



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL CASE NO. 11 OF 2018**

**RISPAH KERUBO ONSASE.....APPELLANT**

**VERSUS**

**DR. VIJAH KUMAR SAIDHA**

**HARIA RAJESH NEMCHAD**

**HANIF ZULFIKAR AHMED HASHAM.....RESPONDENT**

**RULING**

1. The plaintiff filed suit against the defendants on the 16<sup>th</sup> November 2018. In her suit she seeks judgment against the defendants jointly and severally for the following;

- a) An order of Declaration that the defendants continued occupation of the Plaintiff's land parcel **No. Kisii Town/ Block III/128** after the expiry of the Notices dated the 5<sup>th</sup> April 2008 is illegal.
- b) An order of eviction evicting the Defendants, their agents and / or servants from the plaintiff's premises on land parcel aforesaid
- c) Costs of the suit.

2. The defendants filed a joint defence on the 26<sup>th</sup> November 2018. At paragraph 20 of their defence dated the 22<sup>nd</sup> November 2018 the defendants aver as follows;

“20. The Defendants contend that the instant suit as drawn and filed is misconceived, bad in law and otherwise legally untenable. Consequently the Defendants reserve the right to raise and canvass *Preliminary Objections* on points of law as hereunder;

- i. The subject matter in dispute herein having been addressed and/or adjudicated vide Kisii CMCC No. 417 of 2015, same is Res-judicata.
- ii. The instant suit is time barred and / or prohibited by dint of **Section 7(4) of the Civil Procedure Act, Chapter 21 Laws of Kenya**
- iii. The suit is herein is *Pre-mature, Misconceived and Bad in law*
- iv. The Plaintiff does not disclose any reasonable cause of action against the Defendants.
- v. The instant suit amounts to and/or constitutes an abuse of the due process of court.
- vi. The Plaintiff is **Non-suited**

At paragraph of the Defence 21 the defendants aver as follows;

“21. The contents of paragraph 13 of the Plaintiff, pertaining to and /or concerning the Jurisdiction of this Honourable Court and the cause of action are denied.”

The defendant avers as follows at paragraph 13 of the Defence, “IN **ANSWER** to contents of paragraph 8 of the plaint, the Defendant aver that the Tenancy relationship between the Plaintiff and themselves, remains vibrant, valid and subsisting. Consequently, the Defendants were not obliged to vacate.

3. On the 25/4/2019 this court directed that parties file written submissions on the Preliminary Objection (“**the Objection**”) raise by the Defendants in their Defence. I have carefully read and considered the said submissions. The defendants argues that the instant suit is res-judicata as it had been litigated earlier in KISII CMCC NO. 417 of 2015. That the subject matter touches and concerns an interest (lease hold in land) and hence the court lacks jurisdiction to entertain the suit. That the dispute between the parties concerns a house that is on LR No. KISII TOWN/ BLOCK 111/128 and that the competent court to hear the dispute is the Environment and Land Court. the Defendant also raise an issue on the Plaintiff conduct stating that the Plaintiff has abused the due process of the Court having known that the dispute herein had been heard and determined by a court of competent jurisdiction vide case no. KISII CMCC NO. 417 of 2015 and that the appeal preferred by the Plaintiff was dismissed and that it is quite hopeless for the Plaintiff herein to have filed the instant suit. Lastly it is submitted by the defendants that the suit herein is premature, misconceived and bad in law and amounts to an abuse of the court process. That the claim by the Plaintiff does not raise and disclose any reasonable cause of action. The defendants relied on the following cases for their arguments seeking to have the objection upheld.

4. The plaintiff in response challenged the Preliminary Objection stating that the Objection raised is misconceived and totally misplaced. That in KISII CMCC NO. 417 of 2015 the Defendants sued the Plaintiff for wrongful distress and the Chief Magistrate’s court and the High Court confirmed that the Distress was unlawful. That the issue of distress is not the subject matter of the instant suit. That this suit is based on a **NOTICE** duly served on the Defendants which require them to vacate possession of the suit premises on or before the 31<sup>st</sup> July 2018. The **NOTICE** is dated the 5<sup>th</sup> April 2018 and was served upon the Defendants on the 9<sup>th</sup> April 2018 long before the Judgment in Kisii CMCC No. 417 of 2015. That it is not denied that the **NOTICE** was duly served on the Defendants. That the said **NOTICE** promoted the Plaintiff to file this suit, the Plaintiff seek to have the Defendants continued occupation of the Plaintiff’s land no. **KISII TOWN/BLOCK 111/ 128** after the expiry of the Notice dated 5<sup>th</sup> April 2018 declared to be illegal. The **NOTICE** has taken effect and therefore the Defendants are in illegal possession. That the prayer sought in the Plaint have not been the subject of any Court process nor has it been determined by a Court of Law as alleged. That the issues for determination are, whether the **NOTICE** was issued and if it has taken effect, has steps been taken to oppose the said **NOTICE**. It is submitted that this court has the jurisdiction to hear and determine the suit on the prayers sought. That the matter should go to full trial to determine the issues between the parties and therefore the objection should be dismissed.

5. To determine the objection raised am guided by the principles to consider whilst determining that a matter is res judicata as stated in the cited cases.

6. Having considered the pleading of both suits I find that there is nothing res judicata in this matter. This suit clearly relates to an order of eviction after a notice was issued. The previous suit was on a distress that has been levied against the plaintiffs and a claim of Kshs. 1,374,000/- . The claims are not the same. The suit does disclose a cause of action and I find that the preliminary objection raised has no merit. It is dismissed with costs. Parties to proceed for pre-trial conference on a date to given in court.

**Dated, signed and delivered at Kisii this 24th day of October 2019**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

<b>Plaintiff</b>	<b>Absent</b>
<b>Mr. Ochwangi</b>	<b>Defendant</b>
<b>Ms. Rael</b>	<b>Court clerk</b>