



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 394 OF 2015

MARY NJOKI alias MARY NYOKABI MURIRA.....PLAINTIFF/APPLICANT

VERSUS

ZACHARY GICHIRI KARIUKI.....DEFENDANT/RESPONDENT

RULING

Coming up for determination is a Preliminary Objection dated 25th May 2015 filed by the Defendant. The grounds of the objection are:

- 1. The Plaintiff has filed a similar application dated 5th May 2015 in Nairobi ELC No. 362 of 2015 Mary Nyokabi Murira vs Zachary Gichiri and the same was dismissed with costs for non-attendance.***
- 2. The suit should be struck out as there is a similar suit filed by the Plaintiff against the Defendant on the same subject matter in Nairobi ELC No. 362 of 2015.***
- 3. The property stated in this suit is Plot No. 149 within Nyakinyua Investments Ltd whereas documents annexed and listed in the Plaintiff's pleadings are for Plot No. 1439 within Nyakinyua Investment Limited.***
- 4. The application and the entire suit is an abuse of the Court process and should be struck out.***

The objection was canvassed by way of written submissions. **Ng'ang'a Ngigi & Co. Advocates** for the Defendant filed submissions dated 2nd September 2015 wherein it was submitted that the suit herein is *res judicata*, as the issues in dispute is substantially similar to that in **ELC No. 362 of 2015** involving the same parties. Thus, the suit ought to be struck out as it is an abuse of the Court process.

Mburu Machua & Co. Advocates for the Plaintiff submitted that the Court merged the **ELC No. 362 of 2015** with this suit on 8th July 2015 and that no proceedings had taken place in the said suit. Therefore, that the suit herein is not *res judicata* or *sub judice* as it does not fall foul of all the conditions stated under **Section 6 and 7 of the Civil Procedure Rules**. With respect to the objection on the disparity of the plot in dispute, counsel submitted that this point requires the probing of facts and thus does not fit the limited scope and dimension of a preliminary objection. Counsel prayed that the objection herein be dismissed and the Plaintiff be granted an opportunity to prove her case.

Guided by the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, it is my finding that the first and second points of objection raised by the Defendant are pure points of law that falls in the realm of preliminary objection. The same have the potential of determining the matter with finality without the need of ascertaining any additional facts. That is not so for the third point on the disparity in the plot numbers of the disputed parcel of land, as it requires the Court to examine and give a determination on facts.

The Plaintiff does not deny that there is the existence another suit (**ELC No. 362 of 2015**) between the same parties over the same subject matter. Notably, however, the Defendant states that the suit was dismissed for non-attendance and the instant suit is therefore an abuse of the Court Process. The question is therefore whether the instant suit is *res judicata*. **Section 7 of the Civil Procedure Rules Procedure** provides that:

“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” (Emphasis mine)

This Court is indeed barred from entertaining a matter that has previously been adjudicated upon. However, the above provision is clear that the earlier suit must have been heard and finally decided by the Court. Therefore, the earlier suit having been dismissed for non-attendance, was first, not heard, and secondly, not finally determined. Thus, I do find that the suit herein is not *res judicata*.

Having said that, and noting that **ELC No. 362 of 2015** is capable of being revived through an application by either party, the Court is alive to the possibility of parallel suits. **Section 6 of Civil Procedure** further bars the court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously suit between the same parties, where such suit is pending before another Court. The remedy available in such an instance is to stay one suit awaiting the outcome of the other. Since **ELC No. 362 of 2015** was dismissed, the most feasible order, in this regard, is to have both files availed to this Court for possible consolidation and/or any further directions.

The upshot is that the Preliminary Objection is dismissed. However, the Plaintiff shall meet the costs of this application. The Plaintiff shall also be responsible to notify the Deputy Registrar of this Court to avail **ELC No. 362 of 2015** alongside this file for further directions.

Dated, Signed and Delivered this **21st day of March 2016**

It is so ordered.

L. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

..... Court Clerk

L. GACHERU

JUDGE