



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO. 3040 OF 1993**

**MARGARET WAIRIMU MUTHEE & ANOTHER..... PLAINTIFF**

**VERSUS**

**ELIZABETH WANJIKU NZOMO & 2 OTHERS.....DEFENDANTS**

**RULING**

The Defendant/Applicants have moved the Court under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. They seek an order for striking out the Plaintiff's suit/plaint on the grounds that the same is scandalous frivolous and vexatious, will prejudice and embarrass the Defendants and in an abuse of the process of Court. Additionally, the applicants also contend that the suit is res judicata.

Despite the Applicants having come under Order VI Rule 13 1(b) (c) and (d) their supporting affidavit sworn by the 2nd Defendant/Applicant on 16.01.04, as well as submissions by their Counsel at the inter partes hearing have laid greater emphasis on the issue of res judicata. I note that the same was also raised in paragraph 8 of the Defence filed herein on 18.08.93. Although I am of the considered view that where in an application res judicata is pleaded a party ought to invoke the provisions of Section 7 of the civil Procedure Act, I am inclined to deal with it here even in the absence of that invocation since as I have stated, the same forms part of the Defendant's defence and because it goes to jurisdiction. A finding in res judicata will normally dispose of the proceedings.

The Applicants have stated in their supporting affidavit that the matters sought to be canvassed in this suit were considered and determined in H.C.C.C. No.4030 of 1983 in which the ownership of the subject matter, land parcel number Kabete/Kibichiku/353 was determined and the same awarded to them as well as the 2nd Defendant in equal shares. Counsel for the Applicants has submitted that the matters or issues in the present suit cannot be said to have been directly and/or substantially in issue in the earlier suit because, according to Counsel that suit only dealt with the subdivision of the land but did not give any order as to the manner of that subdivision, hence the filing of this suit. I am unable to see the basis of such an argument. The manner in which something is to be done cannot be said to constitute a cause of action, which in the legal sense is the existence of certain facts or a combination of facts giving rise to an enforceable legal right entitling one to relief. Had the Court however ordered the subdivision be done in a particular manner and the same not done thereafter, then the situation would be different in that the court order itself would have given the applicants a right enforceable by way of a mandatory injunction. The issue of the ownership of the subject land exists in both these suits as is seen from the prayers seeking the cancellation of the subdivision ordered by the Court with the consent of the parties (the judgment in H.C.C.C. 4030 was by consent). The Applicants had the opportunity to canvass their present desires in the previous suit but did not do so and entered a judgment by consent. The court having conclusively awarded the title to the subject property in the portions agreed between the parties, it cannot now be asked, in separate proceedings to open up the case and redetermine the boundaries in with the effect that the formula for subdivision is now altered. It is quite clear that the Respondents filed this suit not because a fresh cause of action arose or existed but because they did nothing to enforce the consent judgment. They should be deemed to have been content with it since they did nothing to have it set aside. I find that they ought not be allowed to continue with this suit as to entertain the same would be to reopen issues already adjudicated upon.

In the circumstances I find that the application succeeds in so far as it seeks to strike out the suit on the basis of res judicata. Having found and ruled thus, I find it unnecessary to deal with whether the

plaint/suit offend the provisions of Order VI Rule 13 (b) (c) and (d) since the effect of the striking and or suit ought not to have been filed at all. In the premises I allow this application and hereby strike out the suit with costs to the Defendants.

*Dated and delivered at Nairobi this 26 th day of Novemb er 2004.*

**M.G. Mugo**

**Ag. Judge**

**In the presence of**

***S. Amin for Kiania Njau for Plaintiff/Respondent***

***N/A for Applicant***