REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 932 OF 2003

STEPHEN MUGO MUTOTHORI…….……..…….. 1ST PLAINTIFF

PETER KARUMBI KEINGATI ……. 2ND PLAINTIFF

RAYMOND MWANGI WAWERU ……... 3RD PLAINTIFF

KIAMBU DANDORA FARMERS LTD. …….. 4TH PLAINTIFF

V E R S U S

COMMISSIONER OF LANDS……. 1ST DEFENDANT

CORNELIUS PETERSON WAITHAKA …… 2ND DEFENDANT

DANDORA HOUSING SCHEMES LTD. …….. 3RD DEFENDANT

R U L I N G

The Plaintiffs applied by way of Notice of Motion dated 17.2.2003 under Section 7 of Civil Procedure Act Cap 21 and Order 6 Rule 13 (1) a, b, c & d of the Civil Procedure Rules asking Court to strike out paragraphs 4,5,6 & 8 of the second and third Defendant's statement of defence as the issues pleaded therein are res judicata having directly and substantially been in issue in NBI HCCC NO. 1348 OF 1972 and HCCC No. 1088 of 2000 and having been substantially determined. Secondly that the Court strike the rest of paragraphs of statement of defence as not disclosing reasonable cause of defence and being frivolous, vexatious and an abuse of Court's process. The same is based on the affidavit of Peter Kariuki Kengati sworn on 11th February 2003.

Before this application could be argued, Mr. Kihara for the Respondents raised a point in limine that the said Notice of Motion is defective as having included Order VI Rule 13(1)(a) with other subrules whereas one does not require affidavit when some require. Secondly, that 2nd and 3rd Defendants were joined by Court order but the Defence was not amended as is required under Order 1 Rule 8 and Rule 10(4) of the civil Procedure Rules. Plaint having not been so amended and amended defence filed, thereat the same is defective and cannot be struck out yet for any defect until that is done.

Mr. Njiru for the Applicant in the Notice of Motion opposed the application saying that the prayers are distinct under Section 7 of the Cap 21 and Order 6 rule 13(1) a, b, c, & d. Therefore, Mr. Kihara's arguments are not pertinent. He said the suit had been determined before Mr. Njiru argued that even if the Plaint was not amended, the Defendants were served and filed their defence besides there was no direction by the Court to amend. He said Order 1 Rule 10(2) differs from Order 1 Rule 8.

The learned advocates herein quoted several authorities.

The first point is to show what a preliminary point ought to be and that is now trite following Sir Charles Newbold 's statement in MUKISA BISCUITS MANUFACTURING COMPANY LIMITED vs. WESTEND DISTRIBUTORS COMPANY LIMITIED (1969) EA 696 when he said: -

> **"..a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other facts are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.."**

The limitations are laid. That it must be argued on points of law and or on ascertained facts that are agreed.

The claims are -

> **a) that issues pleaded in paragraphs 4, 5, 6 & 8 of the 2nd and 3rd Defendants' defence are res judicata and ought to be struck out because they have been determined in an earlier suit;**
>
> **b) other paragraphs disclose no reasonable defence.**
>
> **c) That the same are vexatious, frivolous and abuse of court's process.**

I may first tackle the issues (b) and (c). To argue that defence raises no reasonable defence can only be upheld if the defence when considered alone as constructed in the pleading, shows defence with no chance of success, so long as it raises some question fit to be tried by Court, it qualifies as a reasonable defence and cannot be struck off. Normally, the Court should use the power with care and restraint and where a matter is argued preliminarily, the Court will examine the pleading and "only make the order when he sees that the objection raises a serious question of law, which if decided in favour of the party objecting, would dispense with any further trial or at any rate with the trial of some substantial issue in the action.

See ROBINSON V. FENNER (1913) 3 KB 835.

I have looked at the pleadings in question and I can see that there are issues arising from the defences availed by the Applicant. Raising point of fact for example whether 2nd Defendant Cornelius Peterson Waithaka is a director of Dandora Housing Schemes Limited, the Defendant or whether the 1st Defendant, the Commissioner of Lands was issued with certificate of title. These are issues of fact and law that cannot just be whittled away.

