



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMB ASA**

**CIVIL SUIT NO.541 OF 2001**

**ROSE WANJIRU RUGENDO.....PLAINTIFF**

**VERSUS**

**M/S NJIIRI HARDWARE LIMITED .....1ST DEFENDANT**

**WILFRED NJIIRI.....2ND DEFENDANT**

**RULING**

This application is brought by Defendant in this case under S.3A, 7 & 8 of the Civil Procedure Act and Order II rule 3 & Order VI rule 13(1)(b) & (d) of the Civil Procedure Rules. The prayers sought are that:-

- a) All proceedings herein be stayed and the injunction be discharged unconditionally.*
- b) The Plaint filed herein be struck out on the ground that the claims are frivolous and vexatious and an abuse of the process of the court and are otherwise barred by the rules of court.*
- c) Costs of this application and of entire cause.*

The application is grounded upon the affidavit of the Second Defendant and other grounds shown on the summons.

The Applicants/Defendants are tenants on plot number 1956/340, Voi Municipality registered in the name of Millicah Njeri Solomon, also known as Millicah Njeri Kagira or Millicah Njeri Kagira- Falco. The said Millicah Njeri Solomon was deceased by the time this case was filed. The 2nd Applicant/Defendant claims to be the son of the deceased above-mentioned while the 1st Defendant is a company owned by the 2nd Defendant who appears to have been fully authorized to represent the 1st Defendant in this case and in all other possible litigations.

The Respondent/Plaintiff in this application had been granted a temporary injunction restraining the Applicants herein and their agents from entering upon, dealing, erecting any structures, encroaching or interfering with all that piece of land known as L.R. No.1956/803, Voi Township which piece of land is adjoining the piece of land aforementioned on which the Defendants are tenants. The application under which the above injunction was issued ex parte is pending for inter partes hearing.

If this application is allowed as sought by the Defendants, the plaint herein will be struck out and the same will be dismissed thus bringing this case to an end. If it is not allowed, the application for an interim injunction will be heard inter partes and whether or not the injunctions granted ex-parte are allowed to stand, the matter will finally be heard on merit, thus giving each side an ample opportunity to prove his/its case.

The Applicants herein are represented by Kimani & Co., Advocates while the Respondents are represented by Kanyi J & Company.

The main ground upon which the application is brought is that the claims as presented in the plaint filed in this suit are frivolous and vexatious and an abuse of the process of the court. Mr. Kimani argued that this is so because the issues raised in this case were Res Judicata this court's Miscellaneous Civil Application No.214 of 1992.

That there was such application in which a consent order was entered by the parties in that application is not denied by the Respondent/Plaintiff herein. The consent order referred to reads as follows:-

*“By consent the Respondent undertakes not to interfere now or in the future, with the portion of her plot adjoining the applicant's verandah and not to block the access to the front of the applicant's premises. The application be withdrawn with no order as to costs. By consent, order as per terms of the consent letter.”*

This order was recorded and signed by my brother Wambilyangah, J., on 1.12.92. The Applicant was Millicah Njeri Solomon now deceased and the Respondent was Rose Wanjiru (Rugendo) the Plaintiff/Respondent in this application. No more details or pleadings of this application were revealed to this court. Apart from what we can deduce from the order the issues in that application were not placed before this court to assist it to make relevant conclusions that are required to be made. Section 7 of the Civil Procedure Act states:-

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under who they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

To enable this court decide whether the suit or issues before us in this case are the same or similar to those that were directly and/or substantially determined in Misc. Application No.214 of 1992, this court should have been shown the pleadings in that application. The Applicant herein did not tender to this court the said pleadings. The consent order made in that application tends to indicate that the Respondent/Plaintiff herein had tried to interfere with the part of her land Plot No.1956/803 adjoining to Plot No.1956/340 which belonged to Millicah Njeri Solomon. Apparently the Respondent/Plaintiff got the allocation or ownership of Plot No.1956/803 later than the Applicant in that application had obtained Plot No.1956/340. The latter appears to have constructed a building on her plot in such a manner that it may have protruded into what later became Plot No.1956/803. Rose Wanjiru, Plaintiff/Respondent herein tried to stop Millicah Njeri Solomon (deceased) from using the space on Plot No.1956/803 as a frontage and/or verandah whereupon the latter filed the Misc. Application No.214/92. The result was the consent order that barred the Plaintiff from interfering with Millicah Njeri Solomon (deceased)'s usage of the same.

