November 2007 that the parties would deal with the matters in question. It appears that instead the applicant has filed this application seeking an Interlocutory application.

8. I wish to point out that in land matters there is no Interlocutory application available under order IXA r 3 and 5 Civil Procedure Rules or IXA r 4 and 6 Civil Procedure Rules. Unless the issue in question is for Contract or Tort respectively then the Interlocutory Judgement is quite clearly not available under the said rules. The suit must be set down for hearing.

9. If in a situation (which is denied in this case) Interlocutory Judgment has been correctly entered in one file, then when the suits are consolidated, that judgment remains in force and is not set to be applied for a second time.

10. I have perused the CMCC file and find there is no Interlocutory Judgment entered.

11. The application herein is rejected. Parties are to proceed to the main suit on the matters in question.

12. The application is dismissed with costs to the respondent original plaintiff in Hccc146/07.

DATED THIS 8TH DAY OF MAY 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

J.M. Njoroge of Muturi Njoroge & Co. Advocates for the plaintiff- present

R.M. Mokaya holding brief for Gathoga Wairegi & Co. Advocates for the defendant/Respondent - present