

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 331 of 2005

SAMUEL MUTHIA MAGUA PLAINTIFF

VERSUS

AMERICAN LIFE INSURANCE CO. LTD. DEFENDANT

RULING

Preliminary Objection dated 2/2/09 that the suit is res judicata raising issues which were substantially in issue in previous proceedings in HCC No.252 of 1991 – Samuel Muthia Magua vs. American Life Insurance Co. (Kenya) Ltd. Same issues were directly in issue in previously instituted suit between same parties.

In the present case the defendant states that issues were same between same parties. In HCC No. 331/05 was another suit filed without regard to Section 7 of Civil Procedure Act while the other suit has been heard and finally decided. The issues are the same that the defendant is threatening to exercise its power of sale in respect of same charge and same property. However, it is shown that the suit HCC No.252/1991 was dismissed on technicality before finally being heard and determined.

The plaintiff opposes the Preliminary Objection by submitting that HCC No. 252/1991 was a claim for general damages for breach of contract, interest on the claims at court claims. In HCC 331/05 seeks declaration on the issue of redemption of the mortgage refund of Kshs.468,171/02 or alternative a true account be rendered on costs and interest. The claims are quite different.

It is clear parties are the same and the property is the same but the cause of action is different. I have perused the authorities relied upon on both sides and the well written submissions of parties. I am convinced that although the parties are same and property subject to charge are same, the subject matter of the two suits are not the same. The reliefs claimed are different. They could not have been argued together because there is great difference in the time span.

In the circumstances, the Preliminary Objection is overruled with costs. The suit should proceed to hearing on priority basis as it is said the plaintiff is sickly.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 17th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE