



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 166 OF 2009

NYANDARUA PROGRESSIVE AGENCIES LTD.....APPLICANT/DEFENDANT

VERSUS

PAUL KURIA WAINAINA.....RESPONDENT/PLAINTIFF

RULING

The respondent in this application is the plaintiff in the main suit. He brought the suit against the present applicant for a declaration that he (the respondent) is the lawful and legal owner of plot Nos. 1252 and 1258 within Nyandarua Progressive Agencies by way of adverse possession. He also seeks that the defendant or the Nakuru District Lands Registrar be ordered to issue title deeds in respect of the two properties to the respondent.

The applicant filed a defence and a notice of preliminary objection way back on 24th July 2007. The applicant has also filed chamber summons dated 4th February 2009 for orders to strike out the suit with costs. Both the chamber summons and the notice of preliminary objection were, by consent set down for hearing on 9th November 2011. On that date, counsel for the respondent did not attend and the hearing proceeded *ex parte*. Counsel for the applicant only argued the preliminary objection and said nothing about the chamber summons. That course of action may have been informed by the fact that the two are intended to achieve one goal.

The preliminary objection is raised with regard to the suit on the ground that the same is *res judicata* Nakuru HCCC No.73 of 2006 which was dismissed on 14th July 2006 and on subsequent appeal to the Court of Appeal challenging it was also withdrawn; that the suit offends the provisions of the Companies Act and the applicant company's Articles of Association; that the applicant is non-suited and the dispute ought to be referred to arbitration; that **Order XXXVI Rule 3A of Civil Procedure Rules** has not been complied with.

Being a preliminary objection, no response was filed and since counsel for the respondent did not attend, the arguments by counsel for the applicant were not controverted. However, the respondent had filed a further affidavit in response to the chamber summons in which he answers the averments in the objection.

It is deposed that Nakuru HCCC No.73 of 2006 was based on a different cause of action from the present suit hence the same is not *res judicata*.

Section 7 of the **Civil Procedure Act** provides as is material to the matter as follows:

“7. 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.”

The earlier suit as pleaded is Nakuru HCCC No.73 of 2006, copies of the plaint, defence and the application, the subject of the ruling of 14th July 2006, are on record. It is common ground that the parties and subject matter in Nakuru HCCC No. 73 of 2006 are the same ones in this suit. It is also clear both from the pleadings in this matter and from Nakuru HCCC No. 73 of 2006 record that the suit has not been dismissed or struck out. It is only the respondent’s application for injunction that was dismissed. The last limb to **Section 7** aforesaid, namely, that the issue be heard and finally decided, has not been satisfied.

The record of Nakuru HCCC No.73 of 2006 indicates that the applicant’s application seeking the dismissal of the case for want of prosecution is slated for hearing on 28th February 2012. The other matters raised in the notice of preliminary objection cannot be argued within the strictures of **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited**, case. They do not constitute pure points of law. Their consideration will require the ascertainment of certain facts.

For the reasons stated, the preliminary objection is overruled. But having found that the two matters relate to the same subject matter and involve the same parties and in order to prevent the process of this court from being abused, I move under **Section 6** of the **Civil Procedure Act** and order the stay of this suit pending the determination of Nakuru HCCC No. 73 of 2006.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 27th day of January, 2012.

W. OUKO

JUDGE