



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Environmental & Land Case 1437 of 2007**

NANCY WANJIRU ..... PLAINTIFF

VERSUS

WANJIRU WAIRIMU ..... 1<sup>ST</sup> DEFENDANT

PETER MIRINGU. .... 2<sup>ND</sup> DEFENDANT

**R U L I N G**

The record shows that this suit was filed as Nairobi Civil Suit No. 14 of 2004 in the Family Division. It was transferred to the Civil Division where it became Civil Suit No. 1173 of 2004. In 2007 it was again transferred to Land and Environment Division as case No. 1437 of 2007. The parties remained the same.

The application before the court is a Chamber Summons by the Defendants dated 19<sup>th</sup> November, 2008, seeking that the suit by the Plaintiff, be dismissed with costs. The main ground upon which the application is based is that the suit is *res judicata* earlier suits and accordingly incompetent and fatally defective.

Facts in the records, show that the Plaintiff herein Nancy Wanjiru, filed an application by a Notice of Motion, numbered Nairobi Misc. Civil Application No. 738 of 2003, a Judicial Review application. She had sought to quash a decision of Kandara Land Disputes Tribunal apparently relating to the same suit property which is the subject matter in this suit.

In dismissing the above application Lenaola Ag. J (as he then was) found that the said application was bad in form and therefore unsustainable. He also however made other findings i.e. that the applicant therein who is the plaintiff herein, was not a co-proprietor with the 1<sup>st</sup> Defendant herein in the herein suit property that is registered in the name of the 1<sup>st</sup> defendant. The Honourable Judge concluded that the plaintiff had no *locus standi* to have filed the said application. Lenaola Ag. J's ruling is dated the 18<sup>th</sup> December, 2003.

It is observed that it was after that ruling that the Plaintiff who was the applicant in the said Miscellaneous Application No. 738 of 2003, filed this suit suing Wanjiku Wairimu who was one of the Respondents or Interested parties in that application, as defendants.

It is noted further that the plaintiff herein filed simultaneously with this suit, a Chamber Summons dated 1<sup>st</sup> July, 2004 in which she sought the following substantive prayers: -

(a) That there be a stay of proceedings in D.O's case Number 8 of 2003 at Thika District Magistrate's Court and Nairobi High Court Miscellaneous application Number 738 of 2003 pending the hearing and determination of this suit.

(b) That the respondents (Defendants herein), her agents, servants, employees and/or assigns be restrained from selling, alienating and/or in any other manner interfering with the suit property L.R. Loc.5/Kagunduini/1832.

The above application was heard and finally determined by Kubo, J. in a ruling dated 27<sup>th</sup> February, 2006. The Honourable Judge referring to the finding in the ruling in the said High Court Miscellaneous Civil Application No. 738 of 2003 by Lenaola Ag. J, stated as follows: -

**"I am of the respectful view, that the issue of the present Plaintiff/Applicant's *locus standi* with regard to the claim she lays to the suit land, was substantively decided against her by Lenaola Ag. J in High Court Miscellaneous Civil Application No. 738 of 2003. If she was aggrieved by it, she should have challenged it by way of appeal or review. She failed to do so within the prescribed period. Instead she filed, long after the ruling, a suit before a court of concurrent jurisdiction whose purport is essentially to have Lenaola, Ag. J's ruling against her stayed and eventually overturned. In my humble view, if this court granted the application, it would be sitting on appeal over a ruling issued by a court of concurrent jurisdiction and I hold that this court has no jurisdiction to do that. The matter is *res judicata*."**

With the above pronouncement, Kubo, J dismissed the application for injunctions that were seeking to stay proceedings *inter alia* in the Nairobi High Court Miscellaneous Application No. 738 of 2003.

It is in my understanding, upon the rulings of Lenaola Ag. J's and Kubo, J's that the defendants in whose favour both rulings were made, now seeks that this court dismisses this suit on the basis and principle of *res judicata*.

I have given this application a considerable and careful thought. There is no doubt in the ruling of Lenaola Ag. J that he made a finding that the plaintiff herein who was the applicant in the Miscellaneous Application No. 738 of 2003, had no proprietary interest in the suit property, L.R. No. Loc 5/Kagunduini/1832. He found also that the 1<sup>st</sup> Defendant herein was the registered owner. He concluded accordingly, in the absence of registration of any other interest in the suit property register, including any equitable interest, the applicant/plaintiff had no *locus standi*.

Clearly, Kubo, J agreed with Lenaola Ag. J. My understanding of Kubo's J's ruling is that he abided with Lenaola Ag. J's ruling on the issue of proprietorship of the suit property. That is to say, that he agreed with Lenaola Ag. J's ruling and made his own finding that the suit property was registered in the name of and belonged to the 1<sup>st</sup> defendant. That the plaintiff has no proprietary rights thereon and therefore had no *locus standi* to bring a suit claiming any rights thereon. That the plaintiff having not challenged that court's ruling through a review or appeal, cannot purport to do so through this suit as such claim on the issue of ownership of the said suit property, would be *res judicata*.

In my finding, it would not be tenable for this court to overlook the findings and rulings of Lenaola Ag. J's and Kubo, J. As the plaintiff did not challenge the ruling through either appeal or review, the rulings still stand. This court cannot overturn them as that would be sitting on appeal on each of them. In these circumstances, the fate of this suit whose substantive claim is the proprietorship of the suit property, is on the wall. It cannot succeed. The issue as to who owns the suit property is sealed as decided in the two rulings. In the circumstances I rule that this suit is fatally incompetent for being *res judicata*. I hereby strike it out and dismiss it with costs. Orders accordingly.

Dated and delivered at Nairobi this 27<sup>th</sup> day of November, 2009.

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**D A ONYANCHA**

**JUDGE**