

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1055 of 1994

FRANCIS KABAA.....

**PLAINTIFF
VERSUS**

NANCY WAMBUI..... 1ST

DEFENDANT

JANE WANJIRU GITUANJA..... 2ND DEFENDANT

JUDGMENT

This file came to me after Justice Mrs. Oluoch made orders that the preliminary objection by Wangondu & company Advocates for the defendants be heard first. The preliminary objection as I understand it is to the hearing the suit itself on the grounds that the plaintiff failed to challenge award delivered in Succession Cause No. 46 of 1981 in time or at all. The defendants rely on in support of this objection the provisions in orders 45 rule 16, order 45 rule 17(a) and order 20 45 rule 17(2) of the Civil Procedure Rules.

The second preliminary objection is that matters here have already been adjudicated upon in Succession Cause No. 46 of 1981 in Kikuyu Court.

Mr. Wangondu informed the court, from records, that the elders published this award on 1st December 1981. Plots Kabete/Kibichiho/290 and Mujuga/Kinyinini/69 have been awarded to 4 and 3 persons respectively. I did not wish to know to whom as this fact was admitted by Miss Kagwe by the defendant. She confirmed the very same plots are in issue in this suit.

The unchallenged fact that stands out is that the award was not challenged. It resulted into a judgment. This was not appealed against. Nor was the award challenged under relevant. Order 45 provisions.

In the circumstances I rule that the present suit is vexations and is an attempt to reopen already finalised matter when there is no right in law to do so.

Similarly I rule that the matters in issue in this suit have already been adjudicated upon in Kikuyu court. This suit is therefore misconceived.

In H.C.M. Civil Application number 620 of 1992 by consent of both parties the High Court ordered that Succession Cause No. 46 of 1981 for transferred to this court as registered as a succession cause and thereafter proceed to hearing de novo. This order has not been yet complied with and the consent order (which gives no time limit) is still there if the parties wish to give effect thereto.

However before me is H.C.C.C. No. 1055 of 1993 which (I have already so held) is quite wrongly filed. H.C.C.C. No. 1055 of 1993 is therefore dismissed with costs.

Dated and delivered at Nairobi this 1st day of February, 1994 in the presence of:

For the Applicant.

For the Defendant.

A.B. SHAH
JUDGE