



JMM v CWN (Civil Appeal E007 of 2022) [2023] KEHC 20991 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E007 OF 2022**

**FR OLEL, J
JULY 31, 2023**

BETWEEN

JMM PLAINTIFF

AND

CWN DEFENDANT

RULING

1. The plaintiff filed this suit on 16th June 2022 seeking several declarations that there was no marriage by cohabitation as between the parties and that provisions of the matrimonial Act was not applicable in the prevailing circumstances. The plaintiff also sought for injunctive orders restraining the defendant from using motor vehicle KCS xxxx amongst other related orders.
2. The Respondent in response to this suit did file a notice of preliminary objection dated 4th July 2022 wherein he opposed on the validity of this suit on ground that;
 - a. This suit was *Res judicata*.
 - b. That the matters directly and substantially in issue in this suit were directly and substantially in issue in Mavoko Civil suit no. E048 of 2021 and Mavoko civil suit no. E268 of 2022 between the same parties and the courts made a final determination thereto.
 - c. That this suit as filed is an abuse of the court process as the prayers sought herein could only be brought before this honourable court in form of an appeal and not a fresh suit.
 - d. In any case, this suit is bad in law, vexatious and an abuse of the court process.
3. The parties agreed to have the preliminary objection canvassed by way of written submissions which was filed by both parties.



Defendant/Applicant Written submissions

4. The Defendant/Applicant filed his submissions on 15th November 2022 and stated the parties had a romantic relationship from the year 2017 and were blessed with a child. From 2018 they decided to start living together in their matrimonial property solely built by the defendant but jointly purchased the household stuff therein. The defendant also purchased motor vehicle registration no KCS xxxx and had the logbook registered in their joint names.
5. On or about December 2020, the plaintiff deserted the matrimonial home in a bid to end the marriage and ever since the parties have had separate lives. The plaintiff instituted a suit in Mavoko Law courts being Mavoko CMCC E048 of 2021 seeking various orders including that;
 - a. An order be issued that the suit property be sold after joint valuation and the proceeds of the sale be shared equally between the parties at the current value.
 - b. In the alternative to order (a) above, that an order do issue that the defendant do reimburse the plaintiff half the current value of the property.
 - c. An order do issue for the defendant to reimburse the plaintiff all the rent and other incurred bills directly resulting from the failure to use the suit property from 1st January 2021 to date of the judgement
 - d. The defendant be ordered to pay general damages for the time and period spent on the property and the benefit drawn therefrom.
 - e. The defendant be condemned to pay costs.
6. The defendant filed a preliminary objection to this suit and the same was allowed and the said suit was dismissed on the basis that the property being fought over was matrimonial property and the court lacked jurisdictions to hear and determine the suit. The plaintiff instituted a second suit being Mavoko Civil suit no. E268 of 2022 where she sought for orders that;
 - a. An injunction order be issued against the defendant restraining him from using the vehicle until the current market value is ascertained by a jointly appointed motor vehicle assessor.
 - b. An order directing that the vehicle registration number KCS xxxx be preserved at Kasina grounds at Mlolongo pending a joint valuation and sale and the proceeds of the sale be shared equally between the parties.
 - c. In the alternative to (1) above, an order be directed to the defendant to pay the plaintiff half the current value of the motor vehicle ascertained after joint assessment.
 - d. The defendant be ordered to pay the plaintiff the sum of Ksh.80.995/- being the value of the goats and the household items bought by the plaintiff and retained by the defendant.
 - e. Costs of this suit and interest.
7. The defendant in the said suit did file another preliminary objection that the suit was bad in law and was an abuse of the process of the court. Further the court lacked substantive jurisdiction to adjudicate the said claim. The said preliminary objection was upheld and the said suit was dismissed.
8. The defendant herein did submit that the plaintiff was abusing the court process by seeking orders which had already been dealt with in Mavoko CMCC E048 of 2021 and Mavoko civil suit no E 268 of 2022 and therefore the suit as filed was *Res judicata* Reliance was placed on *Handerson versus*



Handerson (1843) 67 ER 313, *Benerd Mugo Ndegwa versus James Nderitu Githae and 2 others* (2020) eKLR and *E.T versus Attorney General and another* (2012) eKLR.

