



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 25 OF 2010 (O.S.)

MASIA SIRONGA LEKASOO.....PLAINTIFF

Versus

FREDRICK NKONGE MUTWIRI

OFFICER SETTLEMENT FUND TRUSTEE TIMAU.....DEFENDANTS

RULING

This matter came up for hearing of a preliminary objection filed by the Defendant/Respondent filed on 26/3/2010. The same was duly served upon the Plaintiff/Appellant who instead of responding to the said preliminary objection on 21st September 2011 filed a notice of motion application for direction by this honourable court.

When this matter was called up Mr. Kimunya held brief for Mr. Naikuni and stated that what was coming up was the notice of motion for directions and in reply to this the advocate for the Respondent Mr. Anampiu, pointed out that what was listed before the honourable court was the preliminary objection.

Since this court was of the view that the preliminary objection had the effect of determining the suit, the court ordered that the matter proceed for preliminary objection to which Mr. Kimunya requested that the court should set free as he was only holding brief and he was duly set free.

The preliminary objection is based on the fact that the subject matter of this suit is res judicata having been dealt with in **C.M.C. case no. 147 of 1997 Meru** and **H.C.C.A. no. 53 of 1999 Meru**. The Respondent advocate submitted before this court that the judgments of the said suits were annexed by the applicant at paragraph 16 and 19 of the Supporting Affidavit to the Originating Summons. Where the same states:

R. 16 THAT after full trial submission and hearing the honourable court on 4th May 1999 delivered its judgment in favour of my deceased brother and our estate.

19. THAT on 30th October 2009 the High court delivered a judgment and substituting it with an order dismissing the said suit of the lower court.

What was the subject matter in the lower court?

According to the judgment of my sister Justice Mary Kasango delivered at Meru on 30th day of October 2009 in the plaint filed in the lower court Joseph Kibithe Sironga sought for orders of specific performance of an agreement entered into between KASU and the defendant who was the Appellant before her over parcel of land Timau SFT Scheme No. 016 wherein she set aside the lower courts judgment and substituted it with an order dismissing the said suit. Once the said suit was dismissed and since the Applicant did not prefer an appeal against the same that was a finality to it.

The issue which this court has to look at is the subject matter of the present action. In the originating summons filed before this court on 19th February 2010 the subject matter is in respect of plot No. Timau SFT Scheme no. 16 where the applicant who is claiming as a legal representative of the estate of the late Joseph Kibithe ole Silonga is claiming to have acquired title to the same land by way of adverse possession.

Having confirmed that the issues herein were the subject matter which were litigated and finally determined in HCCCA no. 53 of 1999 at Meru and which is a court of competent jurisdiction the applicant herein can not now again institute this suit seeking the same relief though now by way of an adverse possession. It is clear that both suits are dealing with the similar issues between the same parties or parties claiming under the same parties.

In support of the preliminary objection the Respondent's advocate submitted the authority of the Court of Appeal in Nakuru Civil Appeal no. 1 of 1986 **BENSON NGUGI vs FRANCIS KIBUI KINYANJUI & OTHERS** wherein the court held:

“In law any litigation has to come to an end. Once a decision has been reached by a competent court it cannot be reopened to be started all over again unless the decision reached has been set aside. It can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment still remains on record.”

Since the Applicant has confirmed that the subject matter of this suit had been litigated upon and since the same did not offer any opposition to the preliminary objection I hold that this suit is res judicata and allow the preliminary objection herein. Since a suit that is res judicata is an absence of the process of court I therefore strike out the suit herein and dismiss the same with costs to the Respondent.

Dated and delivered at Nyeri This 11th day of November 2011.

J. WAKIAGA
JUDGE