



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 424 OF 2013

SAMUEL KAMAU NJUGUNA PLAINTIFF

VERSUS

HANNAH NJERI NYAGA DEFENDANT

RULING

By his plaint filed herein on 19th April 2013 the plaintiff suing as the registered proprietor of land parcel No. LOC 8/KIONJOINI/264 sought an order that the defendant vacates the said property (hereinafter referred to as the suit property) and also pay mesne profits for illegal use of the said land.

In her defence, the defendant denied that the plaintiff is the legal owner of the land adding that ownership of the same is yet to be determined and is subject of NYERI H.C.C.C No. 189 of 2000 (OS) which is pending. Most significantly, however, the defendant stated in paragraph 6 of her defence that she would be moving the Court to strike out/dismiss the suit as it does not comply with the mandatory provisions of **Order 4 Rule 1 (1) (f)** and **Order 4 Rule 1 (2) of the Civil Procedure Rules** for failing to disclose that there are other pending or concluded suits involving the same parties and the same subject matter being:-

- a. Nyeri H.C.C.C No. 189 of 2000 (OS)
- b. Murang'a P.M.C.C No. 291 of 2002
- c. Murang'a P.M.C.C. No. 382 of 1998
- d. Nairobi H.C.C.C No. 569 of 2005
- e. Kahuro L.D.T Case No. 3 of 2001
- f. Nyeri Provincial Appeal No. 28 of 2001

The defendant also pleaded that the plea of res-judicata would be raised seeking the dismissal/striking out of the suit on 4th June 2013. The defendant/applicant filed a Notice of Motion under **Order 4 Rules 1 and 2 and Section 7 of the Civil Procedure Rules and Act** respectively seeking the following orders:-

- a. *That the plaint be struck out for being accompanied by a false verifying affidavit or in the alternative*
- b. *That the plaint be struck out for being res-judicata.*

The application was based on the grounds on the face of the Notice of Motion and supported by the defendant/applicant's affidavit in which she depones, inter alia, that the verifying affidavit sworn by the plaintiff/respondent in support of his claim is false in that it does not disclose that there are pending and previous suit between the parties over the same suit property as listed in (a) to (f) above.

In his reply in opposition to the said application, the plaintiff/respondent has deponed that the issue is not res-judicata and that none of the cases mentioned above ever decided that he is not the owner of the land and further, the issues in this case have never been determined in Court and in any case, he was not a party to those other cases which were either dismissed or struck out on technical grounds.

Counsels for both parties have filed their submissions on the said Notice of Motion which I have considered together with the rival affidavits and annexures.

As stated above, the subject matter in this suit is the land parcel No. LOC. 8/KIONJOINI/264 and in her affidavit in support of this application, the defendant/applicant has annexed the pleadings in the following cases:

1. **Nyeri H.C.C. No. 189 of 2000 (OS) – Hannah N. Nyaga Vs Katiwa Gathenga**
2. **Murang’a P.M.C.C. No. 291 of 2002 – Samuel K. Njuguna Vs Hannah N. Nyaga**
3. **Murang’a P.M.C.C. No. 382 of 1998 – Hannah N. Nyaga Vs Katiwa Gathenga**
4. **Nyeri Provincial Appeal No. 28 of 2001 – Hannah Njeri Nyaga Vs Samuel Kamau Njuguna and Gatiba Wenyoga**
5. **Nairobi H.C.C.C No. 569 of 2005 - Samuel K. Njuguna Vs Hannah Njeri Nyaga.**

It is clear from the above cases that that subject matter is the same subject matter in this case. It is also clear that the parties herein were also parties in Murang’a P.M.C.C. No. 291 of 2002 and Nairobi H.C.C.C No. 569 of 2005. In both those two cases, the plaintiff herein was the plaintiff while the defendant herein was the defendant. In the other cases, the defendant herein is the plaintiff but the other parties are not parties to this suit. It is therefore clear that as far as the plaintiff and defendant herein are concerned, they have litigated over the suit property in Murang’a P.M.C.C No. 291 of 2002, Nairobi H.C.C.C No. 569 of 2005 and at the Nyeri Provincial Land Disputes Tribunal Appeal No. 28 of 2000 although this last case also involved a second party who is not a party in this case. There was some confusion in relation to Nyeri H.C.C.C No. 189 of 2000 (OS) because two different annexures were availed to the Court. One annexure indicated that the plaintiff in the said case is the defendant herein while there were two defendants one being the plaintiff in this case. The other annexures show that infact the parties in that case were the defendant herein as the plaintiff and another party who is not a party to this case. In her affidavit in support of the Notice of Motion, the defendant/applicant has deponed in paragraph 4 (a) that Nyeri H.C.C.C No. 189 of 2000 is still pending. Arising out of that confusion, I did call for Nyeri H.C.C.C No. 189 of 2000 (OS) and confirmed that infact that case was dismissed on 7th March 2006 for want of prosecution and that an application seeking to enjoin the plaintiff herein as a second defendant was filed but was not prosecuted. It is therefore clear that all the cases mentioned above have either been struck out or dismissed for want of prosecution and the only pending case is the Nyeri Provincial Land Disputes Tribunal Appeal No. 28 of 2000 which is of course un-likely to proceed following the disbanding of the Tribunals. Since the plaintiff herein was never made a party to Nyeri H.C.C.C No. 189 of 2000 (OS), the issue of res-judicata would not apply.

The defendant/applicants Notice of Motion was premised on the grounds that:-

- a. ***The plaint was accompanied by a false verifying affidavit and***
- b. ***The claim was res-judicata.***

In paragraph 3 of the said verifying affidavit which is the relevant pleading, the plaintiff/respondent swore as follows:-

(3) “That I further verify that there is no other case pending in any Court save for a Land Disputes Tribunal Case”

From what I have considered above, there is no falsity in the above statement. The only case which the defendant/applicant alleges is still pending in the Nyeri H.C.C. No. 189 of 2000 (OS) but as I have indicated above, that case was dismissed on 7th March 2006 for want of prosecution and even before then, an application filed by the defendant herein seeking to enjoin the plaintiff herein in that case had not been prosecuted. So the plaintiff herein was never a party to Nyeri H.C.C.C No. 189 of 2000 (OS). Since there is no evidence that the plaintiff’s verifying affidavit is false, the prayer seeking the striking out of the plaint on that ground cannot succeed and is dismissed.

The second ground on which the defendant/applicant seeks the striking out of this suit is that it is res-judicata. Res-judicata under **Section 7 of the Civil Procedure Act** comes into play where a suit or issue has been directly and substantially in issue in a former suit between the same parties or parties under whom any of them act and which has been heard and finally decided by a competent Court. No evidence has been placed before me to show that any or all of the other suits were ***heard*** and ***finally*** determined. The only ruling availed to me was that in Nairobi H.C.C.C No. 569 of 2005 which was struck out for being accompanied by a false affidavit. The onus was on the party pleading res-judicata to prove the same and this could only be done by availing the determinations in those cases to show that they were heard and finally determined. This has not been done and consequently, the plea of res-judicata is not well merited and must be dismissed.

Ultimately therefore, the defendant/applicant’s Notice of Motion dated 31st May 2013 and filed herein on 4th July 2013 is dismissed with costs.

B.N. OLAO

JUDGE

16TH SEPTEMBER, 2013

16/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

No appearance for Plaintiff

Mr. Wachira for Mwangi for Defendant – present

COURT: Ruling delivered this 16th day of September 2013 in open Court.

B.N. OLAO

JUDGE

16TH SEPTEMBER, 2013