



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE NO. 389 OF 2009

ORBIT HOLDINGS LIMITED.....PLAINTIFF

-versus-

MARIAKANI HOLDINGS LIMITED..... 1ST DEFENDANT

AMRITAL VIRA SHAH..... 2ND DEFENDANT

Ruling

1. The Plaintiff filed this case on 10th November 2009. Hearing of the case commenced on 1st October 2013 during which one witness, ABDUL SAMJI testified for the Plaintiff. The witness concluded his testimony on that day and matter was adjourned for further hearing. On 25th November 2013, the Defendants filed a Supplementary List of Documents. On 3rd December 2013, the Plaintiff's advocates wrote to the Defendants' advocates and informed them that they would object to the admissibility of the filed documents because the trial had already commenced.
2. Both parties filed their written submissions on the preliminary objection with the Plaintiff urging the court to accept its objection raised in the letter dated 3rd December 2013 while the Defendants submitted that a preliminary objection to the production of the documents ought to be raised properly and not via the letter dated 3rd December 2013.
3. After hearing the parties on the objection, this court delivered a ruling on 8th June 2015 and expunged the Defendants documents from the record Court held *inter alia* as follows:

“The defendant has not given any explanation why the documents were filed late just basing the argument that the plaintiff will suffer no prejudice. In the absence of leave of the court and lack of explanation for delay, this court can only treat the defendant's action as an abuse of the court process. He is blatantly disregarding the rules [of] procedure and cannot thus invoke the courts power under the overriding objectives principle to have the document admitted. I do find the objection by the plaintiff to be merited and do expunge the documents from the record.”

4. About a month later, the Defendants filed a Notice of Motion Application dated 6th July 2015 and filed on 8th July 2015 in which they seek orders that they be allowed to file a Supplementary List of Documents. The Application is supported by the Affidavit of HIMATLALA DHARAMSHI PATEL sworn on 6th July 2015. The Plaintiff opposed the application by filing a Notice of Preliminary Objection dated 15th September 2015 which is the subject of this ruling. The Plaintiff's Preliminary Objection is on the following grounds:
 - i. That the issue raised in the Defendants' application has already been determined by this court in

- its ruling dated 8th June 2015 and is thus *res judicata* in terms of the provisions of section 7 of the Civil Procedure Act.
- ii. That no grounds have been raised or reasons given in the said application to justify a re-determination of the said ruling.
 - iii. That the said application is yet another attempt by the Defendants to delay the further hearing of this matter and constitutes an abuse of the process of this court.
 - iv. That the costs of this application be granted to the Plaintiff.
5. The Plaintiff's Preliminary Objection was heard on 11th April 2016. Mr. Inamdar, learned counsel for the Plaintiff submitted that the explanation given in the application for the late filing of the documents is the same one that was given in the initial application. That there is nothing new that is being shown from what was submitted before. Further that no special circumstances have been raised to warrant the introduction of the documents.
 6. Mr. Asige, learned counsel for the Defendants submitted that save for ground (i) on *res judicata*, grounds (ii), (iii) and (iv) in the Plaintiff's Preliminary Objection do not constitute preliminary objection. Mr. Asige further submitted that even ground (i) is not a preliminary objection because it raises the issue of jurisdiction within the meaning of section 7 of the Civil Procedure Act. That a preliminary objection must raise a pure point of law.
 7. Counsel for the Defendants submitted that the ruling of 8th June 2015 did not make a determination on but only expunged documents which were filed without leave. That the ruling did not close the door to the making of an application for leave. That to expunge a document is not the same thing as making a determination on an issue. That there was no application made by the applicant within the meaning of section 7 of the Civil Procedure Act which the court was seized of.
 8. While I agree with the Defendants' learned counsel that grounds (ii), (iii) and (iv) do not constitute a preliminary objection because the same are based on facts that need to be ascertained. With respect, I do not agree with the counsel that ground (i) does not constitute preliminary objection. In my view the said ground is an objection based on point of law to the effect that the application has already been determined and is therefore barred by doctrine of *res judicata* under section 7 of the Civil Procedure Act. The only issue for the court's determination, therefore, is whether the Defendants' application has already been determined and therefore barred by the doctrine of *res judicata*.
 9. The Defendants argue that the application is not *res judicata* because there has never been an application by the Defendants seeking leave to file the documents in issue. That the court only expunged from the record documents which had been filed without leave but did not determine whether the Defendants should be granted leave to file the documents.
 10. In the ruling of 8th June 2015 the court held, *inter alia*, as follows:

“The defendant has not given any explanation why the documents were filed late just basing the argument that the plaintiff will suffer no prejudice. In the absence of leave of the court and lack of explanation for delay, this court can only treat the defendant's action as an abuse of the court process. He is blatantly disregarding the rules [of] procedure and cannot thus invoke the courts power under the overriding objectives principle to have the document admitted. I do find the objection by the plaintiff to be merited and do expunge the documents from the record.”

11. From the foregoing, it is clear that the court made a decision on whether the Defendants' documents should be admitted or not. It is the same prayer that the Defendants are seeking in their application dated 6th July 2015. In the case of **SULEIMAN SAID SHABHAL V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2014] eKLR**, the Court of Appeal stated as follows on what constitutes *res judicata*:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

12. In the case of **DOMINIC ELKAYANI LESORMAT & 336 others v MACHAMUKA FARMERS CO. LTD & 17 others [2008] eKRL**, the High Court stated as follows on *res judicata*:

“Section 7 of the Civil Procedure Act is clear on what constitutes res judicata. Res judicata arises where there is an issue that has directly and substantially being (sic) in issue and has been determined by a competent court. The same issue cannot be litigated again.”

13. The question of whether the Defendant’s documents should be admitted has already been adjudicated on by this court and conclusively determined in the negative. The Defendants cannot be allowed to seek a similar prayer. In my view, it is immaterial that the issue was determined without the Defendants having filed a formal application. Any party can raise an issue for the court’s determination. In this case, the Defendants filed documents and the Plaintiff objected to the admission of those documents. The court was thereafter called upon to make a finding on whether the documents should be admitted or not. The parties were invited and both sides submitted and addressed the court on whether the documents should be admitted or not. After hearing both sides, the court made a determination in which it rejected the Defendants’ documents. In my view, it is immaterial that there was no formal application by the Defendants seeking the admission of their documents. The bottom line is that the question on whether the Defendants’ documents should be admitted has been litigated on and canvassed before this court by the parties herein and a conclusive determination made. The Defendants are therefore barred by the doctrine of *res judicata* from raising the same issue. They can only seek for appeal against the same.

14. For the foregoing reasons, the Plaintiff’s Preliminary Objection is upheld and the Defendants’ application dated 6th July 2015 dismissed with costs to the Plaintiff.

Ruling Signed, Dated & Delivered at Mombasa this 20th Day of May 2016

A. OMOLLO

JUDGE