



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**LAND AND ENVIRONMENT COURT**  
**CIVIL CASE NO.60 OF 2012**

GEOFFREY MUNDIA KABETHI.....PLAINTIFF

**VERSUS**

PETER WANJOHI NJOGU

PETER WAMBUGU GITONGA..... DEFENDANTS

**R U L I N G**

The application before court is dated 13th August 2012 commenced by way of Notice of Motion and seeking the striking out of the Originating Summons dated 3/3/2012 for failure to disclose any reasonable cause of action in law, misconceived and a gross abuse of the process of the court.

The grounds of the application are namely:

- a. **The suit is *Res judicata* in view of Nyeri PMCC No.192 of 1991, CMCC. No.273 of 2006 and HCCA. 127 of 1993.**
- b. **That the registered proprietors of the suit property are all deceased.**
- c. **It is mete and just in all the circumstances that the appeal be struck out.**

The application is supported by the affidavit of Peter Wanjohi Njogu the 1st defendant who states on oath that the suit property being plot **No.KARATINA TOWN/BLOCK 1/162** (formerly plot No.67) is registered in the names of Fredrick Wanjohi, Robertson Njogu Ngare and Ndegwa Kiragu who are all deceased.

The deponent states that he is advised by counsel that this suit is *res judicata* in view of the previous suit Nos.192 of 1991, Nyeri HCCA No.127 of 2001 and Nyeri CMCC No.273 of 2006.

The genesis of this matter is the Originating Summons dated 3/3/2012 in which Geoffrey Mundia Kabethi (plaintiff) has sued Peter Wanjohi Njogu and Peter Wambugu Gitonga to give accounts of the rent they have collected from plot No.31/162 (formally plot No.67) Karatina and the business standing therein since 1972 to date.

The Originating Summons also seeks an order that Peter Wanjohi Njogu and Peter Wambugu Gitonga be ordered to pay Geoffrey Mundia Kabethi his rightful share entitlement as the partner in respect of rent collected by the defendants from the business premises standing on plot No.B1/162

Karatina.

Lastly that the partnership subsisting between the parties herein be wound up and the property or assets of the partnership be distributed to the parties.

In the plaint dated 5/4/2006 filed in Nyeri CMCC No.192 of 1991 the plaintiff filed a suit against the defendants Robertson Njogu Ngari, Fredrick Wanjohi and Peter Wanjohi Njugu praying for orders that:

- a. **That these defendants be ordered to pay the plaintiff the arrears of the rent claimed or to be assessed by court.**
- b. **Costs of this suit.**
- c. **The plaintiff to collect rent until the arrears are paid up.**

The trial magistrate found that the suit against the 1st and 2nd defendants had abated according to the law leaving the 3rd defendant.

The court further found that the plaintiff failed to prove his claim against the 3rd defendant and therefore the suit was dismissed with costs.

On appeal, the learned judge, Justice Khamoni (retired) held that the appellant could not succeed on appeal because the registered proprietors of the lease were dead. Mr. Muthigani for applicant argues that the suit is *res judicata* the issues in dispute having been determined by the Nyeri CMCC No.192 of 1991 and Nyeri HCCA No.127 of 2001.

The court agrees with the submission of Mr. Muthigani that the suit herein is *res judicata* and therefore it cannot be retried. The court finds that the issue of rent arrears which is directly and substantially is issue in the Originating Summons was directly and substantially in issue in the Nyeri CMCC No.192 of 1991 and Nyeri HCCA No.127 of 2001 between the same parties in a court of competent and concurrent jurisdiction. The matter was heard and finally determined by the court.

The issue of the plaintiff's claim to be included in the lease was determined by the lower court. Moreover the court observed that the plaintiff's claim lay within the co-owners of part B of the said plot and that the 3rd defendant had nothing to do with the plaintiff's claim. For a preliminary objection of *res judicata* to succeed one must demonstrate

- a. **The matter in issue is identical in both suits.**
- b. **The parties in the suit are the same**
- c. **Sameness of title**
- d. **Concurrence of jurisdiction**
- e. **Finality of the previous decision.**

I have perused all documents in respect of the cases referred to as former suits and the current suit and do find that the issue of the plaintiff being included in the lease was considered and determined in the former suits and the same is required to be determined in this suit in order for the court to make a decision on the alleged partnership.

The plaintiff in the former suit and the defendants therein are the same persons as the plaintiff and defendants in the current suit.

I accordingly allow the application and dismiss the Originating Summons dated 3/3/2012 with costs to the defendant.

***Dated, signed and delivered at Nyeri this 25th day of September 2013.***

**A. OMBWAYO**

**JUDGE**