



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 43 of 2012

L.K.W.....PLAINTIFF

VERSUS

L.G.K.....DEFENDANT

RULING

The application dated 22nd June 2012 seeks to strike out the plaint dated and filed on the 21st February, 2012 and that in the result the plaintiff's suit be dismissed with costs to the defendant.

The application is grounded on the fact that there was a competent judgment and orders given in Nyeri HCCC No.14 of 2009 in which the matter was heard and concluded. The gravamen of the plaintiff's application is that the suit is *res-judicata*.

The supporting affidavit sworn by L.G.K was filed on 9th July 2012. She states that the suit filed on 21/2/2012 does not disclose a reasonable cause of action against her as a competent court already gave judgment and orders vide HCCC No.14 of 2009 and the same was concluded and therefore the same is *res-judicata*.

In a replying affidavit sworn and filed on 4/2/2013 the plaintiff states that the issue of vacant possession of land parcel No.Thegenge/Karanga/293 has not been filed, heard or determined by any court.

The facts of this matter as argued by both parties is that the plaintiff and defendant divorced in Nyeri High Court Divorce Cause No.12/05 and proceedings for division of their matrimonial properties under the *Married Women Property Act 1882* being Nyeri High Court case No.14/09 (O.S) were undertaken whereupon the High Court ordered that since the matrimonial home of the plaintiff and defendant was built on the suit land (LR NO.[PARTICULARS WITHHELD]) which land was ancestral and inherited by the plaintiff from his father, the same could not be awarded to the defendant. However, the court found

that she was entitled to half the value of the matrimonial home and directed the parties to appoint a valuer to value the matrimonial home within 60 days and that the defendant was to meet the valuer's fees.

I have looked at the pleadings on record, the Notice of Motion, Supporting affidavit and the reply thereto, I have also read the rival submissions by the parties and do find that on the **8th April 2011** Justice J.K. Serгон delivered a ruling declaring that the plaintiff is entitled to 50% of the parcels of land known as L.R. No.[...] and L.R No.[...]. The court declined to give her the orders sought in respect of LR No. T[...] because the properties were in the names of Karangia S/O Wariari deceased and the deceased's estate was yet to be succeeded.

On 12th May 2011, the defendant herein took out a motion in Nyeri HCCC No.14 of 2009 (O.S) and applied for an order of review pursuant to the provisions of order 45 rule 1 of the Civil Procedure Rules pointing out that the court failed to make a determination in respect of the parcel of land known as LR NO.T[...] on the mistaken belief that the aforesaid property was registered in the name of the plaintiff's deceased father whilst the property was registered in the name of the plaintiff. The court listened to the parties and found that it made an error appeared on the face of record hence corrected the same and thereafter found that the defendant herein contributed in the construction of the matrimonial home.

The court declined to award the defendant the parcel of land LR NO.T[...] but awarded her one half of the value of the matrimonial home.

The court further directed the parties to appoint a valuer to value the matrimonial home within 60 days and the defendant to meet the cost of the valuer. Either party could buy the other out and each party was to meet its own costs .

The issue before court is whether this suit is **res judicata**.

Section 7 of the Civil Procedure Act prohibits the court from trying 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 which 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 **determined**.

The first question to be asked is whether the issues in Nyeri HCCC No.14 of 2009 are similar to the issues in the current suit. The issues in Nyeri HCCC No.14 of 2009 that were determined by the court hinged on distribution of matrimonial property including T[...]. The court decided that the matrimonial home in T[...] was to be valued and shared equally and that either party could buy out the other. I do find that the matter directly and substantially in issue in the current suit is ownership of the matrimonial home in the suit property which matter has been directly and substantially in issue in Nyeri High Court Civil Case No.14 of 2009.

I do further find that the parties in this suit are the same parties in the former suit. The court is the same High Court under the same jurisdiction to try the issues raised.

The issues raised in the plaint in paragraphs 5, 7, 8 and 9 have been heard and finalized by the High Court and therefore nothing further to be tried. The parties ought to move forward and comply with the court order to share the value of the matrimonial home or buy ought each other otherwise the suit herein is an abuse of the process of the court.

The upshot of the foregoing is that the application dated 22/6/2012 is allowed in the following terms.

a) THAT the plaint dated and filed on 21st February 2012 on behalf of the plaintiff herein be struck out.

b) THAT in the result the plaintiff's suit is hereby dismissed with no order as to costs.

Orders accordingly.

Dated, signed and delivered at Nyeri this 17th day of April 2013.

A. OMBWAYO

JUDGE