REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Suit 33 of 2006

BENARD MUTALI…….PLAINTIFF

V E R S U S

VERONICAH NAMALWA……..……..DEFENDANT

R U L I N G

The Defendant/Applicant filed the application dated 13/7/2006 under OVI Rule 13 (1) (a) and (d) of the C.P Rules and Sec.3A and 6 of the Civil Procedure Act Cap 21 of the Laws of Kenya

ng the following orders: -

1. That the suit herein be struck out with costs for disclosing no reasonable cause of action and for being an abuse of the Court Process.

2. That the costs of this application be borne by the Plaintiff.

The same is premised on the 3 grounds on the face of the application and on the supporting affidavit of STEPHEN JUMA SAENYI.

Before I go into the gist of the application, I wish to point out that ground © is misplaced as it relates to a totally different Order and Rules of the Civil Procedure Rules which the applicant has not cited along with the other provisions of the Law he is relying on. If the counsel wanted to move the court to strike out the plaint for failing to comply with OVII Rule l (2) of the C.P Rules, then he should have included that provision along with OVI R.13 (1) a and (d) and Sec.6.

-He cannot arise it as a ground to have the application struck out under OVI R. 13. C.P Rules or Sec. 6 of the Civil Procedure Act. I will not therefore consider that as a ground in this application.

The application is opposed by the Plaintiff/Respondent vide his replying affidavit dated 9/11/2006. Counsel for the Defendant asked the court to ignore this affidavit since the same was served upon them less then 3 clear days before the hearing of the application. As rightly stated by Mr. Wambura for the Respondent however, counsel referred to the affidavit in question in extensor. He should have objected to the same before the application was heard and not after referring to the same. I agree with Mr. Wambura on that point. The late service of the replying affidavit should have been raised before the same was referred to. This would have enabled the court to make its finding on the same early enough before the contents of the affidavit became part of the record. I cannot ignore the same after arguments have been

heard on its contents. I will therefore consider it along with its annexures.

I have considered the application before me along with both affidavits for and against the same. On the issue of a similar matter having been filed earlier, the court rules that both parties are in agreement that S.P.M.C.C. No.59 OF 2006 was withdrawn pursuant to Order XXIV Rule 1 of the C.P Rules. Both parties also agree that it is only the costs which remain unpaid and that is the only part of the suit that is still pending. A discontinuance or withdrawal of a suit under O XXIV r.l of the Civil Procedure Act does not bar a party from filing a similar suit thereafter. If the costs of the previous suit have not been paid, the Defendant can only resort to O XXIV Rule 4, which provides:

"***If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid."***

The Defendant/Applicant's only recourse is to ask the court to stay the hearing of the subsequent suit until payment of the costs but not to ask for its dismissal. The filing of this suit was not duplicity of suits like in Kitale H.C. Civil No.136/2005, which I was referred to by applicant's counsel. In that case, the earlier suit had been heard and finalized. In our case, the earlier suit was withdrawn. There lies the difference.

This brings me to the 1st ground - i.e. the issue of the lack of the Land Control Board Consent.

Annexure 'BMI' is a letter of consent from the Kwanza Land Control Board in respect of the Plot in question.

The same is indicated as a consent to transfer' whether the same was sufficient for sub-division as well as transfer is definitely an issue of evidence. With this consent in the hands of the Plaintiff.

It cannot be said that his case does not disclose any reasonable cause of action. My view is that he does have an arguable case and he should not be removed from the seat of Justice at this early stage. He should be allowed the opportunity to ventilate his case and for him to adduce evidence to show that he has the requisite consent from the Land Control Board to warrant the transfer of the said plot to him. The defendant will also have the opportunity to call evidence to rebut the Plaintiff's claim. This can only be done if the matter gives to full hearing. The court should only invoke the provisions of O VI r. 13 if the Plaintiff's case is so hopeless that it literally lacks the 'legs' to stand on. The same must be shown to be so hopeless that no amount of resuscitation can give it live. Where it is clear to the court that a suit has no life whatsoever and that dragging it to a full hearing will just be a time wasting Exercise, then the court will be in order to guillotine such a case before the same goes to hearing.

In this case however, the Plaintiff has established that he has an arguable case and that he deserves his day in court. For

these reasons, I find the application dated 13/7/2006 devoid of merit. The same is hereby dismissed with costs to the Plaintiff.

W. KARANJA

JUDGE

Delivered, Signed and Dated at KITALE this 10th Day of July, 2007.

In presence of: - Wambura for plaintiff

Saenyi for Defendant

FRED A. OCHIENG

JUDGE