

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 24 of 1990

PHILIP KITOO & OTHERSPLAINTIFF

VERSUS

MWAKINI RANCHING SOCIETY & OTHERS.....DEFENDANT

R U L I N G

The plaintiff/applicant brought this application dated 26.4.2004 pursuant to Section 3A Civil Procedure Act, Order 39 Rule 1(a) 3(1) and 9, Order 50 Rule 7 Civil Procedure Rules. The applicant seeks an order of injunction the plaintiffs from Mwakini Farming Group pending determination of this suit. to issue against the defendant respondent restraining 1st and 2nd respondents from evicting

The respondents filed a replying affidavit in opposition to the application and a notice of preliminary objection dated 4.5.2004. The preliminary objection was fixed for hearing on 22.9.2004. Mr. Kakonzi for applicants was not present in court. The court proceeded to hear the preliminary objection. It is the respondent scontention that the application dated 25.4.2004 is Res judicata because on 10.4.90 this suit and a similar application were dismissed in High Court in Nairobi. That the applicant filed notice of appeal on 2.5.90 but the appeal was never prosecuted. It is submitted that since the appeal was not prosecuted it stands dismissed under Rule 93 of Court of Appeal Rules. It is his contention that this suit does not exist.

The respondents had also filed a replying affidavit to with several annextures. At page 7 and 8 of the annextures is an affidavit sworn by Mr. Kakonzi advocate for the applicants in which he admits that suit No. 24/90 was transferred to Nairobi for hearing during vacation and the judge heard the application filed by the applicants dated 13.3.90 seeking orders of injunction and the same was dismissed along with the main suit. The applicants lodged a notice of appeal but since the court file had gone missing, they wee seeking a reconstruction of the file to enable the plaintiff prosecute the appeal. The notice of appeal is annexed at page 4 of the annextures. Though the respondent claims that the appeal has been withdrawn or dismissed under Rule 93 of Court of Appeal Rules, there is no evidence of that.

I have further looked at the record and noted that on 10.4.90 the respondents through Musyoka and Wambua Advocates filed a notice of preliminary objection to the effect that this suit No. 24/90 was Res judicata since a similar suit with similar issues and parties had been dealt with in Nairobi H.C.C.C. 2403/82. Without evidence to the contrary, it is apparent that the application before court is Res judicata and so is the suit. The court notes that this is a reconstructed file and that explains why most of the proceedings are not on the file. I have noted various applications by the applicants even though they are aware of the prevailing courts order of dismissal of the suit which amounts to an abuse of court processes. It is irrespective of the fact that this is a land matter or otherwise.

Accordingly I uphold the respondents objection and dismiss the application dated 26.4.2004 and the whole suit with costs to the respondents.

Dated, read and delivered at Machakos this 8th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE