



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC NO. 53 OF 2019 (OS)**

**JULIA WANJA M'NIRU.....PLAINTIFF**

**VERSUS**

**DINAH KAWIRA NKABO.....DEFENDANT/APPLICANT**

**RULING**

1. Vide an application filed on 28.1.2020, defendant is seeking orders of dismissal of this suit on the basis that the same is res-judicata to Meru H.C Succ. Cause No. 15 of 2013. The applicant contends that the issue of ownership of the suit land L.R Abothuguchi/Katheri/969 was determined in the aforementioned suit, where the plaintiff participated in the succession cause and she never sought for a review or appeal in that case. The applicant also avers that plaintiff has failed to prosecute the suit.

2. in support of her averments, the applicant has cited the following authorities:

- (i) Cooperative Bank of Kenya Ltd versus Cosmas Mrombo Moka & Legacy Auctioneering Services (2019) eKLR.**
- (ii) MWK versus AMW (2016) eKLR.**
- (iii) Njue Ngai vs Ephantus Njiru Ngai and Another (2016) eKLR.**
- (iv) Rosiello Bruno & 2 others vs. Florence Wairimu Mbugua & 3 others (2012) eKLR.**

3. The plaintiff/respondent has opposed the application averring that the cause of action herein and the one in Meru H.C Succession No. 15 of 2013 are different, so are the parties. It is further argued that the filing of an application under Order 17 rule 2 of the Civil Procedure Rules is baseless and misconceived as the applicant is the one who has been filing applications left, right and centre.

4. In her submissions, plaintiff avers that once there is an ownership claim in land in a succession matter, the same cannot be determined in a probate court, it should be dealt with before the ELC court.

5. In support of her arguments plaintiff has relied on the following cases:

- (i) ELC case no. 78 of 2018 Hesbon Wrace Ongandi vs Priscilla Muhonja Adulu (2019) eKLR.**
- (ii) Succession cause no. 20 of 2017; in the matter of the estate of Muthoni Mbua (deceased).**
- (iii) Succession cause no. 720 of 2013; in the matter of the estate of Julius Ndubi Javan (deceased).**

6. I find that the applicant/defendant has sought for the dismissal of the suit based on the following provisions of law; **Sections 1A, 1B, 3A & 63 of the Civil Procedure Act & order 17 rule 2 and Order 51 of the Civil Procedure Rules**. The substantive proviso is **Order 17 Rule 2 of the Civil Procedure Rules** which states that;

***In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order”.***

7. This suit was filed on 27.9.2019 and the current application was filed 4 months later on 28.1.2020. Certainly the application doesn't meet

the threshold set out under the aforementioned provision of law. It is also not lost to this court that this application was filed when there were two more pending applications, the one dated 26.9.2019 filed by plaintiff and the one dated 30.10.2019 filed by defendant. The prosecution of these two applications were put on hold by the court on 27.11.2019 to await a scene visit report.

8. On 23.1.2020, the court gave directions for the parties to be supplied with the scene visit report. A day later, defendant had framed this application. This is a mark of bad faith on the part of defendant.

9. On the issue of res-judicata, I find that this was not the basis of filing the application going by the cited law.

10. Further, the issue res judicata has not been raised in the form of a preliminary objection to the suit. This court was invited to look at the file Meru Succession cause No. 15 of 2013. I have found it unnecessary to do so at this stage since I am able to discern the dispute in the succession matter as captured in the copy of Judgment availed by the applicant. This court doesn't have sufficient material to determine the nature and extent of plaintiff's participation in the succession cause. And the court cannot and will not embark on an exercise to investigate such kind of participation by the plaintiff in the succession cause.

11. In the circumstances, I decline to allow the claim of res-judicata, hence the application dated 24.1.2020 is not merited and the same is hereby dismissed with costs to respondent. In order to expedite the trial, I direct that the matter be heard on priority basis and case is to be mentioned on 18.11.2020.

**DATED, SIGNED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 5.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**