



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO 1 OF 2020

LAKE BASIN DEVELOPMENT AUTHORITY.....PLAINTIFF

VERSUS

DOMINION FARMS LIMITED.....1ST DEFENDANT

LAKE AGRO LIMITED.....2ND DEFENDANT

RULING

1. In its Notice of Motion application dated 3rd March 2020 and filed on 4th March 2020, the 1st Defendant sought dismissal of the Plaintiff's suit with costs to it. Its application was supported by the Affidavit of Dennis Adika that was sworn on 3rd March 2020.
2. The 1st Defendant pointed out that the Plaintiff's cause of action was based on their claim in **Kisumu HCCOM Case No 22 of 2018 Dominion Farms vs Lake Basin Development Authority & Another**, which claim was dismissed by Cherere J on 6th February 2020 after she determined the issue of rent in its favour. It was categorical that the Plaintiff had no further claim against it and/or have any other reason to stop the transfer of business and that for all purposes and intent, this court was *functus officio* and thus lacked jurisdiction to entertain this suit by dint of the principle of *res judicata*. It added that if it entertained the same, it would in effect be sitting as an appellate court on a decision of a court of a similar stature and jurisdiction. It therefore urged this Court to dismiss the Plaintiff's case with costs.
3. The 2nd Defendant indicated to the court that it was in support of the aforesaid application and did not therefore file any documentation herein.
4. On the other hand, in response to the said application, on 22nd June 2020, Dr Raymond Omollo swore a Replying Affidavit. The same and Grounds of Opposition dated 22nd June 2020 were filed on even date.
5. In its Grounds of Opposition, it termed the present application as incurably defective, misconceived, misplaced and hinged on the wrong provisions of the law amongst several other grounds.
6. The Plaintiff asserted that the issues raised in this suit and in **Kisumu HCCOM Case No 22 of 2018 Dominion Farms vs Lake Basin Development Authority & Another** were totally different as the current suit was seeking to stay the transfer of business from the 1st Defendant to the 2nd Defendant herein and hence urged this court to dismiss the present application with costs.

LEGAL ANALYSIS

7. The question of whether the suit herein was *res judicata* lending itself to dismissal was central to the consideration this court would make in determining whether or not there was merit in the present application. The court therefore deemed it prudent to address the same as it had the potential of disposing of the present application right at the outset.
8. The Principle of *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) 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”

9. The doctrine of *res judicata* as stated in the said section has been explained in a plethora of decided cases amongst them the case of **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017]e KLR.**

10. In its Counter-claim, the 1st Defendant contended that as at 1st March 2017, the Plaintiff herein owed it a sum of Kshs. 34,130,000/- after defaulting in paying rent. In dismissing the 1st Defendant's Counter-claim, of 6th February 2020 Cherere J rendered herself as follows :-

“10. Although the 1st Defendant pleads the existence of a tenancy agreement dated 1st July 2013 between the parties, none was tendered. The Plaintiff in its plaint denied the existence of such a tenancy agreement.

15. It is therefore clear that the burden to prove that that there existed a tenancy agreement between the Plaintiff and the 1st Defendant against the Plaintiff lies with 1st Defendant. The 1st Defendant's counterclaim for Kshs. 34,130,000/- in the absence of prove of existence of a tenancy agreement between the parties is founded on shaky ground and cannot therefore stand.”

11. In the case of E.T.V. Attorney General & Another [2012]e KLR ,Majanja J, correctly warned that:

“The courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the second suit is trying to bring before court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

12. In the case of Omondi v. National Bank of Kenya Limited & Others [2001] EA 177, it was also stated that **“parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.”**

13. From the onset, it is clear that the former suit was between the same parties and parties were litigating under the same title. The Plaintiff submitted that its claim against the Defendants was for an order to stay the transfer of business between them and that they be ordered to make provision for the liabilities.

14. Having looked at the said Judgement of Cherere J, it was the considered opinion of this court that while she may have heard and finally determined the issue regarding the tenancy agreement between the Plaintiff and the 1st Defendant herein and dismissed the Plaintiff's Counter-claim in the sum of Kshs 34,130,000/= as it had failed to prove the existence of a tenancy agreement, the issues raised in the present suit related to the transfer of business.

15. In its Plaint dated 3rd February 2020, the Plaintiff herein asserted that the 1st Defendant was transferring the premises which were subject to an MOU pursuant to the condition that all debts and liabilities due and owing by the 1st Defendant in respect of the date of the transfer were to be received and paid by the Transferor and the 2nd Defendant did not assume or tend to assume any liabilities whatsoever incurred by the 1st Defendant in the business upto the date of the transfer.

16. It was therefore the view of this court that the issues that had been raised in the present suit were not *res judicata* as it could not for a fact determine that the debts and liabilities were in respect of the sum of Kshs 34,130,000/=. It was best that the court allow the parties herein to adduce the evidence they each relied upon before it could make a final determination on merit.

17. Dismissing suits *in limine* must be exercised with caution bearing in mind the life line given to a party to adduce more evidence at the time of hearing the application as this very court held in the case of Wilmot Mwadilo & 4 Others vs Eliud Timothy Mwamunga & Another [2017] eKLR. As was also held in the case of Mukhisa Biscuit Manufacturers Limited vs West End Distributors Ltd [1969] E.A. 696 by Law , J.A. at page 700:-

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit.”

18. In view of the fact that summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort, this court came to the firm conclusion that this was not a suitable case for it to exercise that discretion and dismiss the Plaintiff's suit. It was best to grant the Plaintiff an opportunity to have its day in court as opposed to summarily declining to give it such day.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's decision was that the 1st Defendant's Notice of Motion dated 3rd March 2020 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH 2021

J. KAMAU

JUDGE