

MARY WAIRIMU MWANGI PLAINTIFF

VERSUS

JOHN MWANGI MBUTHIA DEFENDANT

R U L I N G

When this case came up for hearing on 26th March 2009, **Mr. Gathiga Mwangi**, learned Advocate for the defendant raised a preliminary objection. The preliminary objection was to the effect that the Plaintiff had initially filed HCCC No. [...] under the married Women Properties Act which she subsequently withdrew. Thereafter she proceeded to the land Disputes tribunal and filed LDT number 20 of 2001 at Mweiga. The tribunal subsequently made the award. However she was not satisfied with the award. She therefore preferred an appeal to the Provincial Lands Disputes appeals committee, Central Province which appeal was dismissed. Undeterred, she then filed a Judicial Review application in Miscellaneous Civil application number 268 of 2002. The same was again dismissed by **Khamoni J** on 6th November 2003. It was then that she filed the instant suit under the married Women Property again. To **Mr. Gathiga Mwangi** all these proceedings have been in respect of the same suit premises to wit, **Nyeri/Uaso Nyiro/133** and **Mweiga/Block 5/Muthuaini/363**. She had been initially awarded 20 acres out of **Nyeri/Uaso Nyiro/133** by the land disputes tribunal. This suit was thus Res Judicata and ought to be struck out. However the defendant was not asking for costs.

In response, **Mr. Wainaina**, learned advocate for the Plaintiff submitted that the preliminary objection was not maintainable. That the originating summons was brought pursuant to married women properties Act. That the tribunal was not a court of competent jurisdiction. Accordingly this matter was not res judicata.

As I read through the court file in preparation to craft this ruling, it came to my attention that this very same issue of Res Judicata had been previously raised and canvassed before **Kasango J** and a ruling thereon made. Indeed the issue was raised by the late **Mr. Kaburu**, the advocate then on record for the defendant when the suit came up for hearing before **Kasango J** on 26th July 2007. In a ruling dated and delivered on 13th November, 2007, the learned judge dismissed the preliminary objection with no order as to costs. That being the case, it was not open to the advocate for the defendant to renew the issue again. I do not wish to speculate the intention of the advocate in raising the same preliminary objection knowing very well that the same had previously been raised and dismissed. As a consequence, valuable judicial time has been wasted on a matter an advocate knew very well or ought to have known that could not see the light of day. If the advocate was intent on having a second bite of the same cherry and thought that perhaps I would reach a different verdict from my sister's, he is gravely mistaken. Indeed it is his preliminary objection which is Res Judicata. Accordingly I would dismiss the preliminary objection with costs to the plaintiff. However I direct that such costs be paid personally by the advocate for the defendant for having misled the court into hearing a preliminary objection when the same had been heard and determined by **Kasango J**.

Dated and delivered at Nyeri this 11th day of May 2009

M. S. A. MAKHANDIA

JUDGE