



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

Civil Case 427 of 1997

DANIEL MAINA THUO PLAINTIFF

VERSUS

ZAKARIAH MAINA THUO DEFENDANT

RULING

The defendant moved the court to have this suit struck out, “*as the matter directly and substantially in issue has been litigated between the parties in a former suit between the same parties and has been heard finally and decided by a court of competent jurisdiction*”. The defendant’s affidavit supported the application to court. It gave the history of the litigation that has gone on so far between the parties.

The affidavit was sworn by Zakaria Maina Thuo, on 23rd May, 2005.

Annexed to the affidavit was a court order issued on 1st April, 2005, by the Resident Magistrate, Naivasha, adopting the decision of the Land Dispute Tribunal Case No. 8 of 2002 between the parties (Zakaria Maina Thuo) and (Daniel Maina Thuo) as “*the judgment of the court*”.

The court granted a further order, an injunction to restrain the respondent (Daniel Maina Itumu), from “entering, interfering or in anyway alienating or committing acts of waste in the applications land parcel No. NYANDARUA/NYANDARASI/89 or at all”.

It was respondent in that suit, Daniel Maina Itimu, who is the plaintiff in this suit, who had filed the present suit claiming,

“a permanent injunction restraining the defendant (Zakariah Maina Thuo) from interfering, wasting, damaging, alienating or wrongful selling the plaintiff’s land being NYANDARUA/NYANDARUA/94”.

He had also prayed that the matter be referred to arbitration under the Lands Dispute Tribunal Act, which was done and the award taken to the Magistrate’s court and was finally made a judgment in this dispute as I have stated above.

The plaintiff did not file a replying affidavit to the present application of 23rd May 2005. The reason given before me was that he had had a stroke.

Counsel for the defendant objected to that reasoning as the same had been given in court before, and

no action was taken thereafter by his lawyers on record.

Indeed I scrutinized the court file and found that the application was tabled in court on 14th November, 2005, for hearing when the same advocate for the plaintiff told court that his client had had a stroke, and **“was unable to proceed.”**

The court adjourned the application. Another date was taken in the Registry and once more the matter could not proceed.

When the application was tabled before me for hearing on 23rd March, 2006. Counsel for the plaintiff requested for an adjournment giving the same reason.

I declined to grant an adjournment because I considered that counsel for the plaintiff had had sufficient time to have a power of Attorney executed on behalf of his client to enable another person to take over the suit on behalf of the plaintiff.,

Besides, when I read the pleadings on record so far, I found that this case had been referred to Arbitration under the Lands Dispute Tribunal’s Act, as prayed in the plaint, and a decision from the Tribunal had been taken to the Magistrate’s court, and the same confirmed as a Judgment. In the circumstances, I did not find it necessary to delay the proceedings any further, as the plaintiff never appealed against the Magistrate’s order, confirming the award as the judgment in this dispute. In view of this, I have decided to grant prayers 1,2 and 3 in the Chamber Summons application dated 23rd May, 2005.

Dated at Nairobi this 19th day of May, 2006.

JOYCE ALUOCH

JUDGE