9. The defendant further stated that the properties the plaintiff sought to be adjudicated over were matrimonial property within the definition of Section 6(3) of *Matrimonial Property Act* of 2013 which provided that “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
10. Parties herein were married and contributed to buying the household property. The plaintiff had moved court in an improper manner and thus the suit was an abuse of the process of court the defendant/applicant sought that the preliminary objection be upheld and this suit be dismissed.

Plaintiff/Respondent Submissions

11. The plaintiff/Respondent filed her submissions on 17th October 2022 and argued grounds (c) and (b) of the preliminary objection together. She submitted that this suit could not by any stretch of imagination be *Res judicata* as no issues pleaded were determined on merit before the lower court by the time the suit were struck out. Mavoko CMCC 268 of 2022 was filed on 27/4/2022. The defendant/applicant raised an objection on 9/5/2022 that the court lacked substantive jurisdiction to hear and determine the suit. The same was upheld and the suit struck out on 8/6/2022.
12. The court did not make a determination on any of the issues pleaded and thus the said matter could not be *Res judicata*. Reliance was placed on *Uhuru Highway Development Ltd versus Central Bank of Kenya* (1999) eKLR, *Suleiman Said Shabal versus Independent Electoral and Boundaries Commission and 30 others* 2014 eKLR and *Independent Electoral & Boundaries Commission versus Maina Kioi and 5 others* (2017)eKLR.
13. The Respondent further submitted that the suit as filed did not constitute an abuse of the process of court. She considered the Ruling made on Jurisdiction and opted to file a fresh suit, in a court of competent jurisdiction. There was thus no bar which prevented her from filing a fresh suit since the suit was struck out on the basis of technicality. Reliance was placed on *Enock Kiruo Muhenzi versus Hamid Abdalla Mbaruk* (2013)eKLR. The Respondent urged this court to find that this suit is not *Res judicata* nor does it constitute an abuse of the process of court and hence the preliminary objection should be dismissed.

Analysis & Determination

14. I have carefully considered the preliminary objection as filed and both parties’ written submissions and discern that two issues arise for determination.
 - a. Whether this suit is *res judicata* as the matters raised herein were directly and substantially in issue in Mavoko civil suit No E048 of 2021 and Mavoko civil suit No E268 OF 2022.
 - b. The second issue is if the suit as filed constitutes an abuse of the process of the court.
15. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

16. A preliminary objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it became a matter of substantive adjudication of the litigations on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined, and a finding of fact then made by the court.
17. Base on the above it is clear that the only legal issue raised for determination is the issue of res judicata. The other ground raised in the preliminary objection dated 4th July 2022 that the suit as filed is an abuse of the process of court and that the plaintiff ought to have filed an appeal are issues of fact and cannot be determined preliminarily .

Res judicata

18. Section 7 of the [civil procedure Act](#), Cap 21 provides that;

“No court shall try any suit or issue in which the matter has been 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 determined by such court.”

19. The Black’s law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

20. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent suit is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire previous suit and the instant suit to ascertain;
 - i. what issues were really determined in the previous Application;
 - ii. whether they are the same in the subsequent Application and were covered by the Decision.



- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.
21. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties had been decided by an earlier judgment, which court may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
22. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), that:

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
23. The undisputed facts herein is that in Mavoko CMCC E268 of 2022 the said suit was dismissed on the basis that the magistrate court lack of jurisdiction to hear and determine the suits as they related to matrimonial property and the matrimonial act provided that the court to hear and determine such disputes was the High court.
24. The said prior suit Mavoko CMCC E268 of 2022 was definitely not heard and/or determined on merit and therefore this subsequent suit filed before the high court cannot be said to be res judicata.
25. The Defendant/applicant had indicated that there was another suit being Mavoko CMCC E048 of 2021, but when this court called for the file the parties therein were different (James Maina Gachau Vs Ayub Chilo & Synergy Ventures Ltd).

Disposition

26. Taking all relevant factors into consideration I do find that;
 - a. The notice of preliminary objection dated 4th July 2022 and filed in court on 6th July 2022 is wholly unmerited and the same is dismissed with costs.
27. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE



Delivered on the virtual platform, Teams this 31st day of July, 2023.

In the presence of;

.....for Plaintiff

.....for Defendant

.....Court Assistant

