

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 72 OF 2003

**ULUNGALU NA UTANU YATTA TRADING INDUSTRY & TRANSPORT CO.
LTD.....PLAINTIFF**

VERSUS

FRANCIS MUTUA MBOYA P/A

MUTUA MBOYA & CO. ADVOCATE & ANO...DEFENDANTS

R U L I N G

The chamber summons dated 24.9.2003 was coming up for hearing but counsels for 1st defendant/respondent and 2nd defendant/respondent raised Preliminary Objections. Counsel for 2nd defendant/respondent filed his Preliminary Objection on 7.10.2003 to the effect that the whole suit is an abuse of the court process as it seeks judgment in respect of another suit which is already pending before the court.

On 11.11.2003 counsel for 1st defendant/respondent also filed a preliminary objection to the effect that the application by applicants does not comply with provisions of section 6 and 34 of civil procedure Act and offends the subjudice Rule.

The preliminary objections were argued by one counsel who held brief for the counsel for 2nd defendant. The reasons for the preliminary objection are that there is a civil suit no. 82/02 pending before this court whereby the parties are the same as in the present suit, issues and prayers are the same as they are in respect of legal ownership of land parcel Machakos/Matuu/594 and it is also admitted in the present suit at paragraph 11 that civil suit no. 82 of 2002 in respect of same parties and issues is still pending. They pray that the whole suit be struck off.

The preliminary objection was opposed. Whereas it is not denied that the 2 suits HCCC 82/02 and the present are in respect of same parties and same subject matter but the plaintiff seeks to set aside a consent judgement recorded in HCCC 82/02 as the present 2nd defendant purported to enter appearance for defendants in HCCC 82/02 without their authority and knowledge which was fraudulent. He contends that this suit challenges the consent order but not necessarily ownership of the land. He can opt to challenge it by way of review in HCCC 82/02 or being a fresh suit. He realized that there will be a problem with review because of the appearance entered by 2nd defendant in HCCC 82/02. He said that the 2nd method of filing a fresh suit is recognized by law and cited the case of Muniyiri versus nduguya 1985 KLR 370 and Halsbury's Laws versus 22 page 792 which are adopted by our courts by virtue of section 3 of the Judicature Act.

It is not in dispute that the parties in HCCC 82/02 are the same as the parties in the present case. The present plaintiff was the 2nd plaintiff in HCCC 82/02. 1st defendant in this case was 1st plaintiff in HCCC 82/02. 2nd defendant in this case acted as counsel for defendants in HCCC 82/02. HCCC 82/02 is a claim for general damages and prayer for injunctions against defendants who are said to be directors of 1st plaintiff in this case and were named as defendants in HCCC 82/02 to be restrained from interfering with 1st plaintiff's plot no. 594 and interfering with affairs of the plaintiff herein.

In the present case the prayer sought in the plaint are a declaration that the appearance and defence and consent order in HCCC 82/02 a nullity and restraining the 1st defendant from interfering or in anyway dealing with the plot Machakos/Matuu/594. The property in issue in the both suits is the same. The suits are interrelated the main issue being ownership of plot no. 594.

In the present suit the plaintiff wishes to have a consent judgement set aside. Section 67 Civil Procedure Act is clear, that a consent judgement cannot be set aside by way of appeal. However it can be reviewed under order 44 Civil Procedure Rule.

Counsel for the plaintiff cited supreme court practice 1982 vol. 5 in which it is stated at paragraph 13/9/9 “It would appear that a judgement by consent cannot after it has been passed and entered, be set aside.....but it can be set aside in a fresh action for the purpose on grounds that would suffice to set aside a contract.”

This was adopted in the case cited by counsel Munyiri versus Nduguna 1985 KAL 370 where court of appeal held that the remedy open to the parties was to set aside the consent order either by review or by bringing of a fresh suit as a court can only interfere with a consent judgement in such circumstances as would afford a ground for varying or rescinding a contract between the parties.” The plaintiff in this case has got two options in which to have the consent judgement set aside by way of review or bringing of a fresh suit. I believe that if plaintiff sought a review, it would be cheaper and more convenient for the parties. However, in this case I agree with the plaintiffs predicament that the counsel on record for the defendants in HCCC 82/02 who purported to appear for the defendants therein and entered into the consent is the one they are challenging his appearance and defence in that file. He cannot be counsel in the same file and a defendant. I do find that the plaintiffs had an option to make as to how to go about seeking to set aside the consent order in HCCC 82/02 and chose to file a suit which is within their right to do. The present case does not therefore offend the subjudice rule and for the above reasons the preliminary objection has no merit and it is dismissed with costs to the defendants/respondents.

Dated, read and delivered at Machakos this 25th day of January, 2004.

R. WENDOH

JUDGE