



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

**CIVIL CASE NO. 34 OF 2012**

**J K N.....PLAINTIFF**

**VERSUS**

**J N P.....DEFENDANT**

**RULING**

1. By a plaint dated 10<sup>th</sup> February, 2012, the Plaintiff seeks a declaration that he is the legal owner of plot No. [particulars withheld] (*subject plot*) and issuance of a permanent injunction restraining the defendant from utilizing the subject plot.
2. The basis of the claim is that having been registered as the owner of the subject plot he suffered mental impairment and was subsequently admitted at **Mathari Hospital** from the year 1993 to 2000. He was discharged and continued undergoing treatment as an outpatient. Having learned that the plot was transferred to the defendant he filed Objection Proceedings. On the 10<sup>th</sup> May, 2012, the defendant filed a Preliminary Objection on a point of law that the suit herein is *res judicata* and incompetent.
3. The application was canvassed by way of written submissions which I have considered.
4. It has been averred that the suit herein is *res judicata*. It is trite that a matter which has been litigated on merits cannot be re-litigated. **Section 7** of the **Civil Procedure Act** Provides:-

***“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”.***

5. The dispute herein is in regard to land falling under Adjudication. Proceedings were heard by the **Land Adjudication Officer**. Pursuant to the provisions of **Section 30** of the **Land Adjudication Act**, the Officer gave the plaintiff a consent in writing to institute/continue a suit in court concerning the claim for the interest he alleges to have in the land. The suit having not been heard by any competent court and/or decided finally, it cannot be alleged to have been *res judicata*.
6. The second limb of the Preliminary of the Objection is that the suit is incompetent. The plaintiff's competence to file the suit without a guardian was questioned. **Order 32 rule (2) (1)** of the **Civil Procedure Rules** provide:-

***“1)Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented”.***

Order 32 rule (15) of the Civil Procedure Rules provide:-

***“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued”.***

7. The plaintiff filed the suit without a next of friend. He adduced evidence confirming the fact that he was a patient at **Mathari Hospital** since 1993. He suffered from dementia. As at 14<sup>th</sup> September 2011 according to the Medical Superintendent of the aforesaid hospital he had been discharged and was doing well at home on medication.
8. **Section 21** of the **Mental Health Act** provides that:

***“The person incharge of a mental hospital may, by order in writing and upon the recommendation of the medical practitioner incharge of any person’s treatment in the mental hospital, order the discharge of any person admitted to the mental hospital and that person shall thereupon be discharged as having recovered from mental disorder.”***

9. Pursuant to the law, the plaintiff having been discharged from the mental hospital, it is presumed that he had recovered from the mental disorder.
10. It is argued by the Applicant/Defendant that there was no proof that he was no longer insane. The burden of proving that the Plaintiff is still insane rests on the Defendant ( see ***Imperial Loan Co. – versus – Stone [1892] 1RB 599; Grace Wanjiru Munyinyi & Another –versus- Gedion Waweru Githunguri and Others, [2011] eKLR***). It is pleaded in the statement of defence but not established at this stage, therefore, it cannot be stated that the suit is incompetent on that ground.
11. This is a case where the court must investigate facts to reach a just conclusion. Therefore it cannot be dismissed on mere technicalities. In the premises, I find the Preliminary Objection unmeritorious. The same is dismissed with costs to the respondent.

**DATED, SIGNED and DELIVERED at MACHAKOS this 29<sup>TH</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**