



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 221 OF 2013

JOHN KISESE NTHENGE.....PLAINTIFF/APPLICANT

VERSUS

TOEDA MWASARU

NYONGESA WAFULA

ROSEMARY WANJIRU

AMOSE MUSYOKA (Sued in their capacities as

Office Bearers of Ushirika Boma Welfare Society).....DEFENDANTS

(By Original Action)

AND

TOEDA MWASARU

NYONGESA WAFULA

ROSEMARY WANJIRU

AMOSE MUSYOKA (Sued in their capacities as

Office Bearers of Ushirika Boma Welfare Society).....PLAINTIFFS

VERSUS

JOHN KISESE NTHENGE.....1ST DEFENDANT

MBUKONI HOLDINGS LIMITED.....2ND DEFENDANT

THOMAS WAMBUA.....3RD DEFENDANT

RUTH NZULA.....4TH DEFENDANT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT

THE REGISTRAR OF TITLES.....6TH DEFENDANT

DISTRICT LANDS REGISTRAR, MACHAKOS.....7TH DEFENDANT

(By way of Counterclaim)

RULING

In a ruling dated 25th February 2014, this Court dismissed the Plaintiff's application seeking that the Defendants' counterclaim be excluded and directed the Defendants to serve the Defendants in the counterclaim with the Defence and counterclaim together with the supporting documents. The Plaintiff herein and the Defendants in the counterclaim were granted leave to file their responses within 15 days of receipt of service.

The instant application is dated 11th May 2015, and filed by the Plaintiff (*in the original action*) seeking an order that the Defence and Counterclaim filed herein be struck out, the Defendant's counterclaim be dismissed and judgment be entered for the Plaintiff as prayed in the Plaint. The application is premised on grounds that, first, the Defence and Counterclaim is frivolous and is merely intended to prejudice, embarrass or delay the fair trial of the Plaintiff's action and is otherwise an abuse of the Court process. Secondly, that the Defendant's counterclaim is founded on contract and seeks the remedy of specific performance without establishing any privity of contract between them and the Plaintiff. Thirdly, that the Defendants have for more than one year, failed and/or neglected to comply fully or at all with the direction and order given vide the Court's ruling of 25th February 2014.

The application is supported by an affidavit sworn by the Plaintiff wherein he deposes that he is the registered proprietor of the parcel known as **Mavoko Town Block 3/2101** and no valid sale ever materialized between him and **Mbukoni Holdings Limited** as implied by the Defendants in their counterclaim. Consequently, that **Mbukoni Holdings Limited** has never been in any position to pass the title to the Defendants. Thus, that the Defendants' defence is a sham and their counterclaim untenable for lack of any legal relationship between them. The Plaintiff reiterated that for a period of over one year, the Defendants have not complied with the directions given in the ruling of 25th February 2015.

Nyogesa Wafula, the secretary of **of Ushirika Boma Welfare Society** swore a Replying Affidavit on 14th July 2015, in response to the application, wherein he deposed that the prayers sought in the Plaintiff's application are *res judicata*, as they were sought in the previous application dated 28th March 2013 and a ruling on the same delivered on 25th February 2014. Further, that the Plaintiff had not sought for review and/or appealed against the said decision. The deponent refuted the allegation that the Defendants have not complied with the directions given in the ruling of 25th February 2015, deposing the Defendants in a letter dated 28th March 2014, served upon the Plaintiff forwarded: a copy of the ruling; a copy of the Defendant's Defence and Counterclaim, List of Witnesses and Witness Statements. It was also deposed that the Defendants have taken steps including writing to the Deputy Registrar to fix the matter for directions. The deponent urged the Court to dismiss the application, deposing that the same is unmerited.

The application was canvassed by way of written submissions, which I have carefully read. The Plaintiff seeks orders that the Defence be struck out, the counterclaim be dismissed and Judgment be entered in his favor as prayed in the Plaint. In response, the Defendants contend that the prayers sought are *res judicata* as they were subject of adjudication in the ruling delivered on 25th February 2014 following the Plaintiff's application dated 28th March 2013. *Res judicata* is provided under **Section 7 of the Civil Procedure Act**:

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 whom 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.

This principle operates to bar subsequent proceedings where there has been a determination of a dispute between the same parties by a Court of competent jurisdiction.

The Plaintiff in his application dated **28th March 2013**, sought that the counter-claim be excluded. In the instant application, the Plaintiff prays, *inter-alia*, that the counterclaim be dismissed. The grounds in support of the former application is similar to the ones outlined herein, that the counterclaim is founded on a contract to which the Plaintiff is not privy to. This ground was considered in my ruling of **25th February 2014**, wherein I opined that it would be convenient to have the counterclaim disposed off together with the suit as it would enable the court effectually and completely adjudicate upon and settle all questions surrounding ownership of the suit property. In that regard, I do find that the Plaintiff's application, with respect to dismissal of the counterclaim, offends **Section 7 of the Civil Procedure Act**.

What about the prayer that the Defence and Counterclaim be struck out? Counsel for the Plaintiff submitted that the Plaintiff's application arose from the non-compliance of the order of **25th February 2014**, which required that the Defendants do serve the Defence, counterclaim and supporting documents to the Plaintiff. Further that over one year had lapsed with no service at all. It was submitted that there is no return of service to show that service was effected upon the Plaintiff and further, that the letter dated **28th March 2014**, is not accompanied by any proof of delivery, demonstrating that the Defendants did not comply with the directions of the Court.

Counsel for the Plaintiff submitted that non-compliance of the Court order is sufficient to justify the striking out of the Defence and counterclaim and to that end, referred to **Order 17 Rules (3) that any party to the suit may apply for dismissal of a suit; and (4) that the Court may dismiss the suit for non-compliance with any direction given under the order**. On behalf of the Defendants, counsel submitted that the Plaintiff's allegation that there was non-compliance with the Court's directions is without basis, as service was effected and the Defendants also wrote to the Registrar requesting that the matter be listed for Directions. It was submitted that the invocation by the Plaintiff of **Order 17 of the Civil Procedure Rules** is a grave misdirection, as the provisions thereunder do not come in as against the Defendants.

My directions in the ruling of **25th February 2014** were that the Defendants to serve the Defence and Counterclaim to the Plaintiff and the Defendants therein. On perusal of the Court record, there is no Affidavit of Service to show that the Defendants did serve the Plaintiff and Defendants in the Counterclaim. However, the Defendants annexed a letter dated **28th March 2014** (*marked NW2*) forwarding the documents as directed in the Court Order. This letter is addressed to Counsel of the Plaintiff and the Defendants in the counterclaim. The documents attached to the said letter bear stamps for (i) Counsel for the Plaintiff (ii) Land Registrar Machakos and (iii) Mbukoni Holdings Limited acknowledging receipt of service on **22nd and 25th March 2013**, respectively.

On the foregoing, there is doubt as to the allegations made by the Plaintiff that service was never effected. Consequently, I am not convinced that I should exercise my discretion to dismiss the Defence and Counterclaim as pleaded by the Plaintiff/Applicant Defendant. Having said that, affidavits of service are not a mere technical requirement, but evidence to show that service has been effected.

In that regard, and to avert any doubt as to service of the Defence, counterclaim and supporting documents, the Defendants herein are directed to serve the same within **7 days** of the date hereof and file an affidavit of service immediately thereafter. Costs of the application be in the cause.

It is so ordered.

Dated, Signed and Delivered this **1st** day of **July, 2016**.

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant (though served)

M/s Kiget holding brief for Mr Arusei for the Defendants (In the Original Action)

Hilda : Court Cler

L. GACHERU

JUDGE