



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
CIVIL CASE NO. 174 OF 1999**

**KATUA NTHIWA ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**NDAKA KIOKO ::::::::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

The plaintiff/applicant filed a suit against the defendant seeking orders of exclusive possession of the suit land known as MACHAKOS/ULU/2; an order of eviction against the defendant and any other person claiming under the same title as the defendant; General damages for trespassers, costs and interest. The allegation is that the defendant and his family are trespass on the said land. The defendant filed a defence dated 14.6.1999 and the plaintiff applicant has filed an application dated 9.5.2000 seeking to have the said defence struck out and judgement be entered for the plaintiff as prayed in the plaint. It is premised on the grounds that the plaintiff is the registered absolute proprietor of the said land and that the plaintiffs title can not be defeated by virtue of Section 27 and 28 if the Registered Land Act and the defence filed is frivolous and vexatious and meant to delay and embarrass the trial of this matter and that the suit pending before Senior Principal Magistrate's Court is not within the pecuniary jurisdiction of that court as value of the land is 1 million and this suit can not be heard by Land Disputes Tribunal. An affidavit in support of the application was filed by the applicant Katua Muthama. From the affidavit he adds that this land was not ancestral land as it originally belonged to one Fob Wilson who rewarded his former employees in lieu of terminal benefits and applicant was issued with the title deed annexed as KM1: That he sued the defendants before the District Officer in 1985 as per summary annexed as RM 2, and that the matter had also been presented before the chiefs for arbitration as per annexures RM3 and 4. counsel for respondent objected to the two annexures which were written in Kikamba language and the translation done by Mr. Mulwa who is counsel for the applicant. I do uphold that objection. The translation should have been done by another independent party not a counsel interested in this case. The court will disregard the two annexures.

According to the replying affidavit filed by respondent, they have been on the land since 1965 and that the plaintiff/applicant is only registered as a trustee. He also depones that another case is pending as between the parties SPMCC 102/90 regarding the same issue, and that this case is an abuse of court process.

As regards the case allegedly pending before the lower court, it seems the applicant does not deny that it is still pending. The applicant's contention is that that court has no pecuniary jurisdiction as the land is worth 1 million Kenya shillings. If that be the case, that court has jurisdiction in that the Chief Magistrate has pecuniary jurisdiction of 3 million Kenya Shillings. Section 6 of the Civil Procedure Act provides that no court shall proceed with the trial of any suit which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. A suit is pending before Chief Magistrate's Court SPMCC 102/90 which was filed before this case. This case was filed in 1999 and it would only be proper that the court do proceed with the suit filed first.

The plaintiff is indeed the registered proprietor of the suit land. There is a copy of Title Deed annexed. The said title is indefeasible as per Section 27 and 28 of Registered Land Act. However there is a proviso to Section 28 Registered Land Act, that it is subject to any duty or obligation as a trustee. In the present case the defendants defence is that the plaintiff holds the land as a trustee. This can only be proved by way of evidence being adduced not summarily as requested by applicant.

It seems there has been a long standing dispute over the said land. The plaintiff annexed a summons to defendants father to appear before the District Officer, annexure RM 2 but the outcome of the said

summons is unknown to the court. No award by the District Officer is annexed.

The defendants also plead issue of limitation. This suit was filed in 1990 whereas they seem to have settled on the land since 1965. That has to be determined at the hearing.

As to whether the land was given to the plaintiff by one Fob Wilson the court would require records held at Land registry prior to the registration of plaintiff as proprietor. That will be by way of evidence.

The upshot is that this is a land matter that would require adduction of evidence for justice to be done. The defence also raises triable issues that can only be determined at a full hearing. There is also the question of whether this case can proceed before the one pending in lower court. This application is therefore not merited. It is dismissed with costs to defendants/respondent.

Dated, read and delivered at Machakos this 28th day of April, 2004.

**R. V. WENDOH**

**JUDGE**