It will be noted that in the present suit, it is the tenants of Plot No.1956/340 who are alleged to be interfering with the usage of the corridor or verandah. It will also be noticed that while the order aforementioned stood against the Plaintiff/Respondent, the latter from the alleged facts in the pleadings and affidavits, has not broken or disobeyed the order. All she has done is to allege that the tenants on Plot No.1956/340, Voi are building some structures on Plot No.1956/803 Voi and instead of personally interfering or confronting them, she has come to this court for remedy. Also on this point, the consent order aforementioned did not give the owner of Plot No.1956/340 any substantive proprietary rights but

some possible licence to use the verandah to service her own plot.

I make a finding that the issue in Misc. Application No.214/92 are uncertain or at most were limited to non-interference of usage of same by the Plaintiff. It is also my further opinion and finding that the issues now raised in this case are quite different and suggest a totally new cause of action. The Applicants/Defendants do not deny in their pleadings and affidavits that they have not constructed some Mabati fence and canopy or are not in the process of doing so and yet the consent order they cite as their authorization does not give them such wide rights. If the Applicant's application succeeds and the suit is struck out, the likely next step by the Applicant will possibly be to allocate themselves the part of the Respondent/Plaintiff's plot now forming the verandah.

Are the parties in this suit the same as those in Misc. Application No.214/92? The 2nd Applicant is said to be the son of the Applicant in the said application. He exhibited the death certificate of Millicah Njeri Solomon but failed to tender his birth certificate to prove that Millicah Njeri is his mother. And even if he were son to Millicah Njeri Solomon, he failed to prove that he is either her beneficiary or administrator of her estate.

Is he only a tenant? I make a finding that all these issues and others indicated hereinabove need to be proven during a full hearing of the case and not at this preliminary stage by mere affidavits.

I wish to make a further comment relating to the above mentioned consent order in Misc. Application No.214/92. I notice that part of that order indicated that the application was withdrawn. The reasonable way I would interpret this is that all pleadings, interim orders and final orders made under the application were all withdrawn. It may mean in legal terms, that Misc. Application No.214/92 stopped to exist in any possible nature that can affect the rights of parties therein after the said withdrawal. This possibility raises another very substantive issue that need to be fully canvassed and finally determined in a full hearing.

I have carefully examined the pleadings filed by both parties in this case. The Plaintiff/Respondent owns the area in dispute. There is evidence, even in Applicant's affidavits that the area in dispute forms part of Plot No.1956/803 as contained in the relevant Title.

Plaintiff claims that the Defendants have fenced it and are constructing a canopy and have prevented the Plaintiff from using it.

The existence, authority and legal efficacy of the consent order which is central to the disputed rights of parties in this suit is uncertain.

These are issues and circumstances which raise very strong grounds against striking out the suit herein. There are many issues which should be investigated in a full hearing of this case. I find therefore that the Plaintiff's claims as portrayed in the Plaint are far from frivolous or vexatious. They are not an abuse of the court process.

They are not barred by any rules of court that I can think of. There are no adequate grounds shown by the Applicant upon which I may stay any proceedings in this suit.

Furthermore, were I to strike out the Plaintiff's pleadings at this stage unless upon proper and weighty grounds, the Plaintiff would stand to lose his opportunity to protect his rights if any in relation to the premises herein. But giving the Plaintiff the chance to prove his case in no way denies the Defendants the opportunity to prove his defence and protect their rights. Other issues can be taken care of by compensation in costs.

The upshot of the above canvassing is reflected in the following orders:-

**ORDERS:**

*a) The Applicant/Defendant's application is refused and dismissed in its entirety.*

*b) Costs are ordered in favour of the Respondent/Plaintiff.*

**Dated and delivered at Mombasa this 7th day of February, 2002.**

**D.A. ONYANCHA**

**J U D G E**

In the presence of:-

**Miss Osino for Applicant/Defendant**

**Mr. Kimani for Respondent/Plaintiff**