Secondly, where a pleading is scandalous, it is the Court's duty to strike it off. In the case of ARI CREDIT & FINANCE COMPANY LIMITED vs. TRANS-ASIA TRADING COMPANY LTD. & 2 OTHERS HCCC No. 1057 of 1995 this Court said:

> **- …when is a pleading scandalous; -**
>
> **"The authorities seem to divide themselves into 2 main clusters under this heading, first where it is invoked for the need to protect the opposite party by stopping a party from sniping at the opponent, where allegations are made with the imputations against the opposite party or by making charges of misconduct against the opposite party to degrade and demean him.. when such pleading is indecent or offensive, and intended to abuse or prejudice the opposite party.**
>
> **Second cluster that are also scandalous is in style of pleading where pleading employs plethoric superfluity or unnecessary prolixity…"**

of frivolous pleading, the same judgement says is a pleading which is not in itself serious or is incapable of being treated with seriousness which does not disclose a reasonable defence on the face of the pleading; of being vexatious the same judgement said that it is a pleading that has no seriousness that lacks bonafides and it is so when it is hopeless or oppressive and is intended to cause the opposite party unnecessary anxiety, trouble and expense, lacking in foundation with no hope of success; for abuse of Court's process there the case must be a sham, lacking in honesty and bonafides where it is contrary to justice and public policy to litigate the matter where the process of the Court is being sought or bent or used for ill motive, mala fide, where to use the Court is to abuse its integrity, purpose.

The defences sought to be struck off are far from being any of the categories described above. The defences raise issues of fact and law that ought to go for adjudication.

Normally, application of preliminary point should be on a straight forward point of law. The issue ought to be of pure law. Order 6 rule 13(1) which is invoked here have been done so in the face of many anomalies in JOSEPH OKUMU SIMUYU V. STANDARD CHARTERED BANK (k) LTD. HCCC NO. 899 OF 1994 this Court said in part –

> **"When this court exercises its inherent jurisdiction or acts on application under Order 6 Rule 13, the Court can strike out the pleading, or part of it, dismiss the suit, stay action, or enter judgement but in such a case, the submissions must clearly state the fact and indicate precisely what order is being sought whether to strike out, or stay or dismiss the action or enter judgement..**

The summons in this case merely prayed that the statement of defence be struck out. There is no other prayer. This in relation to the RSC 1993 Vol 1 page 311 can make the application incompetent. Part of pleading being attacked ought to be clearly specified.

WILLIAMSON vs. LONDON ETC (1879) 12 CH.D 787

Here they were not shown as to which paragraphs were frivolous, or vexatious or in which way it is an abuse of court's process.

The jurisdiction under Order 6 Rule 13 like inherent jurisdiction of the Court to strike out pleadings is discretionary. Commenting in RSC (1995) Order 18 Rule 19 page 347 says: -

> **"A judicial discretion must be used as to what proceedings are vexatious. For the Court must not prevent a suitor from exercising his undoubted right on any vague or undoubted principle. The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed."**

Where it is clear to Court that plea is res judicata, it will be struck out but the Court is entitled to look not only at the earlier records of the proceedings before the Court, but also the records in other proceedings which were admissible then including its own records.

These documents were not put before this Court as a matter of evidence. It means therefore, the issue of res judicata was not proved. Normally, plea of res judicata is maintained by proof of the fact that the suitor is litigating an issue which although not discussed in the previous case ought to have been discussed. If this is not shown in evidence to Court, it is not possible for the Court to determine res judicata.

I have considered the application in the light of these arguments and I feel constrained to dismiss the application with costs.

DELIVERED at Nairobi this 23rd day of May 2003

A.I. HAYANGA

JUDGE

Read to –

Mr. Njiru for Respondent

No appearance for Applicant

A.I. HAYANGA

JUDGE