



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 331 OF 2017**

**DAVID KARIUKI MATHENGE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARY GATHONI GATHUO.....DEFENDANT/APPLICANT**

**RULING**

1. This suit was filed by the Respondent on the 16<sup>th</sup> March 2017 wherein upon effecting service, the Applicant noted that the matter was a duplicate of Nakuru HCCA No. 168 of 2012 wherein with the leave of the court, she filed her formal application dated the 22<sup>nd</sup> December 2017 pursuant to Order 2 Rule 15 (a) and (b), Order 51 Rule 1 of the Civil Procedure Rules as well as section 3A and 6 of the Civil Procedure Act and all enabling provisions of the law wherein she sought that the Respondent's suit to be struck out and/ or dismissed for being sub judice Nakuru HCCA No. 168 of 2012.

2. The Respondent was granted corresponding leave to file his replying affidavit which he did on the 23<sup>rd</sup> May 2018.

3. Parties took directions that the said Application be dispensed off by way of written submissions

**Applicant's submissions.**

4. Briefly, the Applicant's borne of contention is that this suit should be struck out and/or dismissed for being substantially the same in issue with the matter that was heard and determined in the Nyahururu SPMCC 134 of 2003, wherein the Applicant herein, an administrator of the Estate of the late Joseph Gathuo Githogori, being dissatisfied with the said judgment, filed an Appeal before the Nakuru High Court being Nakuru HCCA No. 168 of 2012, a matter which was still alive and ongoing.

5. It was the Applicant's submission that the orders issued in the Nyahururu SPMCC 134 of 2003 were still in force thus she was apprehensive that there could be a likelihood of conflicting orders being issued in the instant suit.

6. That further, both the matters in the Nyahururu SPMCC 331 of 2003 (sic) and Nakuru HCCA No. 168 of 2012 involved the same subject matter and parties and by virtue of the provisions of Section 6 of the Civil Procedure Act, this matter could therefore not proceed.

7. The Applicant relied on the decided case of **Kenya Planters Co-operative Union Limited vs Kenya Co-operative Coffee Milers Limited & Another [2016] eKLR** to submit that a Constitutional Petition is amenable to the sub judice rule just like any other Civil Proceeding.

8. There was further submission that the provisions of Order 2 Rule 15 of the Civil Procedure Rules stipulate that at any stage of the proceedings, the court may order to be struck out or amend any pleading on the ground that it is an abuse of the process of the court. They sought that the instant suit be struck out for being sub judice.

**Respondent's Submission.**

9. On the onset of the Respondents submission, I must state that the same was confusing to the court when it was signed by counsel for 'the Applicant'.

10. That notwithstanding, the Respondent gave a brief history of the matter in question being that he had instituted Nyahururu SPMCC No. 134 of 2003 against the Applicant's husband one Joseph Gathuo Githogori, wherein he had claimed ownership of land parcel No. Nyandarua/Oljoro Orok Salient/1935. That after a full trial, the court had found in his favour.

11. That the Applicant, being dissatisfied with the judgment of the trial court, filed both an appeal to the Nakuru High Court being Nakuru

HCCA 168 of 2012 and an application for stay of execution which application was denied and she was evicted from the suit land pursuant to court orders, orders which she disobeyed and was cited for contempt of court orders, found guilty and committed to jail for 6 months on the 11<sup>th</sup> December 2013.

12. On the 16<sup>th</sup> March 2017, he had filed the present suit seeking to have the Applicant exhume the remains of her deceased husband Joseph Gathuo Githogori that had been illegally interred on the suit land. Together with the said suit, he had also sought for an injunctive orders against the Applicant herein seeking that she be restrained from interfering with the suit land.

13. That the present matter was not sub judice for reasons that while the parties in the instant suit were similar, yet the issues giving rise to the two matters were different and therefore there was no likelihood in issuing conflicting orders. He relied on the decided case of **Thiba Min-Hydro Co. Ltd vs Josephat Karu Ndiga [2013] eKLR**

*‘it had been held that it was not the form in which the suit was framed that determines whether it is sub judice, rather it is the substance’.*

14. It was further the Respondent’s submission that since the matter before the Nakuru HCCA 168 of 2012 had not been prosecuted as is stipulated under Order 42 Rule 35 of the Civil Procedure Rules wherein 5 years had since elapsed since the lodging of the Appeal, then the same was ripe for dismissal.

15. After considering the submission herein, I find that the matters for determination as;

i. Whether the present case is Sub Judice Nyahururu SPMCC No. 134 of 2003

16. The provisions of section 6 of the Civil Procedure Act provides for stay of suits as follows:-

*“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.*

17. I have since obtained the said file being Nyahururu SPMCC No. 134 of 2003 and I am in agreement with the Defendant/Applicant that parties to the said suits are one and the same save for the fact that the Applicant herein, is an Administrator of the Estate of Joseph Gathuo Githogori who was the Defendant therein.

18. I also note that the subject matter in both the suits is directly and substantially similar and that although the reliefs sought in the two cases are slightly different to the effect that in the previous case, the Plaintiff had sought for a declaration that the Defendant, the Applicant’s deceased husband, was not entitled to lay claim to 2 acres of the suit land and therefore he should be evicted, in the present case the Plaintiff/Respondent is seeking that the remains of the defendant/ Applicant’ deceased husband be exhumed from the suit land. I find that the chain of events leading to the filing of separate suits are the same.

19. I have also perused the file on Nakuru HCCA 168 of 2012 which has since been transferred to the Nyahururu Environment and Land Court, is currently registered under ELCA No 8 of 2018, and is pending hearing and determination of issues arising from Nyahururu SPMCC No. 134 of 2003.

20. That being the case, I find that the issue in this suit is directly and substantially in issue in Nyahururu SPMCC No. 134 of, which is also the subject in the pending Appeal in Nakuru HCCA 168 of 2012 now Nyahururu ELCA No. 8 of 2018, instituted between parties under whom they claim.

21. To this effect, since there is an undecided appeal pending in court and which Appeal if decided, shall put the issue of ownership between the parties herein to an end, this court will be engaging in a pious exploration of issues which are pending determination before another court of competent jurisdiction.

22. Accordingly, I find that this matter is sub judice Nakuru HCCA 168 of 2012 now Nyahururu ELCA No 8 of 2018 whereby the appropriate order that commends itself for granting at this stage is to order and I hereby order that this suit shall forthwith be stayed pending hearing and determination of Nakuru HCCA 168 of 2012 now Nyahururu ELCA No 8 of 2018.

23. In the meantime, parties shall maintain the status quo pending the outcome of the said Appeal so as to preserve the pre-dispute state until the determination of the Appeal.

24. Further orders are to the effect that the record of Appeal shall be filed and served within the next 21 days failure to which the said Appeal shall stand automatically dismissed. Costs of this application are awarded to the Applicant.

**Dated and delivered at Nyahururu this 2<sup>nd</sup> day of July 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**