



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 132 OF 2004**

**MARY NYAKIO WACHIRA**

**(Administratrix of the estate of Joseph Wachira Igoko (deceased)).....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**DAVID K. KINGORI.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is a ruling on a preliminary objection raised by the second Defendant. Miss Njoroge for the second Defendant submitted that the application dated 10<sup>th</sup> May, 2004 and the entire suit were res judicata and/or res subdice in that the plaintiff and/or her husband Joseph Wachira Igoko had previously sued the defendants in Nyahururu PMCC No. 233/01 seeking for an injunction respecting Plot No. Nyahururu Municipality Block 6/210 (Old No. 6585/412) and the suit was decided against the Plaintiff and/or her said husband after which they appealed in Nakuru High court Civil Appeal No. 25/03.

Miss Njoroge also submitted that the suit and application were misconceived and incompetent and bad in law in that the Plaintiff was seeking for orders which were denied in Nakuru High Court Misc. Suit No. 418 of 2003, Nakuru High court Civil Appeal No. 25 of 2003 and Nakuru HCCC No. 30 of 2004. She also submitted that the plaintiff had no cause of action against the second defendant in that the second defendant was the registered owner of the suit property having bought it in an auction and therefore the plaintiff could only seek damages under Section 77(3) of the Registered Land Act if she proved her case.

Mr. Odhiambo for the 1<sup>st</sup> Defendant associated himself with the submissions of Miss Njoroge. He submitted that if there was an appeal pending in court against the decision of the lower court, this case ought not to have been filed, instead the Plaintiff ought to pursue her appeal.

Mr. Kariuki for the plaintiff/applicant stated that PMCC No. 233 of 2001 in Nyahururu had never been heard. What was heard was an application for an injunction and a ruling delivered on 23/10/2003 and the applicant filed an appeal in the High Court against the said ruling. He stated that there was no other application for injunction pending in any court. He submitted that a matter could only be res judicata when it had finally been heard and decided by a court of competent jurisdiction. He stated that interlocutory orders like temporary injunctions did not constitute res judicata. He cited **MULLA, THE**

**CODE OF CIVIL PROCEDURE** for his propositions.

Mr. Kariuki further submitted that the facts which had been stated by the second defendant's counsel had to be ascertained and stated that counsel should have filed an application and sworn affidavits with the necessary annexures. He referred to the definition of a preliminary objection in **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD [1969] E.A. 696.**

He further stated that the prayers in this case were very different from the prayers in PMCC No. 233 of 2001 at Nyahururu and added that the prayers sought in this case could not be granted by a subordinate court.

He further stated that HCCC No. 30 of 2004 was not dismissed but was struck out on a technicality. Regarding High Court Misc. Suit No. 418 of 2003, he submitted that it was an application and it was dismissed.

I have considered the application as well as the submissions made by counsel in this matter. I think the application made by counsel for the second defendant should have been brought by way of a substantive application supported by an affidavit. I say so because some of the issues which she raised cannot be said to be preliminary objections as defined in the well known **MUKISA BISCUIT** case where it was stated that a preliminary objection:-

*“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

In the same matter, Law J.A. put it this way:-

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”*

If counsel had filed an appropriate application, I believe she would for example have attached to the supporting affidavit the pleadings and the ruling in Nyahururu PMCC No. 233 of 2001 so that the court could see what the case was exactly about and what the trial magistrate ruled so that I can contrast it with the pleadings in the present matter.

It was submitted by Mr. Kariuki that only an application for an injunction in the said PMCC No. 233 of 2001 was heard and determined and it is that ruling which is the subject matter of High Court Civil Appeal No. 25 of 2003. If that is the case, then the present matter is not res judicata because interlocutory orders do not operate as res judicata because interlocutory orders are meant only to preserve the status quo during the pendency of the proceedings and do not give rise to final decrees.

The plaintiff's advocate also stated that the orders sought in the present matter cannot be granted by a subordinate court as they include cancellation of a title and only the High Court can make such an order.

These are just some of the points which clearly show that the preliminary objection as raised cannot succeed.

I therefore dismiss with costs the preliminary objection dated 2<sup>nd</sup> June, 2004.

DATED, SIGNED & DELIVERED at Nakuru this 30<sup>th</sup> day of July, 2004.

**DANIEL MUSINGA**

**AG. JUDGE**

**30/7/2004**