



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 340 of 2003

SAMUEL THACHI WANGI PLAINTIFF

VERSUS

ALEX RIGAGA & OTHERS DEFENDANT

1. Civil Practice and Procedure
2. Land and Environment Law Division
3. Subject of main suit

I: TRESSPASS

- i) The court (Kuloba,J) allowed a Judicial Review quashing orders of a land dispute tribunal at Kiambu No. LND16/20/86/2000 in Misc. H.No.474/01
- ii) The plaintiffs filed land case matter to evict the defendants.

4. Subject of application.

A Application 12.1.006

Filed by 1 and 2 defendants

To strike out plaintiffs suit being res-judicata

B: Application 15 August 2000

To strike out defendant 1 and 2 amended statement of defence and counter claim

Having not been served upon the plaintiffs as required by law

C: Application 18.5.06 by plaintiff

D: Application for injunction dismissed Osiemo J 5.7.06

5. Orders of court: Aluoch J – two application be heard together

6. Inter parties hearing Ang'awa J 27.2.07

7. Held;

The suit and the defence to remain. Parties to proceed to trial where the said issues should be heard. Amended defence be served on the plaintiffs reply to be made within 14 days of service.

8. Case law – Nil

9. Advocates:

G.S.Lange for Macharia Kenneth & Associates Advocates for the plaintiff/applicant

A.M. Macharia for Kihara Mutu & Co. Advocates for the 1st and 2nd defendant/respondent

Wachira Mburu & Co. Advocates for the 3rd and 4th defendant

RULING

1: BACKGROUND

1. The main suit concerns land. The parties had been heard in the Land dispute tribunal at Kiambu Ref. No. LND16/20/86 of 2000. Any decision taken in that tribunal was challenged by the plaintiffs/applicant who then filed Misc. Hccc No.474/01 for a Judicial Review. Kuloba J allowed the judicial review and all the proceedings were quashed.

2. The plaintiff/applicant filed this present suit seeking for orders that defendants are trespassers upon the suit land being LR Kiambaa/Kihara/427.

3. The defendants filed their defence, later amended but failed to serve the same upon the plaintiffs. The plaintiff filed application of 15 August 2005 seeking that the amended defence be struck out and judgment entered in favour of the plaintiff. The defendants counteracted this and filed application 12.1.06 seeking for the plaint to be strike out on grounds that the suit was res judicata (not pleaded in the defence)

4. On 23.2.06 Aluoch J consolidated the two application for hearing.

II Application consolidated

12.1.06 and 15.8.05.

5. The application for striking out the plaint dated 12.1.06 did not plead in its defence that the suit before court was res judicata. The party who relies on a preliminary objection or striking out would normally have pleaded such law in his defence or plaint. The defendants did not do so. The application of 12 January 2006 is hereby dismissed with costs to the respondent.

6. The application of 15.8.05 seeking the striking out of amended defence on ground that it has not been served on the plaintiff by the defendant would have first taken the form of requesting the court

formally for orders that the plaintiff be served with a given time frame, failure to, be served the party be at liberty to apply and seek the striking out of the defence for non-compliance of the court orders.

7. The court makes orders that the defendants files and serve the amended defence upon the plaintiff within 14 days. To this extent the application is refused with no orders as to costs.

8. The parties to proceed to pre trial and thereafter set this suit for hearing.

In summary

9. Application to strike out plaint being res judicata is hereby dismissed (dated 12.1.06) with costs to plaintiff/respondent.

10. Application to strike out amended defence for lack of service is hereby dismissed with no orders to cost. Amended defence be served within 14 days.

Dated this 28th day of February 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

G.S. Lange for Macharia Kenneth & Associates Advocates for the plaintiff/applicant

A.M. Macharia for Kihara Muttu & Co. Advocates for the 1st and 2nd defendant/respondent

Wachira Mburu & Co. Advocates for the 3rd and 4th defendants