



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 113 OF 2017

(FORMERLY NAKURU ELC NO 477 OF 2013)

DAMARIS WAITHIRA MUNGAL.....PLAINTIFF/RESPONDENT

VERSUS

MUGO NGOBIA MUGO.....DEFENDANT/APPLICANT

RULING

1. The Respondent filed her suit dated the 23rd July 2013 wherein she sought for perpetual injunctive as well as eviction orders against the Applicant. By consent, parties agreed to have the Nyandarua County Land Surveyor visit the suit land being Nyandarua/Ndemi/1131 and thereafter file his report in court.
2. This was done and a report was filed in court on the 26th September 2014. On the 5th February 2015, the court observed that there was another matter being Nyahururu case No 288 of 1992 touching on the same issues as the present case and directed that the parties notify it on the position of the same before it could issue directions.
3. On the 23rd September 2015, the court stayed the present suit pending determination of Nyahururu CMCC No. 288 of 1992.
4. On the 5th December 2017, after this matter had been transferred to this court, the court directed that since there were orders of 23rd September 2015, staying this matter pending the determination of Nyahururu CMCC No 288 of 1992, that the Deputy Registrar place the Nyahururu CMCC No 288 of 1992 before it for perusal. In the meantime leave was granted to the Defendant to file and serve his application to amend his defence within 7 days. Thereafter the matter lay dormant until the 3rd July 2018, when the court gave directions to have Notice of Preliminary Objection herein filed by the Defendant on the 25th June 2018, disposed of in the first instance, by way of written submissions and thereafter highlight on the same.
5. Only the Defendant/Applicant filed their written submissions on the 7th September 2018. The matter was set for highlighting the 6th November 2018 wherein on that day, counsel sought for the matter to be placed aside up to 11:00 am.
6. At 11:00 am when the same was called out, there was no appearance by either party who then went to slumber prompting the court, suo moto, to list the same for ruling on the application dated the 25th June 2018.
7. I have considered the filed written submissions by the Defendant/Applicant herein.
8. The main bone of contention was that the present matter was incompetent, bad in law and an abuse of the court process for reasons that it violated the provisions of Sections 5, 6, and 7 of the Civil Procedure Act by virtue of the fact that the cause of action in the instant case is similar to the cause of action filed in the plaint in the Nyahururu SPMCC No. 288 of 1992 where a defence and counterclaim were filed on the 26th October 2015.
9. That the proceedings in the Nyandarua Land Dispute Tribunal No.8 of 1997 was heard and determined wherein the finding was adopted in the Nyahururu SPMCC Misc No. 21 of 1999 and subsequently a decree was issued on the 31st January 2012.
10. The Plaintiff/Respondent filed no response to the said Notice of Preliminary Objection.
11. On the issue of the Preliminary Objection raised by the Defendant/Respondent, this court shall make its determination based on the

celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** Court of Appeal held that a preliminary objection per Law J.A. was stated to be thus:-

‘...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

12. I have considered the Preliminary Objection herein filed and the written submissions to the same and find the matters for determination as being:

i. Whether the preset case is Sub Juidice Nyahururu SPMCC No. 288 of 1992

ii. Whether the present case is Res judicata Nyahururu SPMCC No. 288 of 1992

13. I have considered the proceedings filed in the Nyahururu SPMCC No. 288 of 1992 and I agree with the Defendant/Applicant that parties to the said suits are one and the same save for the joinder of the on the Hon Attorney General and the Permanent Secretary Ministry of lands.

14. 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 has sought for an additional relief of specific performance, yet chain of events leading to the filing of separate suits are the same.

15. That 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”.

16. Having had perused the proceedings in the Nyahururu SPMCC No. 288 of 1992, it also clear that the matter therein was part heard wherein the Plaintiff testified on the 29th February 2016 and was stood down for further cross examination and parties directed to take dates in the registry.

17. On the 9th May 2016 when the matter came up for further hearing, counsel for the Plaintiff sought to have the same stood over generally as he had just come on record. He also sought for leave to amend his Notice of Appointment. To that effect, the matter was stood over generally and has not been prosecuted to date.

18. In essence therefore, there is a suit still pending before the Nyahururu Chief magistrates’ court and therefore I find that the provisions of Section 6 of the *Civil Procedure Act* have been properly invoked. *The Preliminary objection on this aspect herein succeeds.*

19. On the second issue as to whether present case is Res judicata Nyahururu SPMCC No. 288 of 1992, the substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been 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, and has been heard and finally decided by such court”

20. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:

i. What issues were really determined in the previous case;

ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

21. As seen in the earlier determination, the matter before the Nyahururu PMCC 288 of 1992 was stood over generally on the 9th May 2016 and therefore **has not been heard and finally decided by the court. The second limb of the Preliminary objection herein fails.**

22. Having considered all the above, I am satisfied that the plea of sub-judice has properly been invoked in this case. Pursuant to the overriding objective of Section 1B of the *Civil Procedure Act* which require that there be an “efficient use of the available judicial and administrative resources” as well as Section 3A of the same Act which provides that ‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court’.

23. Looking at the pleadings in both cases, I find that the order that best commends itself in this scenario is not one of striking out the present

suit as sought by the Defendant, but that claim herein can perfectly be litigated in Nyahururu PMCC 288 of 1992.

24. Since the matter in the Nyahururu PMCC 288 of 1992 was stood over generally and has not been concluded, I hereby make orders as follows:-

i. This suit is hereby transferred to the Chief Magistrate's Court Nyahururu for the parties to consider consolidating it with Nyahururu PMCC 288 of 1992.

ii. The plaintiff will meet the costs of this application at a lower scale since it was undefended.

Dated and delivered at Nyahururu this 18th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE