



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISCELLANEOUS APPLICATION NO. 30 OF 2020

ISAAC NGACHA NDERITU.....APPLICANT

VERSUS

LUCIA NJERU MWANGI.....1ST RESPONDENT

JOSPHAT MWANGI GITHAIGA.....2ND RESPONDENT

EQUITY BANK (K) LTD OTHAYA BRANCH.....3RD RESPONDENT

RULING

Brief Facts

1. In his application dated 15th September 2020 the applicant seeks for orders against the 3rd Respondent to pay to him the amount of funds he paid on behalf of the 1st and 2nd Respondent being loan advanced to them with further orders to allow the applicant access to continue plucking tea leaves on Land Parcel Number MAHIGA/KIHOME/95 so as to pay school fees for his children.
2. The 1st and 2nd respondent did not file any responses to this application. The 3rd respondent has filed grounds of opposition dated 19th October 2020 opposing the application.

The Applicant's Case

3. In the supporting affidavit, the applicant states that he is unable to pay school fees for his children in various institutions and unless this court grants orders against the 3rd respondent to refund the amount paid. He said his children will not be able to attend school due to lack of fees unless the orders are given.
4. It is the Applicant's case that he had leased the 2nd Respondent's tea farm on L.R No. MAHIGA/KIHOME/95) from the 1st Respondent after she was unable to pay the loan which the 2nd Respondent had taken with the 3rd Respondent which had accumulated to Kshs. 343,153/-, which money he had paid into the 1st Respondent's account.
5. The Applicant plucked tea leaves on the said farm until 3rd June 2016, when the 2nd Respondent chased me and my workers out of the said land claiming that there was no agreement in existence between us.

6. Since 3rd June 2016 the Applicant states that the Respondent has not refunded the funds that the applicant paid in satisfaction of the loan granted to the 1st respondent by the 3rd respondent despite demand.

7. The Applicant states that he had filed a similar matter in Othaya being SRMCC No. 12 of 2016, which was heard and determined resulting in dismissal.

8. The Applicant seeks to be allowed to enjoin the 3rd Respondent to the matter herein to determine who is meant to pay back his money. This prayer is contained in the supporting affidavit but does not feature on the face of the application.

The 3rd Respondent's Case

9. It is the Respondent's case that the Applicant has not raised any claim against it and there being no claim to be determined, the application is misconceived and an abuse of the court process.

10. The 3rd Respondent further contends that the Applicant's application is meant to mislead the court as the wrong provisions of the law have been invoked. It is further argued under section 19 of the Civil Procedure Act, a miscellaneous application cannot initiate civil proceedings thus rendering these proceedings defective.

11. The 3rd Respondent states that the suit Othaya SRMCC No. 12 of 2016 was heard and determined and the same issues should not be entertained by this court.

12. The 3rd Respondent further states that it has not infringed on the Applicant's legal rights to educate his children to warrant being ordered to undertake such an obligation.

13. The 3rd Respondent maintains that there exists no suit to enjoin it and further that the prayers sought are inconsistent with the pleadings of the applicant.

14. Parties hereby relied on their respective affidavits and grounds of opposition in arguing this application.

Issues for determination

15. On perusal of the application and the grounds of opposition I identify the main issues for determination as follows:-

- a) Whether the issues raised herein amount to *res judicata*
- b) Whether the application is merited.

The Law

16. The principle of **res judicata** is provided for under **Section 7 of the Civil Procedure Act** which provides:-

17. **"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."**

18. This doctrine has been explained in a number of cases. However I focus on the recent case of **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others Nairobi CA Civil**

Appeal No. 105 of 2017 [2017] eKLR, the Court of Appeal held that:-

“Thus, 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 tendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit**
- b) That the 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**

19. The court explained the role of the doctrine thus:-

“The rule of doctrine of res judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

20. Cognizant of the above principles, the courts called upon to decide suits or issue previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson vs Henderson (1843) 67 ER 313, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, 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. In the case of Mburu Kinyua vs Gachini Tutu (1978) KLR Madan, J. Quoting with approval Wilgram V.C in Henderson vs Henderson (supra) stated:

“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 in 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 on 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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.”

21. The question that arises herein is whether the issues raised in this application were raised and determined in Othaya SRMCC No. 12 of 2016 and whether the former suit involved the same parties.

22. On scrutiny of the judgement in the previous suit, SRMCC No. 12 of 2016, the parties involved are the same as in this application save for the 3rd Respondent, Equity Bank Limited. It is noteworthy that the court in dismissing the case had held that the applicant herein ought to have enjoined Equity Bank

Limited to the suit as a party. The applicant now seeks to cure the omission in the lower court suit by seeking for orders to have equity Bank Limited to be enjoined as a party to this miscellaneous application. However, this prayer to join the 3rd respondent as an interested party was omitted in the application. It appears in paragraph 8 of the supporting affidavit which is irregular. The said paragraph is more of an explanation of who the 3rd respondent is rather than a prayer. It does not qualify to be a prayer at all. I am persuaded by the case of **Omondi vs National Bank of Kenya Ltd & Others [2001] E.A 177** where it was held that **“parties cannot evade the doctrine of re judicata by merely adding other parties or causes of action in a subsequent suit.”**

23. In the lower court case, the applicant was the plaintiff seeking for judgement against the 1st respondent to be refrained from denying him to pick tea leaves at the 1st respondent’s farm, L.R Number MAHIGA/KIHOME/95 until payment of the sum of Kshs.343,153.49/= which was the loan amount allegedly paid to the 3rd respondent. The applicant in the alternative sought judgment against the 1st and 2nd respondents to be ordered to refund the amount in issue plus costs and interest at bank rates. Upon close scrutiny, the matters raised in the former suit are similar to the issues raised in this application. The suit together with the respondent’s counter-claim was dismissed.

24. The law provides that whoever is aggrieved by judgement of a court has a right of appeal to a higher court. The applicant ought to have filed an appeal in this court against the judgement of the lower court rather than file a miscellaneous application. The miscellaneous application is misplaced as argued by the 3rd respondent. Since it is not a suit and cannot achieve the purpose intended by the applicant herein.

25. It is my finding that the issues in this miscellaneous application are *res judicata* and that this application is incompetent and an abuse of the due process of the court.

26. Consequently, the entire miscellaneous application as well as this application dated 15/09/2020 are hereby dismissed.

27. Due to the nature of the application, and the effects of the entire matter initiated by the applicant who was not represented by a counsel in this, I hereby order that each party meets its own costs.

28. It is hereby so ordered

DELIVERED, DATED AND SIGNED AT NYERI THIS 22ND DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 22nd day of March 2021.