REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1143 OF 01

GUCHU MUIRURI ……..PLAINTIFF

V E R S U S

LABAN NJUGUNA ……..DEFENDANT

R U L I N G

This is an application under Order 6A rr 3 and 8 for amendment of the plaint. The supporting affidavit by Guchu Muiruri sworn on 2nd April 2002 states that he drafted and filed the plaint personally but on instructing an advocate later to represent him he was advised professionally that the same requires an amendment hence the application. The original plaint is dated 12th July 2001 and claims damages in trespass and an injunction to stop act of waste and trespass. The statement of defence filed on 9th August 2001 denies the allegations and claims that the case is Res Judicata. The amended plaint pleads specific damages for loss of profit and business income.

In replying affidavit Laban Njuguna the defendant claims that the plaintiff is not candid and claims that Hccc No.2489/72 was finalized and that this court has no jurisdiction.

The principle for allowing amendment is provided amply in our law books in the procedural provisions and in the case law. The defendant has attacked the application for amendment that there was delay and that there is Res Judicata The principle generally is that amendment of any pleading sought before the hearing should be freely allowed if it can be made without prejudice to the other side and that there is no injustice if the other side can be compensated by costs.

The defendant has assailed this amendment on grounds of delay but as I said earlier the defence was filed on 9th August 2001 and this application was filed on 5th April 2002. However what is important is that this application is made before trial, but whatever the case application for amendment can be made at any time at any stage of the case.

As for Res Judicata, this proposes that the case and the issues between the parties have been adjudicated upon. The defendant says that the issues between the parties in this case have been settled in Hccc No.2487 of 1997 and the plaintiff admits it. In that case the parties are GUCHU MUIRURI plaintiff and MURANGA COUNTY COUNCIL and LABAN NJUGUNA as joint defendants. In that case and the case was dismissed. The subject matter was PLOT NO. 19 KAMAHUHA MARKET. In the present suit Plaintiff is GUCHU MUIRURI the plaintiff in the original case and the defendant is LABAN NJUGUNA the second defendant in the original suit. Here the cause of action is trespass to plots Nos. 19 and 55. The original plaint required the Muranga County Council to excise 990 square feet from somewhere apparently plot no.55 and include it in plot no.19. Kamahuha Market then. It also prayed mesne profits.

The question to be asked is whether the matter which was directly and substantially in issue in the

original case is also substantially and directly in issue in the latter case. The causes of action differ. Yes, but it is not necessary that the causes of action in the two suits should be identical. What is necessary is that the causes of action in the two suits should be generic. The matters directly and substantially in issue should be the same in the two suits and should be claimed by one and denied by the other. Did the decision in the original suit decide the issue of trespass directly or by implication? The decision of law must relate to the facts on which the rights are founded, so that the claim of right over 990 square feet depends on the right to own it, but does this mean that the existence of plot 19 without 990 square feet is codependent exclusively on adding 990 square feet. Can one say that the right to own 990 square feet excludes the right to maintain an action in trespass on the plot no.19 less 990 square feet? I do not think so. I draw some illustration from MULLA ON CODE OF CIVIL PROCEDURES (15th Ed.) pp[2] under "Rule 1" where the writer says:-

"The dismissal of a plaintiff`s suit for the recovery of land based on an alleged lease is no bar to a subsequent suit for the recover y of the same land on the strength of his general title."

The proposition supporting that stand is that the legal relationship put forward in the former suit is different from that put forward in the present suit.

Res Judicata has been said to mean a thing upon which a competent court has exercised its judicial mind. A plea of Res Judicata is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure, to be distinguished from the rule of evidence. See COLLECTOR OF FORAKHIPOR vs POLAKDHAR SINGH [1889] 12 ATT 144.

The court would lack jurisdiction where the issue before it has already exercised its judicial mind.

In looking at this application I hold that the matter raised in the latter suit is not Res judicate so this court this court has jurisdiction. I further hold that amendment be and is hereby allowed.

Cost to the plaintiff /.applicant.

Delivered this 1st day of November 2002

A. I. HAYANGA

J U D G E

Read to Mr. Nzavi for applicant

N/A for respondent