

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

Civil Suit 639 of 2002

KHIMJI BHIMJI SEYANI 1ST PLAINTIFF

HIRJI KHIMJI SEYANI 2ND PLAINTIFF

KHARSAN KHIMJI SEYANI 3RD PLAINTIFF

VERSUS

WINSTON J. O. OREGI 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

RULING

On 14th January, 2004, this Court delivered a Ruling in which it issued a mandatory injunction against the 1st Defendant, requiring him to vacate the suit property. Soon, thereafter, on 15th March, 2004 the 2nd Defendant (the Attorney General) sought to

“Set aside vary or discharge the order of Mandatory injunction directed at the 1st defendant to forthwith vacate and hand over vacant possession to the plaintiffs/respondents herein of all that parcel of land known as L. R. No.209/3217 issued on 14th January, 2004.”

It is that application that was listed for hearing before this Court on 24th June, 2008 when the Plaintiff/Respondent raised a Preliminary Objection to strike out the Application on the grounds, inter alia, that the matter was res judicata, and that the applicant had no locus standii to bring the said application.

This Ruling is in respect of the said Preliminary Objection. Let me deal with the two issues raised by the Applicant’s Counsel, Mr Kamau.

(1) Res Judicata

Mr Kamau argued that this Court’s Ruling of 14th January, 2004 had determined the issue of ownership, and accordingly this application was res judicata. I would disagree with Mr Kamau’s interpretation of the Court’s Ruling of 14th January, 2004. That Ruling simply dealt with the rights of the Plaintiff vis a vis the 1st Defendant. This is how the Court expressed itself:

“The 1st Defendant was not a lawful tenant. His tenancy was not registered and cannot override the absolute and indefeasible title of the Plaintiffs. He, therefore, does not have any rights that can stand the title of the Plaintiffs.”

That Ruling did not, and was not intended to, deal with ownership claims of other parties. What we now have is the Attorney General asserting ownership rights. The Attorney General was not a party to the suit when the court handed down its Ruling of 14th January, 2004. He now is, and has advanced serious

allegations of fraud that need to be tested at the hearing of the suit.

Accordingly, I hold that this matter is not res judicata, as the claim of the 2nd Defendant's ownership has not been determined, nor was the 2nd Defendant/Attorney General a party to the suit when the previous Ruling was handed down.

(2) Locus Standii

Secondly, with regard to the issue of locus standii, again I disagree with Mr Kamau, and hold that because the suit property belonged to the Government before it was transferred to Mr Peter Magut and then to the Plaintiff, the Attorney General, on behalf of the Government, has every right to question the validity and legitimacy of those transfers, and is entitled to be heard on such application.

Accordingly, I dismiss the Plaintiff's Preliminary Objection with costs to the 2nd Defendant, and I direct that the Attorney General's application dated 15th March, 2004 proceed to hearing before a Judge in the Land Division. I reiterate, as I did on 16th April, 2008, and as Justice Wendo did on 20th March, 2008, that this is a Land matter, and should be heard in that Division. Indeed, Justice Ang'awa has dealt with it partly when she was in the Land Division.

Dated and delivered at Nairobi this 9th day of July, 2008.

ALNASHIR VISRAM

JUDGE