



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 38 of 2007

JOSEPH MUCHOE WANYAMA
(suing for and on behalf of members of)
YUYA FARMERS CO-OPERATIVE SOCIETY
LIMITED:::PLAINTIFF/RESPONDENT
VERSUS

MERCIA MULIRO

(sued as personal representative of MASINDE
MULIRO(Deceased):::::::::::::::::::::::::DEFENDANT/APPLICANT

RULING

This is an application by the defendant, **Mercia Muliro**, to have the plaint dated 8th March, 2007 struck out. The application is expressed to be brought under section 3A and 63(e) of the Civil Procedure Act and Order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules. The application is made on the premise that the suit discloses no reasonable cause of action; that it is an abuse of the process of the court; that it is scandalous, frivolous and vexatious; that it is actuated by Malice and instituted in bad faith; that it is *res-judicata*; and that it violates the provisions of the Land Control Act.

The application is supported by the defendant's affidavit sworn on 12th January, 2010. It is deponed in the said affidavit, *inter alia*, that a similar suit being Kitale HC.MISC. CIVIL APPEAL NO. 39/2000 involving the same parties and subject matter was heard and determined; that the cause of action arose in 1980 and is therefore statute barred; that the subject transaction did not receive the consent of the relevant Land Control Board; that in so far as the plaintiff's base their claim on an oral agreement the suit is incompetent as any disposition of an interest in Land should be evidenced in writing and that some of the plaintiffs are deceased.

The application is opposed and in that regard there is a replying affidavit of **Joseph Muchee Wanyama** sworn on 28th January, 2011. The gist of the opposition is that the defendant is not entitled to the reliefs sought because the suit is not *res-judicata*; that the consent of the land control Board was duly obtained; that the transaction was reduced into writing and that the deponent is not aware of any plaintiffs being deceased.

When the application came up before me for hearing on 7th March, 2012 counsel agreed to file written submissions which were duly in place by 4th July, 2012. The submissions restated the stand-points taken by the parties in their respective affidavits.

I have considered the application in the light of the pleadings, the affidavits on record and the rival submissions. I am conscious that this is an interlocutory application and it is incumbent upon the court not to make any definitive findings which in reality are the province of the trial court. With regard to the

res-judicata plea I have perused the record of Kitale HC. Misc. Civil Application No. 30 of 2000. It was a judicial review application which was determined by **A.K.A. Etyang J.** as he then was. The Learned Judge concluded that the Land Disputes Tribunal, which had purported to hear the dispute between the parties, had no jurisdiction to do so. Its decision was accordingly null and void and was quashed. In my view the proceedings before the land disputes tribunal and the subsequent Judicial Review application did not determine the dispute between the parties. Indeed the former's decision was declared null and void by the decision in the later. This suit cannot therefore be *res-judicata* by reason of the proceedings in **Kitale Misc. Civil Application No. 30 of 2000.**

With regard to the plea that the plaintiff's claim is statute barred by virtue of the provisions of the limitation of Actions Act, I have come to the conclusion that a definitive resolution of the plea cannot be made at this stage given the parties' conflicting averments in their respective pleadings and affidavits. The parties will have to demonstrate whether the claim is statute barred at the hearing.

The defendant has also contended that the consent of the relevant land control board was not obtained. The plaintiffs aver otherwise. In any event the plaintiffs have sought an alternative relief which is not dependent on the consent of the land control board. The suit cannot therefore be struck out merely because of want of a land control board consent.

With respect to the plea that some of the plaintiffs may be deceased, the short answer is that even if they were (which the plaintiffs do not admit) the suit would not, for that reason alone, be liable to be struck out. Their demise would only affect the claims of the deceased plaintiffs and not those of the surviving ones.

Having disposed of the defendants principal complainants. I ask myself whether the plaintiffs suit is otherwise so obviously unsustainable and/ or is an abuse of the process of the court or whether it is scandalous frivolous and vexatious. The defendant did not demonstrate any of the above. In any event even if there may be inadequacies in the averments in the plaint, in my opinion, the remedy would not be to strike it out as the door to amend has not been closed.

In the result, I must and do hereby dismiss the defendant's application dated 12th January, 2010. Costs shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 5TH DAY OF SEPTEMBER 2012**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Barasa H/B for Mburu for the Applicant

**F. AZANGALALA
JUDGE
5TH SEPTEMBER, 2012**