



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

**ELC. CASE NO. 178 OF 2013**

**AGNES AUMA AKACH.....PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES**

**TELEPOSTA PENSION SCHEME ..... 1<sup>ST</sup> DEFENDANT**

**DEFRONZA MASAKA.....2<sup>ND</sup> DEFENDANT**

**SAMUEL ACHOLA NDONGA.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR - NAIROBI.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the 2<sup>nd</sup> Defendant's Preliminary Objection dated 18<sup>th</sup> February 2013 which is to the following effect:

- a. The suit offends the provisions of Section 7 of the Civil Procedure Act
- b. That the suit is an abuse of the court process
- c. That the suit is unmerited and bad in law
- d. That the Plaintiff lacks the *locus standi* to bring this suit
- e. That the suit ought to be struck out with costs.

In arguing his Preliminary Objection, the 2<sup>nd</sup> Defendant stated that he is not the husband of the Plaintiff as alleged in her application. He also stated that he is the registered owner of the Suit Property being L.R. No. Nairobi/Block 69/117 situated along Kedong (Akal) Road, Nairobi. He stated further that the subject matter of this suit is the ownership and possession of the Suit Property, an issue which arose in a previously determined case, namely **Milimani SPMCC No. 10838 of 2006** in which he was the Plaintiff and the 3<sup>rd</sup> Defendant was the Defendant. He stated that that suit was determined in his favour and that the 3<sup>rd</sup> Defendant has on three occasions viciously frustrated the execution of lawful court orders issued in that case. He further stated that the Plaintiff herein is suing through the 3<sup>rd</sup> Defendant herein and raising the same issues which were determined by the lower court in the above cited suit. To that extent therefore, the 2<sup>nd</sup> Defendant contends that this suit is *res judicata*, is an abuse of the court process and is unmerited and bad in law and should therefore be struck out with costs.

In addition, the 2<sup>nd</sup> Defendant contends that the Plaintiff is the wife of the 3<sup>rd</sup> Defendant and purports to institute this suit in that capacity. He further contends that the lower court in the above cited case having

held that the 3<sup>rd</sup> Defendant has no valid claim to the Suit Property, there is no question that the Plaintiff herein, who claims through the 3<sup>rd</sup> Defendant, lacks *locus standi* to bring this suit.

On her part, the Plaintiff contends that the above cited case and the instant case bear no similarity as the reliefs sought and the legal grounds and factual circumstances advanced differ substantially. She further contended that the instant case is premised upon the spousal rights in properties enshrined in the Land Act 2012 and the Constitution of Kenya, 2010. She also contended that the lower court which determined the above cited case lacks jurisdiction with the establishment of the Environment and Land Court hence the need for the instant case to be determined by this court. She also claimed having lived in the Suit Property with her children for two decades and has never been notified of the existence of any suit or need to move out of the house pursuant to any court orders.

The first task is to determine who the Plaintiff is vis a vis the Defendants and the subject matter of this suit. In her pleadings, the Plaintiff stated that she is the wife of the 2<sup>nd</sup> Defendant herein and that together, they have been blessed with 8 children. She also discloses that the 2<sup>nd</sup> Defendant is the registered proprietor of the Suit Property in which she together with the children live. This position is strongly contested by the 2<sup>nd</sup> Defendant who denies being the husband to the Plaintiff and puts her to strict proof thereof. In fact, the 2<sup>nd</sup> Defendant states that the Plaintiff is the wife of the 3<sup>rd</sup> Defendant. In her submissions, the Plaintiff makes a tacit admission of this position by claiming that just because the lower court issued certain orders against the 3<sup>rd</sup> Defendant, the same was not stated to bind, among others, his family members so she is not bound by those court orders. Bearing in mind that tacit admission, I am of the view that the Plaintiff is in fact the wife of the 3<sup>rd</sup> Defendant herein.

Based on the above finding, I wish to set out the relevant provisions of the law which is section 7 of the Civil Procedure Act which states as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same Parties or between Parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised has been heard and finally decided by such court.”***

Bearing in mind this legal provision, I find that the main issue for determination in this suit, which is the ownership and occupation of the Suit Property, has already been litigated upon and a final binding decision rendered by the lower court. The Plaintiff in the instant case claims under the cover of her husband, the 3<sup>rd</sup> Defendant herein. Accordingly, I agree with the 2<sup>nd</sup> Defendant that this suit is ***res judicata***. In the same breath, I also hold that the Plaintiff lacks any ***locus standi*** to bring this suit before this court. Accordingly, I hereby strike out this suit with costs to the Defendants.

**SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER 2013**

**MARY M. GITUMBI**

**JUDGE**