



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
MATRIMONIAL CAUSE NO. 2 OF 2018
(FORMERLY ELC CIVIL CASE NO. 19 OF 2018 (O.S.))
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
BETWEEN
JMK.....APPLICANT/RESPONDENT
VERSUS
EWM.....RESPONDENT/PETITIONER
RULING
[RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION DATED 9TH APRIL, 2018]

1. The Respondent, JM, through the notice of preliminary objection dated 9th April, 2018 seeks a declaration that the application dated 25th January, 2018 by the Applicant, EWM is *res judicata* for the reason that the issues raised therein were directly and substantially in issue in Malindi ELC Civil Case No. 166 of 2013 (O.S.) between the Applicant and the Respondent which issues were heard and finally decided by the court.

2. EWM's response is that the issues she has raised in the current case (Malindi H.C. Matrimonial Cause No. 2 of 2018, formerly Malindi ELC No. 19 of 2018 (O.S.)) were not determined in Malindi ELC Civil Case No. 166 of 2013 (O.S.) as the judge had concluded that the suit was premature.

3. The law on *res judicata* is as cited by the advocates for the parties in the various authorities presented to this court. Section 7 of the Civil Procedure Act, Cap. 21 establishes the *res judicata* rule as follows:

“7. Res judicata

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.

***Explanation.* —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

***Explanation.* —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

***Explanation.* —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

***Explanation.* —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

4. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of **The Independent Electoral and Boundaries Commission v 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 rendered not in disjunctive but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That 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.”

5. The doctrine of *res judicata* is not meant to deny audience to litigants who are yet to have their day in court. It is only meant to lock out parties who have fully ventilated their issues before a court of competent jurisdiction.

6. The ingredients of the doctrine of *res judicata* are that there has been litigation over the same issues by the same parties litigating under the same title and that the dispute was finally decided by a competent court.

7. I have perused the judgement delivered on 8th May, 2015 by O.A. Angote, J in **Malindi ELC No. 166 of 2013 (O.S.) Esther Wanjiku Mwangi v John Munene Kanyi & Margaret Wangui Ng’ang’a** and it is clear that the dispute involved determination as to whether an identified property was matrimonial property. Two of the three parties in that case are parties in the present dispute. The issues and the parties are therefore the same.

8. The question is whether the issues were heard and finally determined in the former suit. In disposing the matter that was before him, O.A. Angote, J held that:

“59. The Applicant, having admitted that she is married to the 1st Respondent, did not adduce any evidence to show that she has commenced divorce proceedings or that indeed her marriage to the 1st Respondent has been dissolved.

60. Consequently, I am of the view that the suit before me was prematurely filed by the Applicant.

61. On that ground, I strike out the Originating Summons dated 25th October 2012 with no orders as to costs.”

9. It is therefore clear that the issues that EWM had taken before the Court were not resolved as it was found that the marriage between her and JMK had not been dissolved. The determination as to what constituted the matrimonial property and the distribution of the same could therefore not proceed.

10. There is now evidence that the marriage between JMK and EWM was dissolved in a judgment delivered in Mpeketoni PM Divorce Cause No. 3 of 2013. The issue of the identification and distribution of the matrimonial property is now ripe for the determination of this court.

11. It is therefore clear that the claim by JMK that this matter is *res judicata* is without basis. The preliminary objection dated 9th April, 2018 is dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT