

1. Land and Environmental Law Division
2. Subject of main suit: Land LR1870/11/119

Suit property jointly owned by the both parties

- ii) Allegations that defendant collects rent alone

Plaintiff wants share of thee rent. Seeks orders from court to compel plaintiff to pay rates; rents from 1993 compel defendant to stop collecting rents.

3. Defence

- i) Plaintiff suit Res Judicata.

Suit Hccc2313/94 filed

- ii) Defendant ahs collected rents previously and benefited.
- iii) Defendant on loan Ksh 7 m and has to repay though rental income

4. Held:
 - i) Suit Res judicata
 - ii) Suit – plaintiffs no case

5. Case law – Nil

6. Advocate

S.G. Wachira instructed by S.G. Wachira & Co. Advocates for the plaintiff/applicant – present

P.M. Ndungu instructed by P.M. Ndungu & Co. Advocates for the defendant/respondent - present

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1311 OF 2005

WILSON THAMBO TUMBO PLAINTIFF

VERSUS

JEDIDAH WAITHIRA THAMBO DEFENDANT

JUDGMENT

I: PROCEDURE

1. On the 27 June 1994 Wilson Thambo Tambo filed a suit against Jedidah Waithira Thambo the defendant herein and his lawful wife seeking orders of this court for declaration that:-

“1) The house hold goods are property of the plaintiff.

ii) The plaintiff is entitled to receive rental income from a house

iii) The defendant be restrained from collecting the rents and or dealing with property LR1870/11/119.

iv) The delivery of the house hold goods and money to the said plaintiff by his wife the defendant”.

2. An injunction application was filed by the plaintiff and duly heard by Aganyanya J. The Hon. Judge dismissed the claims made by the said plaintiff as having no basis. No prima facie case has been made out nor has there a likely hold of irreparable loss.

3. The plaintiff took no action in the matter. The file Hccc2313/94 called up by this court has never been dealt with since 6 October 1994.

4. On the 31 October 2005 almost 11 years later the plaintiff once again files a fresh suit touching on the same subject matter. The issue before the parties is whether this suit now before me is Res Judicata. The parties did not address me fully on this point nor provide any case law on it. In order to determine this issue a brief back ground of the evidence and trial requires to be given.

II: Background.

5. The plaintiff and defendant are man and wife. The defendant stated she was once a Bsc student at the University when she dropped out to marry the plaintiff. They were blessed with three children but unfortunately one, a son died in the year 2007 as a drug addict.

6. She worked with the City Council. As a Senior officer she was given a house on sale that was ex City Council. She obtained a loan and purchased the said house. In the meantime she lived with the plaintiff in their matrimonial house in Kimathi estate. Unfortunately, in 1994, she was forced out of the matrimonial home on grounds that she refused to give the rental money to the plaintiff. Between 1988 to 1994 she allowed the plaintiff to collect rent for 6 years. She had put his name on her property but the said plaintiff never paid any sums of money at all towards the purchasing of the house. In 1988 when she was convinced by the plaintiff to allow him collect rents, the plaintiff failed to pay for the children's school fees. The plaintiff took over the house in 1994. She left the matrimonial home. It is the same year I note that the former suit was filed Hccc2313/94 and no action to date occurred.

7. The plaintiff is now retired. He lives in the Kimathi estate house but his pension is Ksh.6,000/- per month. He again wants more money and sees it from the rent. The defendant stated that the plaintiff sold some other properties that could have earned them good money. He was also not able to account for Ksh.2 million rent collected in those 6 years previously.

8. The defendant states she had taken a loan for the children's fee of Ksh 7 million She uses the income to pay for the loan. Meanwhile she lives in Eastleigh. As a result of this she prays that she be allowed to file for a divorce.

9. The plaintiff informed the court that he was in need of money but never disclosed the issue of not being able to pay fees and mishandling rent money.

III: Opinion

10. The plaintiff suit herein is res judicata in view of Hccc2313/94. There is no cause of action and the same is misconceived. I am satisfied that the defendant acquired the right of the house on her own. That the defendant then has been collecting rent but that the plaintiff has since obtained a fifty year lease for the property from the Commission of Lands. This argued the defendant could not be possible without the said rates and rents being paid.

11. The issue of whether the defendant is under an obligation to review the lease does not arise. I do not

think that the plaintiff is entitled to income from the property as he has his own. This though would be subject to appointment of property. There is the married in his property rights act available to the defendant.

12. As this matter is Res Judicata I hereby dismiss this whole suit with costs to the defendant.

DATED THIS 8TH DAY OF APRIL 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

S.G. Wachira instructed by S.G. Wachira & Co. Advocates for the plaintiff/applicant – present

P.M. Ndungu instructed by P.M. Ndungu & Co. Advocates for the defendant/respondent- present