REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 201 of 200

JOSEPHAT SUPARE OLE SAKUNDA & 10 OTHERS ……..…PLAINTIFFS

VERSUS

HARISON MUSAU …….....…….1ST DEFENDANT

FLORA WAKESHO MWAU ……..…….....……....2ND DEFENDANT

RULING

There is an application herein dated 30th April and filed in Court on 2nd May 2007 by the defendants/respondents which seeks the striking out of an Originating summons dated 22nd February and filed in Court on 23rd February 2005.

The grounds set out on the body thereof and upon which the application is based are that the Originating Summons upon which the application is drawn and filed is fatally defective for want of compliance with the mandatory provisions of the law, that the same is *res judicata* by virtue of another suit, namely ***HCCC No. 924 of 2004*** decided earlier, that the entire suit was scandalous, frivolous and vexatious and that suit is an abuse of the Court's process and/or intended to prejudice, embarrass or delay the fair trial of the action.

Apart from these grounds, there was also a supporting affidavit whose averments were deponed to by the 2nd defendant/respondent.

She stated that she, together with her deceased husband; they are registered proprietors of all that property known as ***L.R. No. 13869,*** (hereinafter referred to as "***the suit property***").

That on 31st August 2004 the 2nd defendant, deceased, filed a suit by plaint together with Chamber Summons application seeking, *inter alia* a mandatory injunction to compel the defendants, their servants and/or agents to immediately and unconditionally vacate the suit property.

That on information received from her advocate, which information the deponent believes to be true, on 12th September 2004 the ***Honourable Mr. Justice Kihara Kariuki*** ordered the defendants therein, their servants and/or agents to immediately and unconditionally vacate the suit property.

That still on information received from her advocates which the deponent believes to be true, the matters substantially in issue in this suit have been heard and determined in ***HCCC No. 294 of 2004*** by the said

Judge and as such this suit is *res judicata* and that it ought to be struck out.

According to the deponent, the Originating Summons filed herein was neither accompanied by a supporting affidavit nor was a certified copy of the title to the suit property annexed thereto.

The deponent has been advised by her advocates, which advice she accepts as true that by reason of the matters she has deponed to, the Originating Summons as drawn and filed is incompetent for want of compliance with mandatory provisions of the law and ought to be struck out.

In a replying affidavit deponed to by the 1st plaintiff/applicant, ***Josephat Supare Ole Sekunda*** and filed in Court on 3rd October 2007 he states that the application had been filed in Court in extreme bad faith and with the sole purpose of derailing the hearing and final determination of the matter on merit.

That on information received from his advocates which he believes to be true, when this matter was mentioned in Court on 26th March 2007 before ***Honourable Justice Kihara*** directions were taken by consent and it was agreed that the plaintiffs' pending application for contempt dated 7th September 2005 be withdrawn to pave way for this matter to go for full trial. That it was agreed further that the respective advocates would exchange the list of authorities and bundle of documents and that the matter would be mentioned before the Duty Judge for further directions on 30th April 2007.

That the said list of documents and bundle of documents were exchanged and that when the matter was mentioned before ***Justice Aganyanya*** on 30th April 2007 for further directions, a hearing date was fixed for 4th July 2007.

That before the hearing date a foresaid the defendant filed the current application on 2nd May 2007 with no other reason in mind other than derailing the hearing already scheduled.

That on advice from his advocates which he believes to be true, all the grounds raised in the current application can and should be raised during full trial of this matter on merit.

That further the issue raised in the Originating Summons are weighty and involve a valuable piece of land and the same cannot be determined on an interlocutory application without the benefit of oral evidence tested by cross-examination and that the grant of the application would visit a great injustice as the respondent will be condemned unheard.

Counsel for the parties appeared before this Court on 9th October 2007 to make submissions on the application.

Mr. Odera for the defendant/applicant submitted for his client and relied mainly on the grounds set out on the body of the application and the averments in the supporting affidavit.

That there was no affidavit to support the Originating Summons though there was one in support of the Chamber Summons application for an interlocutory injunction.

That the present suit by Originating summons is an abuse of the Court process as it is *res judicata* in view of the conclusive determination made by ***Honourable Justice Kihara Kariuki*** in ***HCCC No. 924 of 2004*** on 12th September 2004.

That that suit related to the same suit property herein and that the plaintiff in the previous case is the 1st defendant in the present application.

Mr. Mburugu for the plaintiff/respondent opposed the application and also relied on the replying affidavit. He reiterated that the intention of the present application was to delay the determination of the Originating Summons.

According to him if the Originating Summons had been heard as scheduled on 4th July 2007 the whole case would have been disposed of.

That the issues raised now should have been raised in the year 2005 because the existence of ***HCCC No. 924 of 2004*** was within the applicants' knowledge then.

That parties had made discoveries and exchanged authorities only to come back to this application which is taking the Court for a ride.

That the affidavit in support of the application for an injunction had a paragraph (20) in support of the Originating summons; therefore it is not true that there was no supporting affidavit for the latter.

According to counsel, the defendants/applicants reference to ***HCCC No. 924 of 2004*** is irrelevant because it has no bearing to the Originating Summons.

That the plaintiffs in the present case were not parties to the earlier case which in any case is still pending and no final judgment had been given therein. That they were not served with the Court process (documents) in the earlier suit hence the doctrine of *res judicata* cannot apply.

