



Gaithuma v Gikonyo (Civil Suit E191 of 2021)
[2022] KEHC 15922 (KLR) (Civ) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15922 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL
CIVIL SUIT E191 OF 2021

JK SERGON, J
NOVEMBER 29, 2022

BETWEEN

JOHN MUTHOGA GAITHUMA PLAINTIFF

AND

GEORGE SIMON GIKONYO DEFENDANT

RULING

1. The defendant herein filed a preliminary objection to the application dated November 1, 2021 on the following grounds:
 - i. That the matter of a similar issues and parties was filed at the Business Premises Rent Tribunal (Nairobi BPRT/45/2021) the same was heard and a ruling was delivered on 12th day of March 2021.
 - ii. That the application offends the provision of section 7 of the *Civil Procedure Act* cap 21 laws of Kenya which preclude from entertaining re-litigation of a matter that has already been decided by a court of competent jurisdiction to hear this case.
 - iii. That for the grounds set above, this court lacks jurisdiction to hear this case.
 - iv. That the defendant is on the foregoing grounds applying that this suit be struck.
2. In opposing the preliminary objection, the plaintiff filed grounds of objection and raised the following grounds;
 - i. That the notice of preliminary objection is frivolous, unmeritorious and otherwise an abuse of the process of court.
 - ii. That the honourable court is well clothed with jurisdiction to handle the suit.



- iii. That the substance of this suit and prayers sought is substantially different from that raised at the Business Rent Tribunal (Nairobi BPRT 45/2021)
3. The preliminary objection was canvassed by way of written submissions. This court however has not had the benefit of looking at the respondent's submissions as the same were not filed.
 4. The plaintiff submitted that on whether the suit herein is *res judicata*, the plaintiff stated that the defendant had failed to place any material before this court that may aid this court adjudicate on the issue in controversy.
 5. The plaintiff therefore submits that the issues in Nairobi BPRT 45/2021 are substantially and materially at variance with the case before this court.
 6. The plaintiff therefore urges the court to be guided by the words of his Lordship Hon Charles Nebbold JA in the matter of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696

“The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.”
 7. To begin with, what constitutes a preliminary objection was discussed in the case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
 8. The doctrine of res-judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not suffer double jeopardy on the same account of litigation. See the Supreme Court's decision in the case of *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & another* [2016] eKLR.
 9. In essence therefore, the doctrine implies that for a matter to be res-judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson vs Henderson* (1843-60) All ER 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
 10. In the matter before this court, the defendant's position is that a similar issues were filed at the Business Premises Tribunal and the same was heard and a ruling delivered on March 12, 2021. To the contrary,



the plaintiff states that the issues in Nairobi BPRT 45/2021 are substantially and materially at variance with the case before this court.

11. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs MainaKiai & 5 others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
 - "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."
12. I have considered both suits and in my view the matter before this court is that the plaintiff is seeking general damages for the illegal eviction while the application that was before the Business Tribunal was seeking orders for the landlord to allow the tenant access the business premises and immediately continue with her business.
13. There is no doubt that the parties are the same. However, the issues litigated are totally different. Moreover, nothing stops the same parties litigating over and over again so long as they do not cross the red tape of the principle of *res judicata*. The plaintiff in the instant case is within the law to litigate its claim.
14. Based on the foregoing considerations, I dismiss the preliminary objection filed on November 1, 2021 and direct that this suit be heard and determined on its merits.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2022.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

