

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 264 OF 2002
(Formerly Nairobi HCCC No. 209 of 2001)

HALIMA MOHAMED KASSIM & ANOTHERPLAINTIFF
VERSUS
ABDI AZIZ AHMED & OTHERSDEFENDANT

RULING

I agree with Mrs Mbanya for the Plaintiff that a Preliminary Objection cannot be raised where the Court has to investigate any facts. The 1st , 3rd and 4th Defendants' Preliminary Objection dated March 6, 2001 which is under consideration was based on the following grounds:

- “1. There exists a part heard suit in NKU HCC NO. 517 OF 1999 between the same parties or between the same parties under whom they or any of them claim or litigating under the same title.
2. The issues in this suit are also directly and substantially in issue in NKU HCC NO. 517 OF 1999 which is part heard and now fixed by consent for hearing on May 14, 2001.
3. This Court should proceed with this suit as per Section 6 Civil Procedure Act otherwise this matter should be stayed generally and transferred to Nakuru.
4. NKU HCC NO. 517 OF 1999 has stopped the 2nd Defendant from dealing with the suit land in any manner whatsoever and the application herein is duplication of the same and the issues or substance of the same is res judicata as authorised by Section 7 Civil Procedure Act.
5. The suit herein and the application are misconceived and bad in law.”

Whether or not there exists another suit involving the same parties and similar issues is a matter which requires evidence of the existence of the other suit. It is not surprising, therefore, that at the hearing of the Preliminary Objection, Counsel referred to affidavits filed in the matter. That cannot be the case where the Court is considering a Preliminary Objection which must be limited to points of law only. The decisions cited are irrelevant in the circumstances.

I, therefore, dismiss the 1st, 3rd and 4th Defendants' Preliminary Objection dated March 6, 2001 with costs.

Dated and Delivered at Nakuru this 29th day of July, 2003.

ALNASHIR VISRAM

JUDGE