



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

**Civil Suit 76 of 2008**

**RICHARD S. MASAI.....PLAINTIFF.**

**VERSUS**

**SAMUEL K. MOIBEN .....DEFENDANT.**

**RULING.**

By a chamber summons application dated 6<sup>th</sup> October, 2008, pursuant to the provisions of order VI Rule 13 (1) (d) and order L rule 1 of the Civil Procedure Rules, the applicant seeks orders:

1. That the plaint dated 15<sup>th</sup> September, 2008 be struck out with costs.
2. That the costs of this application be borne by the plaintiff/respondent.

The application is based on the grounds:-

- (i) That the filing of the plaint dated 15<sup>th</sup> September, 2008 amounts to a serious abuse of the due process of this court.
- (ii) That the reliefs sought cannot legally obtain.

The application is predicated upon the annexed affidavit of Samwel K. Moiben sworn on the 6<sup>th</sup> October, 2008.

On behalf of the applicant, it was argued that the applicant is seeking a declaration that the proceedings before the Central Division Land Disputes Tribunal are null and void. Accordingly, the subsequent decree in Kitale CMC Land Case No. 148 of 2006 be reviewed and/or set aside.

That neither the Central Division Land Disputes Tribunal nor the Kitale Chief Magistrate court are parties to this suit. Yet they are the bodies that originated the mischief.

In support of his position, he annexed a decree issued by the Kitale Court in Land Case No. 148/2006 which declared that the plaintiff should remain with five (5) acres of land in Kitale plot No. 827 which he is currently occupying. That the plaintiff/respondent was not awarded plot No. 826 which was declared to belong to the applicant. No appeal was preferred against the decree in Kitale CMC Land case No. 148/2006. Through Kitale HC. Misc. Civil Application No. 13/2008 the plaintiff challenged the decree in Kitale CMC Land Case No. 148/2006 but on 18<sup>th</sup> June, 2005 the said suit was struck out with costs.

Subsequently, an appeal was preferred against the decision. In this regard the applicant exhibited a court order of 18<sup>th</sup> June, 2005 marked as "SKM 2"

Accordingly, the filing of the current suit, seeking reliefs that have already been competently dealt with and without appeal preferred therefrom, clearly amount to an abuse of the due process of the law.

The respondent opposed the application. He relied on the replying affidavit of Risper Arunga advocate sworn on the 23<sup>rd</sup> day of

January, 2009.

On behalf of the respondent, it was argued that there are two prayers.

- (i) A declaration that the plaintiff is legally entitled to the use and possession of plot No. 823 Kitale Settlement Scheme.
- (ii) A declaration that the proceedings before the Central Division Land Disputes Tribunal are null and void.

That the decree annexed to the application issued by the lower court concerns only plot No. 827/ Kitale Settlement Scheme. However, the Tribunal did not determine the issue of the legality of the contract between the parties.

The decree was issued on 18<sup>th</sup> April, 2006. Yet this case was filed on 15<sup>th</sup> September, 2008 – about 2 years and 5 months later. There was judicial Review application vide HCCC No. 467/2007 before the High court in Nairobi but the same was transferred to Kitale and registered as Kitale HCCC No. 13/2008. Upon determination of the Judicial Review application against the defendant/respondent the only remedy was to file an appeal. In this regard, counsel called on aid the authority of **MACHEO LTD. VS. JOSEPH WAFULA KHAOYA – KITALE HCCC NO. 141/2007.**

I am grateful to the respective counsel for their input in law. I have considered the authorities cited before me though I have not quoted them in extenso.

Having done so, I take this view that the respondent at all material times had an opportunity of quashing the decision of the said Land Disputes Tribunal. Equally, the respondent had an opportunity of appealing to the Provincial Appeals Committee at Nakuru under section 8 (1) of the Act.

Having failed to pursue the aforementioned remedies the respondent have hit a *cul-de-sac*. That is the end of the road. The respondent is flogging a dead horse so to speak.

The suit cannot lie, in law. Accordingly I order that the plaint dated 15<sup>th</sup> September, 2008 be and is hereby struck out with costs to the applicant.

Dated and delivered at Kitale this 2<sup>nd</sup> day of June, 2009.

**N.R.O. OMBIJA.**  
**JUDGE.**