



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

Civil Appeal 11 of 2005

JOHN NDUNGURU & 3 OTHERS..... PLAINTIFFS

VERSUS

SAMUEL GAKUYA & 5 OTHERS..... RESPONDENTS

R U L I N G

This Chamber Summons, under Order 39 Rules 1,2,3 & 9 of Civil Procedure Rules; Sections 3A and 63(c) and (e) of Cap. 21, filed on 26/8/05, seeks restraining orders against the appellants/respondents and/or their servants/agents from: interfering with the administration, religious functions, funds and/or accounts and Plot No. 600 Ngei II, Huruma Estate; entering or remaining upon the said plot pending the hearing of the appeal herein. That the OCPD, Kasarani Division, do supervise the enforcement of these orders.

The application is supported by an Affidavit by Arch Deacon Wilson Muchai, one of the Trustees of the AIPCA, dated 26/8/05.

In opposition, the Respondents, **aver**, in Johnson Ndunguru's Replying affidavit dated 7/9/05 and filed on 8/9/05 that they are the Registered proprietor of the suit premises – plot No. 600 Ngei II on behalf of AIPCA; that the **exparte**, manner in which the applicants were enjoined as interested parties is an issue at the appeal herein, that this application, dated 26/8/05, is a Replica of the Notice of Motion dated 14/1/05 and therefore this application is **Res Judicata**; that they have never been involved in unlawful activities; that paragraphs 14 and 15 of the Supporting Affidavit are hearsay and should be expunged as they offend Order 18 Rule 3 of the Civil Procedure Rules.

I have carefully considered the pleadings and submissions by counsel for both sides.

I begin by rejecting the Respondents' submissions that paragraphs 14 and 15 of the Supporting Affidavit, by Archdeacon Wilson Muchai, dated 26/8/05 are hearsay and offend Order 18 Rule 3, for non-disclosure of the source of information. The two paragraphs clearly state that it was a Mr. John Muiruri who supplied the information to the deponent of the affidavit. To that extent, there is a clear intention to mislead this court by denying that which is in black and white.

The Respondents contention that the application herein is **Res Judicata** is as misconceived as it is a deliberate attempt to distort the law on the subject, as per Section 7, explanation 4 of Cap. 21, Laws of

Kenya, The Doctrine of **res judicata**, as per Section 7 of Cap. 21, Laws of Kenya provides:

“No court shall try any suit or issue on 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 the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The doctrine is elaborated by some (6) six explanations, the relevant one for my Ruling here being explanation No. 4, which provides:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

From the above, it is evident that the principle can only apply to issues or matters which have been, or ought to have been raised in a past dispute between the parties. The future cannot be decided upon until it is with us.

In the application before me, the activities sought to be restrained, as per the Supporting Affidavit of Archdeacon Wilson Muchai, took place on 21/8/05, while the application in which there is alleged to have been determined was in an application dated 14/1/05. In my view, even if the issues in that case are similar to those of 21/8/05, clearly they preceded the current activities, which had not taken place, and which could therefore not have been adjudicated upon before they arose.

Though the issue of the proper proprietor of the suit premises is a subject of determination on merit, at the appeal, it should be stressed that ownership is not necessarily concurrent with occupation or possession of the plot. Both the subordinate court and this court, vide Visram, J’s Ruling of 2/3/05, found and held that the applicants herein have always had the control of the suit, as opposed to the Respondent/Appellants who could not show that they were in possession or occupation of the suit plot.

For all the above reasons, this court grants the orders prayed for in the Chamber summons herein, dated 26/8/2005.

DATED and delivered in Nairobi, this 29th Day of May, 2006.

O.K. MUTUNGI

JUDGE