



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL SUIT NO. 7 OF 2016**

**PETER OBARA ONDARI.....PLAINTIFF**

**-VERSUS-**

**1. KENYA REVENUE AUTHORITY**

**2. NATIONAL TRANSPORT & SAFETY AUTHORITY.....DEFENDANTS**

**RULING**

1. By a Notice of Preliminary Objection dated 18/05/2018 the 2<sup>nd</sup> Defendant raised the following legal issues in respect to **Migori High Court Civil Suit No. 7 of 2016** (hereinafter referred to as '**the suit**'): -

**1. The suit is Res Judicata.**

**2. The suit is filed contrary to Section 7 of the Civil Procedure Act, 2010.**

**3. The suit is bad in law, vexatious and an abuse of the Court Process.**

2. Upon concurrence of the Counsels for the parties and the approval of this Court the objection was heard by way of written submissions. All parties filed their respective submissions hence this ruling.

3. The 2<sup>nd</sup> Defendant contended that the suit was *res judicata* **Rongo RMCC No. 101 of 2007, Kisii High Court Civil Appeal No. 193 of 2008 and Kisumu Court of Appeal Civil Appeal No. 208 of 2010**. That, the issues raised in the suit were raised and finally determined in the said previous suits such that the Plaintiff was only but re-opening long-finalized litigations. It was submitted that **Section 7** of the **Civil Procedure Act** barred the Plaintiff from relitigating matters already determined by competent courts. Counsel submitted that the suit was therefore bad in law, vexatious and an abuse of the Court process. **Malindi Court of Appeal Civil Appeal No. 42 of 2014 John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 2 others (2015) eKLR** was referred in support of the 2<sup>nd</sup> Defendant's submissions. The 2<sup>nd</sup> Defendant also filed copies of the pleadings and judgment in **Rongo RMCC No. 101 of 2007** and the judgments in **Kisii High Court Civil Appeal No. 193 of 2008** and **Kisumu Court of Appeal Civil Appeal No. 208 of 2010**.

4. The 1<sup>st</sup> Defendant supported the objection and contended that the issues in this suit were long determined in finality by competent courts.

5. The Plaintiff opposed the objection. He contended that the suit was not *res judicata* since the issues raised crystallized after the determination of the **Kisumu Court of Appeal Civil Appeal No. 208 of 2010** and that the issue of assessment of damages was not determined in the previous suits. The Plaintiff further submitted that the suit was not bad in law, vexatious or an abuse of the court process. Relying on **Sections 1A, 1B and 3A** of the **Civil Procedure Act** the Plaintiff argued that the suit was necessary for substantive justice to be visited upon the Plaintiff. He therefore urged this Court to allow the suit to proceed for full hearing.

6. The legal background of the doctrine of *res judicata* was recently discussed at length by a Five – Judge bench (Achode, Ngugi, Nyamweya, Ogola and Mrima, JJ) in **Mombasa High Court Constitutional Petition No. 159 of 2018 William Odhiambo Ramogi & 2 Others vs. The Attorney General & 3 Others** (unreported) in a ruling rendered on 02/11/2018 as under: -

39. The **Black's Law Dictionary, 10<sup>th</sup> Edition** defines the term "*res judicata*" to mean "*a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.*"

40. Section 7 of the Civil Procedure Act provides for when a suit is *res judicata*. It reads 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.

41. A reading of this provision reveals that for a matter to be *res judicata* the suit must raise issues that are directly and substantially similar to those in a former suit. In examining whether, indeed, a matter is *res judicata*, the Court has to examine the two suits: the current suit and the former suit in totality. This would mean that the Court has to investigate whether the parties in both suits are the same; whether issues raised are substantially similar; and whether the prayers sought are the same. The purpose of this doctrine is to bring an end to litigation and ensure that litigants do not abuse the Court process by bringing suits which evoke issues that have already been determined by the Court in other suits. In **Ukay Estate Ltd & Another vs Shah Hirji Manek Ltd & 2 Others [2006] eKLR**, Justice Waki elaborated on the relevance of this doctrine by expressing himself as follows:

*The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.*

42. What, then, is the test for whether a suit is *res judicata*? In **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR**, the Court of Appeal stated that for the doctrine of *res judicata* to apply the following conditions must be fulfilled:

- (i.) *[There must be] a previous suit in which the matter was in issue;*
- (ii.) *the parties were the same or litigating under the same title.*
- (iii.) *a competent Court heard the matter in issue;*
- (iv.) *the issue has been raised once again in a fresh suit.*

43. Similarly, in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** the Court of Appeal observed as follows:

*The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.*

7. The issue herein, therefore, is whether the suit is *res judicata* **Rongo RMCC No. 101 of 2007, Kisii High Court Civil Appeal No. 193 of 2008 and Kisumu Court of Appeal Civil Appeal No. 208 of 2010.**

