

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC NO. 71 OF 2013

M N M.....APPLICANT

VERSUS

J N M.....RESPONDENT

RULING

1. The suit herein commenced on 7th November 2013 by way of an originating summons dated 17th October 2013. It is a suit for division of matrimonial property.
2. The defendant appeared on 16th December 2013, and filed a reply by way of an affidavit sworn on 11th December 2013.
3. A motion is filed on 29th March 2014 by the plaintiff for directions under Order 37 rules 16, 17 and 18 of the Civil Procedure Rules.
4. To this motion the respondent filed an affidavit in reply, sworn a 10th June 2014. His case is that a similar suit between the same parties on the same issues, being HCCC No. 52 of 2006 (OS), had been dismissed on 25th July 2013 for want of prosecution. He argues that the matter is now *res judicata*.
5. He simultaneously filed a notice of preliminary objection dated 10th June 2014 to urge that the application dated 29th March 2014 and the entire suit are in competent and *res judicata*.
6. It was directed on 12th June 2014 that the preliminary objection would be disposed of by way of written submissions. Both parties dutifully filed their submissions, the respondent on 20th June 2014 and the applicant on 24th July 2014.
7. The respondent's submissions minor the averments in his replying affidavit of 10th June 2014 and the preliminary objection of even date.
8. The applicant's submissions dated 23rd July 2014 are more elaborate. She cites ample authority – Kuloba J. in judicial Hints on Civil Procedure, Law Africa pages 43 and 44 and *Bureau Veritas (K) Limited –vs- Kenya Bureau of Standards and 4 others* (2010) eKLR - to break her argument that the dismissal of a suit for want of prosecution does not present the plaintiff with a *fair accomplish*. They can still thereafter strict, subject to the law on limitation of actions, a fresh action.
9. I find merit in the arguments advised by the applicant in her submissions. Consequently, I hold that the objection raised by the respondent cannot stand. I thereby hereby decline to uphold the objection and proceed to dismiss it with no order as to costs. The applicant is at liberty to have the Motion dated 29th March 2014 listed for disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF MAY, 2015.

W. MUSYOKA

JUDGE

In the presence of advocate for the plaintiff.

In the presence of advocate for the defendant.