

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 82 OF 1999

JUSTUS NGILA MOSA.....PLAINTIFF

VERSUS

ALEXANDER MUTUKU MUTHINI &

FRANCIS MANTHI MASIKA.....DEFENDANTS

R U L I N G

The 2nd defendant applicant filed the amended chamber summons dated 14.2.2002 seeking orders that the plaintiffs case be struck off with costs since it does not disclose any cause of action as it is res judicata and that costs be awarded to the 2nd defendant.

The grounds upon which the application is brought are that this matter is Res judicate since HCCC 261/96 had earlier been filed which involved same parties, same subject matter and same issues and that the matter was determined on 21.1.1999. That a preliminary objection was raised on 10.12.1998 that the suit was time barred which objection was upheld by the court and the suit was dismissed; that the pleadings do not disclose any cause of action as the 2nd defendant/respondent is the registered owner of the lease hold property known as Machakos Town Block 1/511 Mrs. Nzei for the 1st defendant associated herself with the submissions of counsel for the 2nd defendant. 1st defendant had also raised a similar preliminary objection in their defence at paragraphs 4 and 5. The plaintiff did not file any affidavit or grounds in opposition to this application. He said that there are new issues raised in the suit and that the ruling on preliminary objection was appealed against. If there was such an appeal, that Court of Appeal's decision should have been availed to the court or pleaded it in the plaint.

As regards the question of whether new issues have been raised i.e. fraud and development of the plot by the plaintiff, these are issues that should have been raised in the earlier suit because they had arise. They have not arisen after the striking out of the suit. They would still be part of the suit that was struck out for being statute barred. The plaintiff brought this suit to court because the land had allegedly been fraudulently sold to 2nd defendant. It is not a new issue.

I have had a look at HCCC 261/96 and it is a fact that the plaintiffs suit was dismissed on 21.1.1999 for being statute barred. By filing a similar suit this amounts to the plaintiff abusing the court process.

The order of dismissal has not been set aside or appeal against the suit stands struck off with costs to the 1st and 2nd defendants.

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

R. WENDOH

JUDGE