8. For a better understanding of this matter reference must be made to the previous suits. In the **Rongo RMCC No. 101 of 2007 Peter Obara Ondari vs. Kenya Revenue Authority** (hereinafter referred to as '**the Rongo Case**') the Plaintiff sought the following prayers:

- (a) **The release of motor vehicle registration No. KAG 620 Y.**
- (b) **A permanent injunction to restrain the defendant, its employees, servants and or agents from disposing off the motor vehicle Registration No. KAG 630Y.**
- (c) **A declaration that the said seizure was / is illegal, wrongful unlawful and void abinitio.**
- (d) **General damages.**
- (e) **Costs of the suit.**
- (f) **Interest at court rates as from the date of filing in this suit..."**

9. After a full hearing the trial court in a judgment rendered on 09/10/2008 granted all the prayers sought in the Plaint. Aggrieved by the decision, the 1<sup>st</sup> Defendant herein appealed in **Kisii High Court Civil Appeal No. 193 of 2008 Kenya Revenue Authority vs. Peter Obara Ondari** (hereinafter referred to as '**the Kisii Appeal**'). In a judgment delivered on 31/05/2010 the High Court allowed the appeal, set-aside the judgment in the **Rongo Case** and dismissed the **Rongo Case** with costs.

10. On a further appeal in **Kisumu Court of Appeal Civil Appeal No. 208 of 2010 Peter Obara Ondari vs. Kenya Revenue Authority** (hereinafter referred to as '**the Kisumu Appeal**') the appeal was allowed and the decision in the Kisii Appeal set-aside. The Court of Appeal noted that the trial court erred in not assessing the general damages and in correcting the error the Court of Appeal entered judgement in favour of the Plaintiff herein '**to the extent that he is entitled to the possession and ownership of the motor vehicle KAG 620Y and the**

**Respondent has no authority to interfere with the Appellant's rights of ownership thereof.'**

11. But what are the prayers in the suit? The prayers sought in the suit *vide* the Amended Complaint dated 21/02/2017 and filed on 10/03/2017 are as follows: -

**(a) General Damages for retention of the vehicle from 26<sup>th</sup> September 2006 to 10<sup>th</sup> March 2014 when the vehicle was released and general damages for loss of reputation of the dramatic seizures and confiscation of the plaintiff's vehicle registration number KAG 620Y and for the loss of value of the vehicle because of rotting and decay.**

**(b) Costs of this suit.**

**(c) Interest on (a) and (b) above.**

12. I will now apply the conditions enumerated by the Court of Appeal in **Uhuru Highway Development Limited** (supra) to the suit. On whether '*There must be* a previous suit in which the matter was in issue', I find that **the Rongo Case** raised similar issues to the ones in the suit. As to whether '*the parties were the same or litigating under the same title*' I find that the parties in the suit are similar to those in **the Rongo Case** and that the 2<sup>nd</sup> Defendant in the suit is a creation of a statute; The National Transport and Safety Authority Act 2012 and is charged with some functions initially undertaken by the 1<sup>st</sup> Defendant. On whether '*a competent Court heard the matter in issue*', I must answer in the affirmative and on whether '*the issue has been raised once again in a fresh suit*' the answer can only be in the affirmative.

13. I have carefully perused the suit and noted that when the Plaintiff realized that he was not able to get any general damages in the previous suits as the trial court only gave a blanket decree on general damages without assessing the quantum payable, the Plaintiff filed the suit principally seeking the assessment of general damages which he could not get in **the Rongo Case** and through to **the Kisumu Appeal**. That is in essence re-opening the litigation. What the Plaintiff ought to have done after the delivery of the judgment in **the Rongo Case** was to file a Cross-Appeal and seek the assessment of the general damages. The issue of assessment of the general damages would then have found its way to **the Kisumu Appeal** and the appellate Court would definitely have dealt with it. Having not been diligent enough to properly litigate the issue of general damages in the former suits, the Plaintiff is now estopped by the doctrine of *res judicata* as enshrined in **Section 7 of the Civil Procedure Act** and settled in binding precedents in attempting to re-litigate matters long and finally determined by competent courts.

14. The upshot of the foregone analysis is that the Preliminary Objection dated 18/05/2018 is merited. The suit is *res judicata* **Rongo RMCC No. 101 of 2007, Kisii High Court Civil Appeal No. 193 of 2008 and Kisumu Court of Appeal Civil Appeal No. 208 of 2010**. Consequently, the suit, **Migori High Court Civil Suit No. 7 of 2016**, be and is hereby struck out with costs.

15. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of November, 2018.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open court and in the presence of: -**

**Mr. Oyagi Counsel** instructed by the firm of Messrs. Oyagi, Ong'uti Magiya & Co. Advocates for the Plaintiff.

**Mr. Twahir Alwi Mohamed Counsel** instructed by Kenya Revenue Authority the 1<sup>st</sup> Respondent.

**Judith Opil Sirai Counsel** instructed by the 2<sup>nd</sup> Defendant.

**Evelyne Nyauke – Court Assistant**