REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E020 OF 2020

DANSON KISILU.....1ST APPLICANT/APPELLANT

JANE WAMBUA.....2ND APPLICANT/ APPELLANT

VERSUS

SAMMY WAMBUA MUKEKU

AGNES MUTINDI WAMBUA (*Suing as the personal representatives of the estate of*

SAMSON MUSYOKA WAMBUA …RESPONDENTS/OBJECTORS

RULING

1. This is a Preliminary Objection dated 01/03/2021 seeking to strike out an application by the appellants dated 16/02/2021.

2. The Preliminary Objection filed by counsel for the respondents is in the following terms –

> ***1) That the application herein lacks merit, it is vexatious, frivolous and an abuse of the court process and the same should be dismissed with costs.***
>
> ***2) That the application herein offends the mandatory provisions of section 6 and 7 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 51 Rule 4 of the Civil Procedure Rules 2010.***

3. The Preliminary Objection proceeded by way of filing written submissions, and I have perused and considered the submissions of both the respondents (Objectors), and the appellants (*applicants).*

4. The objector (respondents) has relied on res-judicata. Indeed, the doctrine of *res-judicata* is anchored under section 7 of the Civil Procedure Act (cap.21) which provides as follows –

> ***"7. 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."***

5. The respondents have objected to the appellant's application herein on the basis that it is *res-judicata*, as a Preliminary Objection. What constitutes a preliminary Objection was clearly stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) E.A 696** wherein it was 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."***

6. In my view, res-judicata is a point of law. However, the respondents having relied on the ground that the application is *res-judicata*, they should have come out clear and candid to say that a similar application between the same parties had been heard and substantively determined by a court of competent jurisdiction. They have not done so. Thus their purported Preliminary Objection cannot succeed as *res-judicata* has not been established.

7. I thus dismiss the Preliminary Objection herein. Costs will follow the results of the appeal.

Delivered, signed & dated this 22nd day of July, 2021, in open court at Makueni.

…….

GEORGE DULU

JUDGE