

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 510 of 2004

GIKERA MUNENE..... PLAINTIFF/RESPONDENT

VERSUS

MWANGI NGURO.....1ST DEFENDANT/APPLICANT

THE CITY COUNCIL OF NAIROBI..... 2ND DEFENDANT/APPLICANT

DISTRICT LAND REGISTRAR..... 3RD DEFENDANT/APPLICANT

THE COMMISSIONER FOR LANDS..... 4TH DEFENDANT/APPLICANT

RULING

In his application brought by way of a Chamber Summons dated 13th July 2004 under Order XVI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the 1st Defendant/Applicant seeks orders for the striking out of the Plaintiff's suit against him on the grounds:

- a) That the Plaintiff's suit against him is scandalous, frivolous and vexatious*
- b) That the suit is an abuse of the process of the Court.*
- c) That the issues canvassed in the matter have already been dealt with by this Court in another matter namely, H.C.C.C. No.645 of 1997 and the suit is therefore res judicata.*
- d) That the 1st Defendant's registration as the proprietor of the leasehold property, the subject matter herein cannot be cancelled, and the register in respect thereto is not capable of cancellation.*
- e) That prayers sought in the Complaint cannot be granted as prayed or as framed.*
- f) That the suit is fatally defective.*

In his submissions during the hearing of the application Counsel for the applicant emphasized mainly on the issue of res judicata and the procedural defects of the suit. He did not address other issues particularly as relates to the orders sought herein which on the face relate more to the user of the suit premises by the 1st Defendant more than anything else. The ownership of the plot is not in issue as was the case in H.C.C.C. No.645 of 1997. The Respondent has clearly demonstrated the threat posed to his own investment by the intended development of the 1st Defendant's plot. The injury and prejudice which would occasion the Respondent is clearly supported by the 2nd and 3rd Defendants in the annexures GM2 and GM3 to the Plaintiff/Respondent's Replying Affidavit to this application, which annexures have not been controverted.

I find that the Plaintiff/Respondent has a reason to join the 1st Defendant in this suit since the orders as would be made against the 2nd 3rd and 4th Defendant would affect him directly. The Plaintiff's suit cannot be said to be lacking in merit in view of the evidence on record. The judgment in H.C.C.C. No.645 of 1997 did not place a bar to the power of the Government to compulsorily acquire the land herein for the purposes for which it was initially intended prior to the "erroneous" allocation to the 1st Defendant, which can still be done provided that the proper procedure as relates to due compensation is followed. Noting that the prayers sought are really intended for the preservation and upholding of the Plaintiff's rightful and beneficial user of his own land I am of the view that the suit ought not to be struck out on the

grounds put forth in this application. The Court will not play “Robbin Hood” and take away one citizen’s right to benefit another. That would not be equity. The matter is clearly not res judicata since ownership is not the issue here. The Plaintiff has a reasonable cause of action against the 1st Defendant notwithstanding that his prayers may be improperly framed. I therefore refuse to grant the application and dismiss the same but with no order as to costs. The Respondent may wish to consider amending the Plaint in view of the procedural defects noted.

Dated, Signed and Delivered at Nairobi this 8th day of June 2005

M.G. Mugo

Judge

In the presence of

Mr. Mbugua h/b for Kanyangi: For Plaintiff/Respondent

N/A : For 1st Defendant/Applicant