He urged the Court to dismiss the application with costs.

I have heard and recorded these submissions, ably articulated by counsel. But before going into the merits of those submissions, there is a consent order on this file dated 26th March 2007 and made by ***Honourable Justice Kihara Kariuki.***

It is in the following terms:-

"***By Court, orders by consent***:

1. That the plaintiffs' notice of motion filed on the 8th September 2005 be and is hereby deemed to have been withdrawn with no order as to costs.

2. That the parties do complete discoveries and inspection and do file and serve their respective bundles of documents within the next twenty one days hereof.

3. That the plaintiff's do serve draft issues within the next ten (10) days hereof, that defendants do return such draft issues duly approved (with or without amendment) within seven (7) days of service that the plaintiffs do file and serve the agreed issues within seven days of service of the approved draft issues.

4. That the suit be listed for mention before Aganyanya J, the Presiding Judge of the Lands & Environment Division of the Court on the 24th April 2007 at 9.00 a.m. to confirm that the parties have complied with the orders hereby made and subject thereto, for direction on the hearing of the suit on a priority basis."

Counsel for the parties signed this consent order and thereafter the Judge concluded with the following remarks:-

"***By Court: Orders by consent on terms set out herein above be and are hereby entered or recorded accordingly***"**.**

Then the Judge signed at the end thereof.

On 24th April 2007 the matter was listed before me and I fixed the main suit for hearing on 5th July 2007 to be heard by any Judge in the Land & Environment Division because it was to be accorded a priority

date.

But when the case came up for hearing before me on that day I discovered there was this application dated 30th April 2007 and without raising any query, I heard it.

I wish, however, to make a few remarks over this, in that when counsel for the parties together with the Court record a consent order as that made on 26th March 2007 followed by an order of 24th April 2007 which fixes a hearing date for the main suit, one of them should be daring enough to make an intervening application like the present one based on the grounds, one of which is that "***the suit is an abuse of the process of the Honourable Court and/or is intended to prejudice, embarrass or delay the fair trial of this action".***

There is no action on the part of the parties through counsel more prejudicial, embarrassing, delaying, vexing or abusive of the Court process than back-tracking on an earlier recorded agreement to withdraw or dispense with all intervening applications in favour of hearing the main suit. I believe and do hope that such agreements should be adhered to in future.

No explanation or reason is given by counsel for the applicant during the submissions for saying that the entire suit and Originating Summons is scandalous, frivolous or vexatious.

Can we call the action herein by Originating Summons as lacking any seriousness, defamatory or lacking sufficient grounds? Not really at this stage; until the Court hears all the evidence or submissions that appertains to the main application.

The principle of *Res judicata* is provided for under Section 7 of the Civil Procedure Act. This Section provides as follows:

"***(7) No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such suit has been subsequently raised, and has been heard and finally decided by such Court".***

The applicants' counsel has referred to ***HCCC 924 of 2004*** and said by virtue of it having been conclusively determined by ***Honourable Kihara*** then the present suit is *res judicata.*

But that case has not been concluded because the ruling ***Honourable Judge Kihara*** made thereon was on an interlocutory application and that a final decision on the main suit is still awaited. This is what the last sentence in Section 7 talks about.

Moreover, apart from the 1st defendant who was the plaintiff in the suit cited, all other parties to the present Originating Summons were not parties to that suit – (see explanation 6 of Section 7 aforesaid).

Is the Originating Summons fatally defective for want of a supporting affidavit in terms of section ***XXXVI Rule 3(d)(2)*** of the Civil Procedure Rules?

It states:

"***3(3)(2) The Summons shall be supported by an affidavit to which a certified extract of title to the land in question has been annexed***."

Counsel for the applicant says there was no such compliance while counsel for the respondent submits that there was such compliance and refers the Court to paragraph 20 of the supporting affidavit to the Chamber Summons application for injunction which was filed at the same time as the Originating Summons.

That paragraph states:-

"***That I swear this affidavit in support of the Chamber Summons and Originating Summons annexed hereto."***

Indeed on this affidavit are annexed a grant issued in the name of the defendants by the President of the republic of Kenya

deed plan of the area allocated as well as a verifying affidavit. Largely these annexures comply with the provisions of *Order XXXVI Rule 3(d)(2)* of the Civil Procedure Rules and the Plaintiff Counsel's arguments that the Originating Summons and the application for injunction were filed in Court in a hurry due to the urgency of the matters involved gives some justification for the poor arrangement of the supporting affidavit and annexures.

I am aware that in general, the court's primary duty and aim is to sustain rather than to terminate a suit, and that pleadings can only be termed frivolous and vexatious if the case disclosed therein is obviously and plainly unsustainable see The Supreme Court Practice 1988, Volume 1, paragraph 18/19/14; *Wenlock v. Moloney (1965) 1 W.L.R. 1235* and *D.T. Dobie v. Joseph Mbaria Muchina C.A. 37 of 1978.*

I do not think this is the case with the Originating Summons filed herein on 23rd February 2005. If anything it is very vexatious for a party to file the application subject to the present ruling after the consent order and directions recorded by ***Judge Kihara Kariuki*** on 26th March 2007.

I dismiss this application with costs.

Delivered, dated and ***signed*** at Nairobi this 24th October 2007.

D. K. S. AGANYANYA

JUDGE