



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO 143 OF 2009**

AYUB MUCHUI THURANIRA.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF MERU.....1ST DEFENDANT

KIURIA FAITH RWITO.....2ND DEFENDANT

RWITO M'ITIRI.....3RD DEFENDANT

**R U L I N G**

1. This Ruling concerns a Notice of Preliminary Objection on points of law filed by the applicant dated 18th August, 2013

2.The P.O reads:

“ **TAKE NOTICE** that when this suit comes up for hearing the Counsel for the applicant shall raise a Preliminary Objection on the following points of law.

***1.THAT this suit is res judicata Nkubu PMCC No. 22 of 2007.***

***2. THAT this suit is abuse of the court process WHEREFORE This suit should be struck out with costs to the applicant.”***

3. The Applicant submits that PMCC NO. 27 of 2007 was concluded and a Judgment was delivered on 11th September, 2009. It is argued for him that the Court at Nkubu was competent to try the matter before it which was basically prayers for the defendant to deliver vacant possession of plot No. 24B KAGUMA MARKET and to also transfer the said plot to the Plaintiff, the applicant in this suit.

4. The applicant submits that the matter alleged in the former suit by one party and either denied or admitted expressly or denied by the other party, was substantively canvassed and concluded in the former suit and hence this suit is res judicata SPMCC NO. 22 of 2007 at Nkubu.

5. The applicant argues that any matter which might or ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue. The applicant submits that this suit is substantially on the ownership of plot No. 24B, KAGUMA MARKET, and hence the former suit's substratum was the same plot.

6. The applicant argues that relief sought in the previous/former suit which was not granted when the plaintiff became a party is deemed to have been refused. Since the Plaintiff's application was refused, it is opined that this Court would be sitting on appeal if it entertained this matter.

7. The applicant argues that persons litigating in the previous suit be it in private or public capacity are deemed to have litigated or claimed in common for themselves and others interested in the same relief.

8. The Applicant claims that the Plaintiff in this case has added parties to try and camouflage and present this suit as a different one. He opines that nothing can be further from the truth and laconically states that the issues, the subject matter, the relief sought and the facts are the same as the ones which were all addressed in Nkubu PMCC No. 22 of 2007.

9. In support of his assertions the applicant has proffered the case of *KENORERO RIVER FARM LIMITED AND MAINA CHEGE **VERSUS** NATIONAL BANK OF KENYA-MILIMANI HCCC NO. 313 OF 2005*.

10. The Plaintiff in this suit submits that he was not a party to the suit in Nkubu SPMCC NO. 22 of 2007, (the former suit).

11. The Plaintiff claims that the 1st Defendant was also not a party to the former suit.

12. The Plaintiff submits that the former suit had only one Plaintiff and one Defendant while the current suit has one Plaintiff and three Defendants.

13. It is argued for the Plaintiff that since sometimes different people may bear the same or similar names or names with very small or insignificant differences, one requires positive evidence to show that the two parties in the former suit are the same as the five parties in the instant suit or that the ones in one of the cases claim title under those in the other. The Plaintiff laconically opines that a positive identity must be shown. It is argued that it is not enough merely to assert that they are the same people or that some were the same or privy to the former suit.

14. The Plaintiff asserts that the suit at Nkubu amounted to sibling rivalry between a brother and a sister where the main relief sought was a transfer of the suit premises from the Defendant to the Plaintiff in the former suit. It is asserted that the current suit is between a person not related to the parties in the former suit against the County Council of Meru as the 1st Plaintiff and both parties in the former suit as 2nd and 3rd defendants.

15. The plaintiff submits that the relief sought in this suit is different from the relief sought in the former suit. He says that even though the same plot has been the cause of actions in both suits, this is not enough reason why there should be justification for a plea of res judicata.

16. I find it necessary to allude to the Judgment made in the former suit. This is key to unravelling if or not the claim that this suit is res judicata has merit.

17. In the Judgment, the Judicial Officer concluded as follows:-

**“What is crystal clear from the evidence is that PW4 sold his plot to Amon Mwinga Ruto. It is Amon Mwinga Ruto who laboured for the purchase amount of which he paid through the defendant. He is therefore entitled to the said plot. The defendant tried to defeat his claim by selling the said plot to another party. She can refund the 350,000/= paid to her as she was selling that which was not legally hers.**

**“ This Court therefore orders the defendant to transfer Plot No. 24 B Kagumo Market, Gatimbi to her brother Amon Rwinga Ruto, and to vacate the shop built thereon. She will also pay costs and interest at Court rates from the date of filing of this suit to date of payment”.**

18.I find that the case of *KANORERO RIVER FARM LIMITED AND MAINA CHEGE VERSUS NATIONAL BANK OF KENYA (op.cit)* is good law in its circumstances. However, no one suit has similar circumstances and identical facts to another.

19.It is Crystal clear from the record of proceedings in the former suit that the Plaintiff was aware of SPMCC NO. 22 of 2007 at Nkubu. This is because the transfer of the subject plot from the 2nd Defendant to himself had been stopped. A diligent litigant would have sought to be enjoined in the said suit.

20.The Judgment in the former suit had the effect of declaring that th 2nd defendant in this suit did not own plot No. 24B, KAGUMA MARKET. The *Latin Maxim “Nemo Dat Quod Non Habet”* is veritably apposite here. The 2nd defendant, Faith Rwito Kuria, could not give what she did not have. She had no authority, however strongly contrived, to transfer plot No. 24B, KAGUMA MARKET to the Plaintiff or to any other person.

21.The ownership of plot No 24 B , KAGUMA MARKET was what was substantially in issue in Nkubu PMCC No. 22 of 2007. The Court definitively determined that the plot belonged to the applicant. This finding has not been controverted. I find that the substantial issue germane to the ownership of plot No. GAITU/KAGUMA/243 is res judicata Nkubu PMCC No. 22 of 2007. I opine that this finding can not be controverted by a mere sleight of hand through the contrivance by the Plaintiff to include other parties in his pleadings.

22.I do note that Hon. S.M. Githinji, Principal Magistrate, the Presiding Judicial Officer in the former suit had intimated that the Defendant could **“refund the Kshs. 350,000 /= paid to her as she was selling that which was not legally hers.”** Perhaps this is the route that the present Plaintiff should have explored.

23.In the Circumstances, **I uphold the Applicants Preliminary Objection on Points of Law dated 18th April, 2013 and dismiss this suit as res judicata Nkubu PMCC NO. 22 of 2007. I also deem the suit to be an abuse of the Court process.**

24.As I have dismissed the suit, **Costs will follow the event. Therefore, costs are awarded to the Applicant.**

25.It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 14<sup>TH</sup> DAY OF SEPTEMBER, 2016 IN THE PRESENCE OF:-**

CC: Lilian/Daniel

Miss Njenga h/b Mwanzia for the Interested Party

Kimathi Kiara h/b Riungu for the Plaintiff

**P.M. NJOROGE**

**JUDGE**