

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

CIVIL CASE 675 OF 2004

JAMES KIIRU KABUTI.....PLAINTIFF

VERSUS

WANJIKU MWANGI.....1ST DEFENDANT

SHADRACK KINYUA MWANGI.....2ND DEFENDANT

RULING

The plaintiff filed this suit by way of a plaint dated 22nd June 2004 seeking the following orders:-

(i) A permanent injunction restraining the first defendant and the second defendant from interfering in any way with the plaintiffs legal rights on the land parcel LR NO.NYANDARUA/NJABINI/11, removal of restriction dated 24th July 2003 and a consequent declaration that the plaintiff is the legal owner of the suit land.

(ii) Nullification and or revocation of any title deed issued to first defendant and or any intended to be issued particularly title NO. NYANDARUA/NJAMBINI/5504.

(iii) Costs of the suit plus interest. The defendants upon being served with the summons filed defence and at the same time filed Notice of a Preliminary Objection dated 16th November 2004. Premised that the application and the suit filed herein are fatally and incurably defective and should be struck out for failing to comply with the mandatory provisions of Order VII Rule 1 (e) of the Civil Procedure Rules averring that safe for the criminal case, there are no previous proceedings filed, yet there were proceedings commenced by the plaintiff over the same matters and involving the same parties.

Counsel for the defendant submitted that the suit is defective on the grounds that the plaintiff has failed to disclose that there is a previous suit filed in Naivasha SRM's Court being MISC. APPLICATION NO. 17 OF 2002 in respect of the same suit premises LR. NO.NYANDARUA/NJABINI.1183 and 1184. The parties are the same except that Grace Wangari Mwangi who was the first respondent has since passed away.

Secondly he submitted that the matter in issue had been dealt with by the Land Registrar under the provisions of the Registered Land Act Cap.300 in which a ruling was given but the plaintiff failed to appeal against that decision as provided for under Section 149 and Section 150. Instead of the plaintiff appealing against that decision to the High Court, he filed a fresh suit.

Mr. Kimani counsel for the plaintiff in opposing the Preliminary Objection submitted that the suit filed in Naivasha SRM's Court was an application seeking prohibitory orders. There was a dispute and there was a risk that the plaintiff's land could be interfered with. He further submitted that under Order VII Rule 3(e) the disclosures envisaged is on the other suit pending on the same subject matter.

The matter before the Naivasha Court, the magistrate was to determine if the plaintiff was entitled to equitable relief and the same was determined and the court found that the plaintiff was not entitled. The issues raised in this suit i.e. removal of prohibition, nullification of title were not canvassed before the lower court.

After I have considered the application as well as the submissions by both counsel for the defendant and the plaintiff, I have come to the conclusion that the proceedings before the Land Registrar and the Lower Court never reached a final decision over the matter and the issues raised in this suit are different and previous proceedings. The provisions of Order VII Rule 3 (e) of the Civil Procedure Rules are not applicable.

The Preliminary Objection is therefore dismissed with costs to the plaintiff.

Dated at Nairobi this 25th day of October 2005.

J.L.A. OSIEMO

JUDGE