REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 347 OF 1990

KAMAU

TICHU .....PLAINTIFF

versus

THE DIRECTOR OF SETTLEMENT, MINISTRY OF LANDS AND HOUSING .....DEFENDANT

RULING

On 30th March 1993, by an order of the court of the same date IKERE GITAU was joined in this suit as the second Defendant/Respondent. It has since transpired that the applicants in the suit had earlier sued him under NAI HCCC No.1727 of 1985 claiming the same reliefs as herein. The suit was dimissed pursuant to the provisions of O.XVI rule 5 Civil Procedure Rules. A subsequent application for the revival of the suit was dismissed because the Applicaaant did not attend court on the date the application was posted to come for a heariTnhge. 2nd Respondent(Defendant) herein now applies that his name be struck out on the ground that the suit is an abuse of the process of the court and, also, that it is res judicata.

Mr Kerugara for the Applicant in the suit does not think this suit is res judicata. In his view the matter has not been adjudicated upon on the merits.

O.XVI rule 6 Civil Procedure Rules seems to suggest that a plaintiff whose suit has been dismissed under O.XVI rule 5 Civil Procedure Rules, has no right of bringing a fresh suit.

The reason does not appear to me to be res judicata, but perhaps estoppel, or that bringing a fresh suit will amount to an abuse of the process of the court. Clearly a suit dismissed under O.XVI rule 5 Civil Procedure Rules has not been considered on the merits. Consequently, to my mind, res judicata should not be invoked to bar a subsequent suit between the same parties and or the same cause of action.

The Plaintiff or Applicant in the subsequent suit must have been barred on the ground that it will be an abuse of the process of court to bring a fresh suit. The basis is clear. The party has abused an earlier opportunity to ventilate his cause of action in court. He should not be allowed to come to court once more. The earlier suit having been dismissed following the laid down procedure, the Plaintiff was called upon to offer any explanation as to the delay in presenting the cause but failed to do so. He should consider himself to blameI.t should be recalled that the policy of the law is that a suit must be presented on the basis of a given timetable.The law stipulates what should be done in the event that a litigant does not follow the timetable. The opposite party has the liberty to move, the court by an appropriate application to dismiss the suit. The hearing of the application must, of necessity, be inter partes. However where the suing party is served and does not attend the court on the date and place the matter is fixed to come for a hearing the court is at liberty tomake orders, ex parte. That is what happened to NAI HCCC. No.1727 of 1985. To let this case to proceed will be tantamount to rewarding the Applicant without basis or proper basis.

I have found support in a passage in the Book A.I.R. Commentaries on the Code of Civil Procedure, 6th Ed. (1957) (Vol.1) by V.V. Chitaley and S. Appu Rao at p.439. It reads:

"Where the former suit was tried according to the procedure

then in force, the mere fact that such procedure waas summary

does not affect the finality of the decision."

Apart from the foregoing there is a more fundamental reason why this suit must be dismissed as against the Applicant (2nd Defendant). A long time has passed and there is possibly no likelihood of witnesses being traced. The issue has not been raised by the affected party, however, the reason why there is a timetable, for the prosecution of suits is that matters be determined while witnesses can be found or can readily be found to obviate prejudice.

In the above circumstances, I am constrained to grant the application, strike out the name of the 2nd Defendant/Respondent and order that costs of this application be paid by the applicants in the suit to be taxed if not agreed upon.Orders accordingly.

Dated at Nairobi and delivered this 9th day of June 1994.

S.E.O. BOSIRE

JUDGE