



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

**Civil Case 1262 of 2005**

**FRANCIS NJUGUNA MWANGI.....PLAINTIFF**

**VERSUS**

**JOSEPH MAHURO MAINA.....DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendant by way of a Plaint dated 19<sup>th</sup> October 2005 and amended on 26<sup>th</sup> October 2005 seeking declaratory orders as well as a Judgment to be entered against the defendant to give immediate vacant possession of all that property known as LR NO. DAGORETTI/UTHIRU/994 among other prayers plus general damages as well as costs of the suit and interest.

The claim is based on the ground that the plaintiff had purchased the suit property from one Grace Wahu Njau and was registered as the lawful proprietor on 12<sup>th</sup> July 2002. Upon being served with the summons, the defendant filed a defence in which he denied the claim and states in paragraph 5 of the defence that the suit land was sold to him by one Grace Wahu Njau along side with her daughter Mary Wanjiru. He also challenged the plaintiff to produce a Sale Agreement to prove purchase.

By Notice of Motion dated 10<sup>th</sup> March 2006 and expressed to be brought under Order 35 Rule 1 and 2 and Order 6 Rule 13(1) (c) and (d) of the Civil procedure Rules, the plaintiff sought orders for Summary Judgment to be entered against the defendant to give vacant possession of the suit premises being LR NO. DAGORETTI/UTHIRU/994.

The application is based on the ground that he is the registered proprietor of the suit premises having purchased the same from one Grace Wahu Njau on 5<sup>th</sup> July 2002 after which he was assigned on state duties to Belgium. When he came back to Kenya in September 2005, he found that the defendant had constructed thereon 12 houses and was in the process of constructing more houses. The application is also supported by an affidavit sworn by the applicant on 1<sup>st</sup> March 2006.

The Respondent in opposition to the applicant's Notice of Motion herein filed a Replying Affidavit in which he avers that the instant application is res judicata and that the defence filed herein raises triable issues.

The Respondent submitted that the instant application is res judicata as a similar application by the plaintiff had been dismissed by this court (Wendoh J) in her ruling delivered on 10<sup>th</sup> February 2006 in which the plaintiff had sought injunctive orders to restrain the defendant from entering or remaining upon

the suit property being DAGORETTI/UTHIRU/994 until the hearing and determination of the suit.

It is not every matter decided in a former suit that can be pleaded as res judicata in a subsequent suit.

The test whether or not a suit is barred by a doctrine of res judicata is:

**“Is the plaintiff in this second suit trying to bring before the court in another way and in the form of a new Cause of Action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon.”**

If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

In the earlier application the plaintiff sought interlocutory injunctive orders but in the instant application the plaintiff is seeking orders to strike out the defence and enter Summary Judgment.

This application is therefore not barred for being res judicata.

The instant application is brought under the provisions of Order XXXV Rule 1 and 2 and Order Rule 1 and 2 and Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules seeking orders that the defendant's defence be struck out and that Summary Judgment be entered in favour of the plaintiff and against the defendant. The application is based on the ground that the defence as filed does not raise any triable issues.

The summary remedy should only be applied in plain and obvious cases. The Court of appeal in the case of **DHANJAL INVESTMENTS LTD VS. SABAMA INVESTMENTS LTD CIVIL APPEAL NO. 1252 OF 1997** (unreported) said:

**“That if the defendant shows a bone fide triable issue he must be allowed to defend without conditions. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable Cause of Action.”**

In the instant suit the defendant claims to have purchased the portion upon which he has erected permanent structures from one Grace Wahu Njau along side her daughter Mary Wanjiru. The plaintiff also claims to have purchased the suit land from Grace Wahu Njau. Both claim purchasers interest.

There ought to be evidence adduced and to be subjected to cross examination to establish the truth.

Where there are triable issues raised in the application for Summary Judgment there is no room for discretion and the court must grant leave to defend unconditionally.

In the case of **OSODO BARCLAYS BANK INTERNATIONAL (1981) KLR 30 Madan, JA** (as he then was) had this to say:-

**“If upon an application for Summary Judgment a defendant is able to raise a prima facie triable issues, there is no room for discretion. There is only one course for the court to follow – i.e. to grant unconditional leave to defend”.**

I am satisfied that the defence filed herein raises triable issues. I therefore dismiss the plaintiff's application and grant the defendant unconditional leave to defend.

Costs to the Respondent.

Dated at Nairobi this 9<sup>th</sup> day of March, 2007.

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**J.L.A. OSIEMO**

**JUDGE**