



REPUBLIC OF KENYA
IN THE HIGH COURT
AT BUNGOMA
CIVIL SUIT NO.50 OF 2009

MAKHANU NAKITARE
OF BUNGOMA

CHRISTINE PHILOMENA
:::::: PLAINTIFF/APPLICANT

~VRS~
MUNICIPAL COUNCIL
::::::DEFENDANT/RESPONDENT

RULING

The application dated 15/06/2009 seeks for an injunction to permanently restrain the Defendant/Respondent from re-possessing, selling, transferring or dealing in any manner with plot no.Bungoma/Township/528 pending the hearing of the suit.

The Respondent in his replying affidavit raises the issue that the suit is *resjudicata* since the issue of the ownership of plot no.Bungoma/Township/528 was determined in CMCC NO.204 of 2005. The Applicant argues that the suit was between other E.M.S. Stationers & Printers and Municipal Council of Bungoma. The deceased and the Plaintiff were not parties.

Section 7 of the Civil Procedure Act provides that a suit is *res-judicata* where:

“The matter directly and substantially in issue in a former suit between the same parties 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 by such court.”

The Respondent has annexed the decree in Bungoma SRMCC No.204 of 2005 showing that the Plaintiff in that case was Municipal Council of Bungoma and the Defendant was E.M.S Printers and Stationers.

The Municipal Council was successful in the case. The Plaintiff or her deceased husband were not

parties to the case. However, there is a letter annexed to the replying affidavit dated 30/09/2008. The letter is addressed to the Town Clerk, Bungoma Municipal Council by J. S. Khakula & Co. Advocates in which the counsel states that he represents **“the Defendant whose sole owner and Managing director was the late Eliud Paul Nakitare”** (in reference to E.M.S. Printers & Stationery).

The court entered judgment in favour of the Plaintiff (Bungoma Municipal Council). The deceased was the sole proprietor and Managing Director of the Defendant E.M.S Stationers. There is no registration certificate attached but from the name E.M.S. Printers and Stationers, it appears to be just a business name and not a limited liability company. There is no evidence whether an appeal was preferred against the decision by the Senior Resident Magistrate. As the decree stands, the Defendant E.M.S. Printers and Stationers lost the suit. The deceased being the Managing Director and sole owner of the business was trading in the said name. The Applicant here is the widow of the deceased who has obtained a grant. Although the pleadings are not annexed to the replying affidavit, I find the decree clear that the issue in the plaint herein are the same as those in the earlier suit. The administrator of the deceased’s estate cannot file a suit to restrain the Bungoma Municipal Council from selling, transferring or dealing in any manner with plot no.528 Bungoma township when the issue of ownership was determined.

It is my finding that the suit herein is *res-judicata* and I dismiss the suit with costs. I need not go into the merits of the application.

**F. N. MUCHEMI
JUDGE**

Ruling dated and delivered at Bungoma this 10th day of March, 2011 in the presence of Mr. Khakula for the Applicant and Mr. Wattanga for the Respondent.

**F. N. MUCHEMI
JUDGE**